Policy Delivery - advice request form

The role of Policy Delivery is to provide advice on novel or complex issues where existing lines to take may need clarifying, amending or new ones created altogether.

Once your form is submitted you will receive a response within 15 working days. If it is not possible to provide a full response within 15 working days an initial response will be given together with an estimate of the date by which a full response should be completed.

Name: Simone Burgoyne

CMEH Reference: RCC0621317

Date Requested: 31 May 2016

1. What kind of issue is it?	**DPA**	**PECR**	**FOIA**	**EIR**	**Hybrid** (if so, please state below e.g. Yes - DP / FOI	**Legal**
Please indicate by stating "Yes".	Yes					

1. What do you need advice on?
During a call to the Helpline the caller was advised that the ICO is unable to make a section 42 assessment in relation to the right to prevent processing under section 10 of the Act and that we are only able to consider concerns in relation to compliance with the 21 day period allowed for replying to a section 10 notice. Can you please advise if this is correct and on what basis is the ICO able to refuse to make an assessment of concerns raised in relation to section 10? Is it correct that the ICO cannot undertake an assessment on an organisation's determination as to whether to accede to a section 10

notice or not?

In circumstances where processing is for an 'improper' purpose (i.e., where a condition is schedule 2:5 or 2:6 is not satisfied), could any damage/distress be said to be unwarranted and therefore a breach of section 10 and is it possible for the ICO to make such an assessment under section 42?

2. Please give us any relevant background and facts.

Please see attached

3. Is there anything else we need to know? (e.g. the name(s) and location(s) of any documentation relevant to this request)

TO BE COMPLETED BY MEMBERS OF POLICY DELIVERY

Name: Julia Parr **Date of Response:** 31st May 2016

4. Advice given

Background

The complainant in this matter telephoned the ICO Helpline for advice in connection with his concern about how SKY had processed his personal data. During the course of the telephone conversation the complainant explained that he was concerned about "Sky's information security and their handling of my [his] data". He also advised the ICO that he had issued a 'cease processing' notice on the data controller under section 10(1) but he had not received a satisfactory response to his notice.

It is not clear from the papers on CMEH whether, in response to the data subject's section 10(1) notice, the data controller:

- failed entirely to respond;
- responded, but not within the 21 day time limit;
- responded, but refused to comply with the request without setting out reasons for the refusal; or

- responded, but refused to comply with the request while setting out its reasons for regarding the notice as unjustified.

Further information is required on this point.

Whilst the complainant was clearly unhappy with the manner in which SKY has processed his personal data, it would appear that the focus of the data subject's conversation with the Helpline was whether or not the ICO is able to make an assessment under section 42 DPA with regard to the data controller's compliance with the data subject's section 10(1) notice.

The data subject expressed the view that the ICO should issue an assessment under section 42 DPA in relation to SKY's handling of his section 10 notice. The Helpline advised that the ICO was unable to make an assessment under section 42 DPA in relation to the right to prevent processing under section 10 of the Act as:

- the mechanism for enforcing a section 10 notice is through the courts; and
- we are only able to consider concerns in relation to compliance with the 21 day period allowed for replying to a section 10 notice.

The data subject has submitted a concern to the ICO (see Complaint Form on CMEH) which provides very little information about the processing which prompted him to serve the section 10(1) notice and about the response (if any) he received to that notice. On the Complaint Form the data subject has simply reiterated his belief that the ICO is wrong to suggest that it cannot carry out a section 42 assessment of the data controller's compliance with his section 10(1) notice.

Query

1. Is it correct that the ICO is only able to consider concerns in relation to compliance with the 21 day period allowed for replying to a section 10 notice?

2. If the ICO can only consider compliance with the section 10 time limit, on what basis is the ICO able to refuse to make an assessment of concerns raised in relation to section 10?

3. Is the ICO able to undertake an assessment of whether the data controller was correct in its determination as to whether to accede to a section 10 notice or not?

4. In circumstances where the processing is in breach of the First Principle (for example, where the data controller is unable to identify a schedule 2 ground for the processing), could any damage/distress arising from the processing be said to be unwarranted and therefore a breach of section 10?

Advice

Section 42(1) provides that:

> "A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of [the DPA]".

Section 10(1) DPA provides that an individual is entitled:

> "at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons -
>
> (a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or distress to him or to another , and
> (b) that damage or distress is or would be unwarranted".

Section 10(4) provides that an individual who has given a section 10(1) notice to a data controller may apply to the court to enforce that notice. In deciding whether or not it should order compliance with the notice, the court will need to consider whether the notice was justified. This will involve consideration of three issues:

- whether the processing complained about is likely to cause substantial damage or distress to the data subject (s.10(1)(a);
- whether that damage or distress is unwarranted (s.10(1)(b); and
- whether subsection 10(1) is dis-applied under section 10(2) (as the processing is based on one of the grounds in paragraphs 1 to 4 of Schedule 2).

Interestingly subsection 10(4) simply empowers the court, if it finds

that the section 10(1) notice was justified, to order the data controller to take such steps for complying with the notice (the data controller's 'primary obligation' under section 10) as the court thinks fit. Subsection 10(4) does not require the court to consider the data controller's compliance with its 'supplementary obligations' under section 10(3), that is to say:

- whether or not the data controller has responded to the notice at all,
- whether the data controller provided the correct information in its response (did it provide its reasons for refusing to comply); and
- whether it responded within the required time period under section 10.

It would appear that these matters of compliance with the DPA are to be left to the Commissioner to determine.

If the Commissioner receives a request for assessment under section 42 as to whether processing is likely to be being carried out in compliance with the DPA, there would appear to be no reason why the Commissioner should not make an assessment at least as to whether the a data controller has complied with its 'supplementary obligations' under section 10(3) DPA as identified above.

If, in accordance with section 10(4), the data subject has applied to the court for an order compelling the data controller to comply with his section 10(1) notice the Commissioner might decide not investigate the data controller's compliance (or lack of compliance) with its supplementary obligations under section 10(3) on the basis that the data subject is concerned with compliance with the data controller's primary, rather than supplementary, obligations in relation to the notice to cease processing. However, where the matter has not been put before the court, there is no reason why the Commissioner cannot make a section 42 assessment as to whether or not the data controller's processing on receipt of the section 10(1) notice is likely or unlikely to be in compliance with the data controller's supplementary obligations under section 10.

The more tricky question to answer concerns whether or not, on receipt of a concern where a section 10(1) notice has been issued by the data subject, the Commissioner is able to make a section 42 assessment as to whether the processing that prompted the complainant to give the section 10 notice, is likely or unlikely to be in compliance with the DPA. In his Complaint Form the data subject stated that ,in his view:

"S42 is clear in that it obliges the ICO to conduct assessments on request as to whether "it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act." This makes no reference to excepting specific sections of the Act; and S10 of the Act is a provision as is any other. Nothing in the Act excludes S10 from consideration under this obligation. Similarly, secondary legislation and/or statutory guidance do not make any such exception.

The ability of data subjects to enforce their rights by application to the Court under S10(4) of the Act does not negate the Information Commissioner's obligation to undertake a S43 *(sic)* assessment. The ICO conducts S43 *(sic)* assessments of organisations' compliance with S7 rights, even though S7 can similarly be enforced through the courts. It is not legitimate to refuse to conduct an assessment of an organisation's compliance with S10, even though it may be possible for a data subject to enforce their rights through the courts.

The Data Protection Act Schedule 1 Part II para 8(b) states:

'A person is to be regarded as contravening the sixth principle if, but only if—

(a) he contravenes section 7 by failing to supply information in accordance with that section,

(b) he contravenes section 10 by failing to comply with a notice given under subsection (1) of that section to the extent that the notice is justified or by failing to give a notice under subsection (3) of that section'.

It is therefore clear that a failure to comply with a justified S10 notice is a failure to comply with the 6th Data Protection Principle, in every bit as much as a failure to comply with S7*.

...

It is clear to me that the ICO should conduct a S42 assessment as to a data controller's compliance or otherwise with S10(1) and (3). By refusing to do so, they are refusing to conduct investigations as to whether a data controller has complied with the 6th Principle".

The discussion between the Helpline and the data subject, in focusing on the section 10 notice, has somewhat confused the

question being considered here.

If the Commissioner had received a request from the data subject as to whether or not Sky's processing of personal data was in compliance with the DPA, the Commissioner would have had no difficulty in recognising that he had an obligation under section 42(2) to make an assessment as to whether the processing in question was likely or unlikely to be being carried out in compliance with the Act.

In the present case, rather than referring his complaint about Sky's processing to the Commissioner for an assessment, the data subject has tried to sort out the matter himself by issuing a section 10(1) notice. The question therefore is whether the prior issue of a section 10(1) by the data subject removes the Commissioner's obligation to make an assessment in response to the data subject's subsequent request for an assessment of the processing under section 42. I can see no reason why, provided the matter has not been put before the court, the Commissioner should not make a section 42 assessment as to whether the processing in question is likely to be being carried out in compliance with the DPA.

The confusion in this case appears to arise from the fact that the data subject has not asked the ICO to make an assessment of "Sky's information security and their handling of my [his] data" but has instead asked the Commissioner to make an assessment of the data controller's/Sky's compliance with his section 10(1) notice.

As stated above, it is for the Commissioner (rather than the court) to determine whether or not the data controller has complied with its supplementary obligations under section 10(3). Such a determination might take the form of an assessment under section 42.

In order to make such an assessment the Commissioner would need to obtain confirmation that the section 10(1) notice was given to the data controller by the data subject and confirmation of the data controller's/Sky's failure:

- to respond to the notice; or
- to respond within the required time limits; or
- if refusing to comply with a notice, to set out reasons for refusing to comply.

With such information the Commissioner could easily have made an assessment that the data controller had failed to comply with its supplementary obligations under section 10(3) and that the processing required in respect of such obligations was unlikely to be in compliance with the Act. The Commissioner would need no

further information in order to make an assessment as a data controller is required to comply with the supplementary obligations regardless of whether or not the section 10(1) notice was 'justified'.

If the data subject had requested that the Commissioner assess whether Sky's processing in connection with its primary section 10 obligation (to comply with the request to cease processing) was is in compliance with the Act, further information would be needed.

I see no reason why, if requested, the Commissioner would be precluded from making an assessment as to whether the processing by the data controller for its primary obligation under section 10 (complying with the section 10(1) notice) was likely to be in compliance with the provisions of the DPA. The data subject has the option to seek an order from the court requiring the data controller to comply with his notice or, alternatively, he might seek an assessment from the Commissioner as to whether the data controller's failure to comply with the notice involved processing likely or unlikely to be in compliance with the Act. As the data subject has pointed out, a failure to comply with both the primary and supplementary obligations of a data controller under section 10(3) amount to breaches of the sixth principle and the Commissioner is empowered to make an assessment as to whether such a breach (or breaches) has (or have) occurred.

Obviously, if the Commissioner were to undertake an assessment relating to the data controller's primary obligation under section 10 the Commissioner would, like the Court, need to determine whether the section 10 was justified or whether section 10(1) was dis-applied by section 10(2) (the data is being processed under one of the conditions in paragraphs 1-4 of Schedule 2). In order to make a finding as to whether the notice was justified the Commissioner would need to obtain information as to the nature of the processing, how the processing causes damage or distress to the data subject and whether the damage or distress is unwarranted. The data subject has provided no information which would assist Commissioner in making an assessment as to whether or not the notice was justified. Instead, as mentioned above, the data subject appears to be want the ICO to investigate his concerns about "Sky's information security and their handling of my [his] data". Again, the data subject has provided no information setting out these concerns. His Complaint Form simply focuses on arguing that the ICO should make an assessment about compliance with his section 10 notice.

Conclusion

As set out above, I can see no reason, provided that the matter is

not before the court, why the Commissioner would be unable to make a section 42 assessment as to whether:

- Sky's processing in relation to the data subject's section 10(1) notice is likely or unlikely to be in compliance with Sky's supplementary obligations under section 10(3) DPA (i.e. whether Sky has complied with the administrative requirements of the section);

- Sky's processing in relation to the data subject's section 10(1) notice is likely or unlikely to be in compliance with Sky's primary obligation under section 10(3) DPA (i.e. whether Sky has received a justified notice and should have complied with that notice); or

- Sky's processing in connection with the service provided to the data subject is likely or unlikely to be in compliance with Sky's obligations with regard to data security.

However, rather than debating the Commissioner's powers/obligations under section 42 it would perhaps be more fruitful to discuss with the data subject what is his underlying concern with how Sky is processing his data. We appear to have received no information as to the details of the data subject's concerns about Sky's information security or information as to the data Sky is processing and how that processing causes the data subject damage or distress. If we are to make any assessment under section 42 we need to know what the data subject is principally concerned about, obtain details of his concerns and then seek information from Sky. The data subject has a data protection concern and the discussion of section 10 appears to have created an obstacle to him providing information to the Commissioner about his concern and the Commissioner providing an assessment under section 42. In these circumstances it is perhaps not necessary to address the fourth query above. Once we know more details about the data subject's principle concerns we will be better placed to assess damage and distress under section 10.

JP
2-6-16

8th July 2016 - Note: [redacted] has contacted [redacted] and [redacted] to discuss the line set out in this PDARF. The suggestion that the ICO might not be in a position to deal with this sort of complaint may have been based on an old policy line which should no longer be applied.