



## **Enforced Subject Access: Disclosure of Criminal Convictions**

### **Issue**

In light of the introduction of Section 56 Data Protection Act (DPA) which outlaws enforced subject access, this note outlines ways in which insurers can continue to seek disclosure of unspent criminal convictions.

### **Background**

Where there have been suspicions that a policyholder or applicant for insurance has undeclared unspent criminal convictions, some insurers may previously have asked the individual to complete a subject access request (SAR) to obtain personal data from a data controller. While the request will typically be used to obtain conviction details from a police force, it could be used for other purposes, including obtaining DVLA documentation, benefits documents or employment documentation.

On 10 March 2015, [Section 56](#) of the DPA 1998 came into force, covering enforced subject access requests to obtain 'relevant records' from 'relevant data controllers', including in relation to 'contracts for services', such as insurance. This makes it a criminal offence punishable by unlimited fines to make a SAR in the circumstances set out in s.56.

S.56 (6) includes a table of what constitutes a relevant data controller and a relevant record. This essentially covers any SAR that may reveal criminal convictions (i.e. for convictions/cautions to a Chief Constable of a police force) or periods of incarceration (i.e. to the Secretary of State for Justice).

### **Information Commissioner (ICO) Guidance**

The ICO's detailed [guidance](#) on s.56 of the DPA explains how the change will apply.

However, it is understood that some insurers have been confused by inconsistent advice provided by the ICO Helpline, as well as the meaning of paragraph 18 of the ICO guidance which provides:

*"An individual will have been required to make a subject access request if they are given the option to either be subjected to an appropriate and lawful criminal records check (through the Disclosure and Barring Service (DBS), Disclosure Scotland or Access Northern Ireland) or make a subject access request."*

The ICO has subsequently confirmed the meaning of paragraph 18 - while applications to the DBS remain permissible, if the insurer were also to provide the option to make a SAR on behalf of the insurer, then that would amount to enforced subject access. The ICO will also ensure that its Helpline will provide consistent advice going forward.

The ICO's rationale for the approach set out in paragraph 18 is to prevent organisations attempting to circumvent s.56 by offering an alternative to a SAR (rather than 'forcing' a SAR upon them as the only option) and bypassing the established checking service.



## **Obtaining disclosure of criminal convictions after the introduction of s.56**

The introduction of s.56 means that the insurer should not give a policyholder or applicant the option to complete a SAR, without taking independent legal advice to ensure that providing such an option does not amount to an enforced SAR.

While there exist limited defences to committing a s.56 offence, such as the request being 'in the public interest', the DPA makes it clear that a request is not in the public interest simply because it is for the prevention or detection of crime.

An insurer wishing to verify the criminal conviction history of a policyholder or potential policyholder may use the [basic disclosure service](#) provided by [Disclosure Scotland](#) (which covers UK-wide disclosure). A basic disclosure certificate either contains information about every unspent conviction of an applicant or states that there are no convictions, although the exact content will differ according to whether the application is processed under legislation pertaining to England and Wales or to Scotland. Convictions, even for some serious offences, can become spent relatively quickly so the scope of the information returned may be more limited than under the former SAR process.

Whether or not the insurer chooses to make an application for basic disclosure, the advent of s.56 does not alter the position that should undisclosed convictions or criminal activities get discovered through other means – such as news reports or internet-based research – the insurer could seek to use and rely on them in evidence.

It is important for insurance staff to be properly trained so that they are aware of the consequences of breaching s.56 DPA and the legitimate avenues that remain open for the disclosure of unspent criminal convictions.