

# Disclosure by another name?

SARs will remain a valuable tool in a litigator's armoury and should be a first port of call in many types of litigation, advises **Jason Woodland**



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One of the main focuses for any common law lawyer reviewing a potential dispute is to identify the documents which will support their client's case, or undermine their opponent's. A strategy is then put in place to secure those documents not in the client's possession, either by obtaining an order for disclosure in the litigation against the other party, or by utilising the court's powers to order disclosure by a third party.

With the modern day focus on personal data, and how it is captured, stored, and utilised by third parties, it is inevitable that the interaction between rules designed to regulate the use of personal data and disclosure for the purposes of litigation will increase. The courts have begun to deal with these issues, most recently in *Dawson-Damer and others v Taylor Wessing LLP* [2017] EWCA Civ 74.

## Subject access requests

The Data Protection Act 1998 provides a powerful mechanism for individuals to ascertain what personal information about them is held by "data controllers" (which is broadly construed) by serving a subject access request (SAR). The SAR does not need to be in any particular form and there is a nominal fee (usually £10) to be paid.

On receipt of the SAR, the data controller is required to provide information to the individual, including confirming what personal data is being processed, as well as the information containing that personal

data in an intelligible form.

One can immediately see how this may be attractive to potential litigants. The request can be very brief and easily made, the costs are limited, and, importantly, there is no need to jump through the hoops necessary to obtain, for example, pre-action disclosure under CPR 31.16.

The Act provides various exemptions from the need to respond fully to a SAR, most notably if the data is subject to legal professional privilege or if providing a copy of the information in permanent form would involve "disproportionate effort" (section 8(2) of the Act).

## Dawson-Damer

The claimant was Mrs Dawson-Damer, who was the beneficiary of a trust established in the Bahamas. Taylor Wessing (TW) acted for the trustees.

In August 2014, the claimant served TW with an SAR. The context was a dispute between the claimant and the trustees about their decision to move various assets out of the trust and into another trust, established for the benefit of others. In March 2015 (some eight months after the SAR had been served) the claimant issued proceedings in the Bahamas to challenge the trustees' actions.

TW declined to respond to the SAR fully on the basis that:

- Some of the documents were subject to legal professional privilege, and therefore were not required to be produced by the Act;

- A further search for documents (beyond that which TW had already carried out) would involve "disproportionate effort"; and
- The real motive of the claimant was to obtain information for use in the proceedings in the Bahamas, which was not a legitimate use of the Act.

The claimant therefore applied for an order requiring TW to comply with the SAR. At first instance, the judge held that conducting a further search and review of documents for legal professional privilege would involve disproportionate effort and therefore declined to make the order.

Importantly, the judge also held that it was not a proper use of the Act to obtain information for use in the Bahamian proceedings and to obtain documents which the claimant could not obtain through disclosure, relying on the earlier judgment in *Durant v Financial Services Authority* [2004] FSR 573.

However, the Court of Appeal disagreed. It held that *Durant* was not authority for the proposition that an SAR could not be used to assist the individual with other proceedings, and pointed to a number of cases which had approved of SARs being used for the purposes of other litigation, both civil and criminal.

Unless the Supreme Court overturns that decision, it is clear that SARs will remain a valuable tool in a litigator's armoury and should be seen as a first port of call in many types of litigation. **SJ**

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