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HC-2015-005001

Case No: HC-2015-005001

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 April 2017

Before :

HIS HONOUR JUDGE JARMAN QC

- -

Between :

ROBERT GAINES-COOPER	**Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

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- -

Mr Timothy Pitt-Payne QC (instructed by **Mishcon de Reya LLP**) for the **claimant**
Mr Akash Nawblatt QC and Mr Christopher Stone (instructed by **HMRC Solicitor's Office and Legal Services**) for the **defendant**

Hearing dates: 14,15, 16 February 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. The parties are in dispute as to whether the defendant (HMRC) is in breach of its duty under section 7(1) of the Data Protection Act 1998 (the DPA) to communicate to Mr Gaines-Cooper the information which it holds constituting any personal data of which he is the data subject and any information as to the source of those data. All section numbers referred to in this judgment are sections of the 1998 Act unless otherwise indicated. A subject access request (SAR) was made on his behalf in April 2014 for copies of the entire internal files held in relation to him by HMRC which “should include all personal data relating to our client by, or on behalf of, HMRC in the period 1976 to the present.”

2. On the third morning of the hearing the Court of Appeal handed down judgment in *Dawson-Damer & Ors v Taylor Wessing LLP* [2017] EWCA Civ 74, which has an important bearing on some of the issues which I must determine. Mr Pitt-Payne QC for Mr Gaines-Cooper and Mr Nawbatt QC for HMRC helpfully were able to deal with that decision and to make submissions on it. I reserved judgment and before it was handed down a differently constituted Court of Appeal handed down a further relevant judgment in *Ittihadieh v 5-11 Cheyne Gardens & Ors and Deer v The University of Oxford with The Information Commissioner intervening* [2017] EWCA Civ 121. The latter judgment was delayed so that the former may be considered, and I gave the parties an opportunity to make written representations upon it.

3. It will be necessary in this judgment to refer to several sections of the DPA, and I gratefully adopt the practice used by the Court of Appeal in *Dawson-Damer* of setting out in an appendix the relevant provisions and those of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 which the 1998 Act sought to implement.

4. It is not in dispute that HMRC is a data controller within the meaning of section 1 and is processing data about Mr Gaines-Cooper as a data subject, and for present purposes processing includes holding data. HMRC holds a substantial amount of documentation in both electronic and manual form which relates to him. The parties have been embroiled in substantial litigation since 2006 concerning his tax affairs.

5. In order to understand the nature of the data which HMRC holds relating to Mr Gaines-Cooper, it is necessary to say something more about that litigation. HMRC began an investigation into his tax affairs in 2000 by which time he had moved from the UK to the Seychelles where he claimed to be domiciled and resident for tax purposes. The investigations were complex. They involved not only him but also business partners of his. His evidence before the Special Commissioners was that he and business partners had set up some 100 companies in several different countries. The investigation included international exploitation of patents, transfers of assets into trust, the setting up of companies, the correct tax treatment of transferring profits between countries.

6. HMRC made assessments and amendments to Mr Gaines-Cooper’s self-assessment of his tax liability for the tax years 1992-1993 to 2003-4 inclusive (except 1999-2000),

2004-5, and 2005-6 totalling nearly £15million. He appealed those assessments. In 2006 the Special Commissioners in the appeal against the earlier assessments heard issues of residence and domicile during a ten-day hearing. He adduced one bundle of documents and HMRC adduced four. A sixth bundle contained copies of his passports between 1976 and 2004 was also put into evidence. Air travel data and day count data were provided by Mr Gaines-Cooper. He was represented by leading and junior counsel and gave evidence over four and a half days. The Special Commissioners made detailed findings of fact on domicile and residence in favour of HMRC in respect of the assessment in the period up to the end of the 2004 tax year. HMRC made further assessments and amendments for the tax years 1997-1998 and 1999-2006 in March 2010.

7. Mr Gaines-Cooper sought to appeal the domicile finding, but permission to do so was ultimately refused by the Court of Appeal in October 2008. By then, he had commenced judicial review proceedings in which he argued that he had a legitimate expectation that his position was governed by guidance set out in a HMRC booklet called IR20. HMRC argued that the effect of this guidance was that a person who had formerly been resident in the UK would cease to be resident only in the event of a distinct break in that person’s life in the UK. Those proceedings reached the Supreme Court which by a majority dismissed the appeal in a judgment handed down in October 2011, see *R (on the application of Gaines-Cooper) v HMRC* [2011] UKSC 47.

8. The majority held that whilst the booklet was not as clear as it should have been it was sufficient to convey to an ordinary taxpayer that in order to achieve non-residence he or she had to leave the UK permanently, indefinitely or for full time employment, do more than just take up residence in another country, and relinquish his or her usual residence in the UK. The court noted that there was a change of practice of the HMRC in 2001, which Lord Wilson described as “more frequent scrutiny of claims to non-residence,” probably triggered by mobile workers such as lorry drivers and airline pilots.

9. During 2012 and 2013 there were meetings between the parties in an attempt to settle outstanding issues. The finding of the Supreme Court did not determine the litigation between them and the First-tier Tribunal (Tax Chamber) (the FTT) will have to decide issues such as transfer of assets abroad, settlement, technical competence and quantum. Further disclosure of documents has been directed to take place in September 2017. Mr Gaines-Cooper has also appealed the 2004-6 assessments and unless resolved the appeal will also be determined by the FTT. Further, there is a possibility of future assessment. HMRC continues actively to investigate his tax affairs during more recent years.

10. The SAR was made by solicitors newly instructed by him, Mishcon de Reya LLP. It ran to some four pages. After setting out the scope of the request as summarised above, the request continued that its scope specifically “but without limitation” extended to eight categories of information, including all assessments, internal correspondence, attendance notes and correspondence between divisions of HMRC in relation to the Special Commissioners, and any internal correspondence generated

as a result of analysis and assessment of Mr Gaines-Cooper relating to his residence and domicile and the IR20 booklet. The final category included documentation in relation to covert and overt investigations of Mr Gaines-Cooper, and any records of surveillance or interception of communication of him whether in the UK or abroad. The request then stated that a number of individuals may have processed his personal data including (but not limited to) eight named individuals.

11. HMRC responded on 25 April 2014 through Sara Harris, an investigator in the Specialist Investigations. She said:

> "I appreciate your client's right to access his personal data, but your request covers a vast period of time and is very broad in terms of what is being sought."

She asked for clarification as to what information and documents were being sought.

12. Mishcon de Reya replied agreeing with that description but saying that they considered each element of the request to be sufficiently specific and very clear and asked for HMRC to say which elements were not clear. HMRC did not take up that invitation, but in an internal memorandum at the time Ms Harris stated that she was hoping to "knock back" the request. In my judgment, it is inappropriate to infer from this any more than indicated in her initial response that the request covered many years and was very broad in its scope.

13. The manual and electronic documentation which HMRC held at the time of the SAR concerning Mr Gaines-Cooper is set out in a detailed witness statement of Ms Harris dated 29 January 2016.

14. There are 271 manual files formerly held in HMRC's solicitor's office relating to the investigations and the litigation outlined above. Ms Harris says that she saw these files before they were relocated and recalls that most of the documentation consisted of litigation files, with a number of duplicates. There are some other files, including the working papers of the solicitor working for HMRC.

15. 24 boxes of documents were held by Specialist Investigations (now called Fraud Investigation Service), which are labelled by reference to Mr Gaines- Cooper's reference number, but contain records relating to other persons both natural and legal. The files in the boxes are not indexed and some of the papers are not in files. There is a general index of what is held in the boxes.

16. 1500 electronic documents were identified in files held by Specialist Investigations and Specialist Personal Tax, most of which related to Mr Gaines-Cooper but a small number of which related to linked investigations. Both those departments held manual files relating to him.

17. Ms Harris also sets out the steps taken by HMRC to comply with the SAR. She wrote to the people within HMRC who were likely to hold personal data of Mr Gaines-Cooper either at that time or previously. She asked for whole documents, electronic and/or manual that may come with the scope of the SRA to be sent to her to ensure consistency of approach in examining the documents for personal data and in the application of exemptions. Where that was not practical because of controls over the transfer of manual files, she arranged for scanned copies of documents likely to contain personal date to be transferred to her electronically.

18. She arranged for each of the documents to be examined to find personal data to which Mr Gaines-Cooper was entitled to under the DPA. It was too large a task for her to carry out alone so seven other people assisted her. She arranged a briefing session with her assistants in which she explained the meaning of personal data, the exemptions that were likely to apply and the context of the case. She explained that some documents might need to be redacted, and that in line with HMRC policy, redaction should include the names of staff other than senior civil servants because it could not be assumed that as third parties they had given consent to their names being disclosed. In the session, a sample of documents were considered and the approach to application of the exemptions was discussed. Ms Harris explained that Mr Gaines-Cooper had a fundamental right to access his personal data, and that regardless of HMRC's preference to disclosing information, such data must fall within one of the exemptions to be withheld.

19. Following an examination and redaction of the documents, Ms Harris reviewed each page that was to be released. Each document was individually considered. No blanket exemption was applied to classes of documents, other than to assume that the documents held within the files of the HMRC solicitor's office were exempt by legal professional privilege.

20. She asked those people involved in the examination of the documents to keep a log on the hours spent and says that in relation to the examination and redaction alone, the total time spent in complying with the SAR exceeded 100 hours, although no logs were adduced in evidence.

21. Ms Harris did not consider the litigation bundles or correspondence between HMRC and Mr Gaines-Cooper to be within the scope of the SAR because he had previously had access to that information. She had seen the contents of the 24 boxes and estimated that there are over 8000 pages. She estimates it would take an average of two minutes per page to consider the information and extract relevant personal data and to extract such data would take over 200 hours which at a cost of £25 would mean a total of over £5000. She considered that a cost exemption applies to this documentation.

22. HMRC relies upon the time-consuming nature of the searches to explain why it was unable to comply with the statutory requirement to comply with the request within 40 days. The first response came on 17 June 2014 when 130 pages of documents, many heavily redacted, were handed over to Mishcon De Reya, with a covering letter saying that HMRC was still considering further documentation and hoped to send a

further response shortly. The reply was that only "a fraction of the documents" returnable under the SAR had been handed over. On 9 July 2014 some 390 further pages of documentation were emailed which related in the main to the amount of time which Mr Gaines-Cooper spends in UK. Most of the disclosed documentation came from the Specialist Investigations and Specialist Personal Tax files, but some electronic data held on the High Net Worth Unit and Self-Assessment systems were also disclosed.

23. A request was made on behalf of Mr Gaines-Cooper to HMRC for a review of its response to the SAR. This was carried out by HMRC reviewing the searches already carried out and carrying out further searches of files. However, in August 2014 HMRC replied with the outcome, which was to maintain its stance that there had been a proper response. That led to a letter before action. In its reply, HMRC set out its reasons for not disclosing further information as outlined above. However, it also stated that HMRC considered the request for further documentation to be abusive.

24. In these proceedings, HMRC maintains its claim that it has considered the Specialist Investigations and Specialist Personal Tax electronic and paper files on a document by document basis and disclosed all of Mr Gaines-Cooper's personal data which is not exempt. It relies upon section 29(1)(c) and says that disclosure of some information is likely to prejudice the assessment or collection of tax. Moreover, it says that information held in the Specialist Investigations and Specialist Personal Tax files which records HMRC's intentions in relation to the negotiations of payment of Mr Gaines-Cooper's outstanding tax liabilities is exempt under Schedule 7 paragraph 7.

25. HMRC also maintains its reasons for not searching some of the documentation it holds. The first category is the external correspondence, and that has not been searched because HMRC says the request related to internal files and in any event this correspondence has already been seen by Mr Gaines-Cooper or his representatives.

26. The second category comprises the 271 files held by the solicitor's office of HMRC. Much of the information is subject to legal professional privilege, says HMRC, and is exempt from disclosure by Schedule 7 paragraph 10. HMRC accepts that such privilege may not attach to some of this information, which may contain personal data of Mr Gaines-Cooper, but considers to extract it would involve a disproportionate effort within the meaning of section 8(2)(a).

27. The third comprises the 24 boxes of documents. A short description of each box was attached to the skeleton argument of HMRC in the present proceedings. HMRC says that these documents amount to unstructured personal data within the meaning of section 1 and that the cost of searching these would be disproportionate. Nine of the boxes are said to be litigation files.

28. In the hearing before me, the trial bundle included three witness statements from Mr Gaines-Cooper's solicitor, Adam Rose, but none from Mr Gaines-Cooper. HMRC filed three statements from Ms Harris and one from Steve Symonds. During case

management of the present proceedings, HMRC prepared a sample bundle of documents it held for the attention of the court but not for Mr Gaines-Cooper, under a procedure provided for by section 15(2), to assist the court to determine any question whether Mr Gaines-Cooper is entitled to information which he seeks. The first bundle so provided is labelled D2 and was considered by His Honour Judge Raeside QC at a case management conference who ruled that the bundle did not go far enough. Accordingly, a further bundle D3 was prepared.

29. On the first morning of the hearing an application was made on behalf of Mr Gaines-Cooper to cross examine Ms Harris on the compilation of the redacted index to the 24 boxes (which Mr Gaines-Cooper's representatives had seen only as an attachment to the skeleton argument of HMRC) and to clarify the basis of selection of documents in D2 and D3, as well as other points relating to the approach of HMRC to Mr Gaines-Cooper's request. I allowed the application but limited cross examination to the index and the bundles. The index shows that 10 of the boxes have the main heading as "Litigation SC," and another as "Litigation High Court." Another is headed "Miscellaneous: RGC grounds of defence; skeleton arguments; SCI working papers: "Bits & Pieces"; RGC domicile papers."

30. She was not involved in the preparation of the index but her understanding was that redacted parts of the index contains names of others. She confirmed the boxes form part of the current working case file of Mr Gaines-Cooper only and that the reference to RGC is to him. The key to the cupboard which contains the boxes is marked with the initials of Mr Gaines-Cooper. Boxes are removed and updated from time to time, so that they are now 25 in number. The documents contained in them refer to others as well as Mr Gaines-Cooper.

31. She was involved in the preparation of D2 and D3. These were drawn from the 1500 electronic documents held by HMRC, but not from the 25 boxes or the 271 solicitor's files. The electronic documents were contained in folders and subfolders identified by the investigation team, or by the name of the originating department and the person who sent it to Ms Harris. She said that in respect of the documentation received as a result of her contact with other members of staff, this documentation was not held by category of exemption, and she was not looking for particular exemptions. She first chose folders in an attempt to make a varied selection. Where this produced a document already disclosed it was discarded. She then wanted to ensure that the documents which were produced amounted to a fair and representative systematic sample. In consultation with solicitors she looked at every tenth document in the subfolders until she reached 250 pages.

32. I was referred during the hearing to a selection of documents in D2 and D3 by Mr Nawbatt, but of course these were not seen by Mr Gaines-Cooper or his representatives.

33. On behalf of Mr Gaines-Cooper, Mr Pitt-Payne submits that the request deals with an important part of his personal life namely residence and non- residence and domicile. A proper response is important in two ways. First, it lets him know what

information is held about him. Second, it is a gateway right enabling him to enforce other rights such the right to rectify inaccurate data under section 14.

34. He emphasises that the right to the protection of personal data concerning an individual is a fundamental right under Article 8 of Charter of Fundamental Rights of the European Unions, and the courts have taken the DPA seriously as giving effect to such rights, for example in *Vidal-Hall* v *Google Inc.* [2016] QB 1003 and *Dawson-Damer* per Arden LJ at paragraph 107. In *Ittihadieh,* in the lead judgment given by Lewison LJ, reference is made at paragraph 37 to 38 to the jurisprudence of the European Court which emphasises that the purpose of the Directive is “to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data” (see (case C-553/07) *College van burgemeester en wethouders van Rotterdam v Rijkeboer* [2009] 3 CMLR 28).

35. In his first statement, Mr Rose said that Mr Gaines-Cooper thought he had been singled out for the adoption by HMRC of a new approach of closer and more rigorous scrutiny to claims of non- residence, and wanted to establish why this was done. He also said that Mr Gaines-Cooper was concerned that inaccurate data may have informed the treatment of him by HMRC and that decisions may be based on factually inaccurate data or “by reference to ill founded or tendentious judgments or expressions of opinion about him that he has had no opportunity to comment on or correct.” That brought forward a reply that Mr Gaines-Cooper was one of a group affected by this new approach. Mr Rose in his second statement says that it is no answer to say that there were other examples of cases where the new approach was applied.

36. One of the issues which was clarified by the Court of Appeal is whether there is a rule that no order will be made under section 7(9) if the applicant proposes to use the information obtained for some purpose other than verifying or correcting data held about him. The uncertainty arose from a passage in the judgment of Auld LJ (with whom the other member of the court agreed) in *Durant v Financial Services Authority* [2004] FSR 573 to the effect that the right to obtain information under section 7 was not to assist the applicant, for example, to obtain discovery of documents that may assist him in litigation or complaints against the third parties.

37. At paragraph 111 of *Dawson-Damer,* Arden LJ (with whom the other members of the court agreed) said that the passage should not be taken out of context, which was that Auld LJ was emphasising the limited nature of personal data, and that was the principal issue in that case. A person could not claim that something was personal data because it would assist him in discovery or in litigation or complaints against third parties. That was reinforced by Auld LJ’s acceptance at paragraph 74 of his judgment that the discretion under section 7(9) was general and untrammelled.

38. Arden LJ had earlier in paragraphs 108- 109 indicated that the matter might be different if the application under section 7(9) was an abuse of the court’s process (which the mere holding of a collateral purpose would not normally be) or if the

applicant had a purpose which might give rise to a conflict of interest within a group which he represents. Her Ladyship continued at paragraphs 112 and 113:

> "In those circumstances, in my judgment, David Richards J (as he then was) was right when he said that this passage did not establish that a request would be made invalid if made for the collateral purpose of assisting in litigation; see *Southern Pacific Personal Loans Limited* [2013] EWHC 2485 (Ch) at paragraph 10.
>
> Likewise, it would not in my judgment be correct to refuse to exercise the discretion because this disclosure could not be obtained from the trustees under the governing law of the trusts"

39. At paragraphs 86-90 of his judgment in *Ittihadieh,* Lewison LJ gave five reasons why it is not a valid objection to comply with a SAR that it is made for a collateral purpose. First, the target of a SAR is or should not be documentation, it is personal data. Second, the mere fact that a person has collateral purposes will not invalidate a SAR, or relieve the data controller from the obligation in relation to it, if that person also wishes to achieve one or more of the purposes of the Directive. Third, there is now a considerable body of case law in England and Wales which recognises that it is no objection to a SAR that it is made in connection with actual or contemplated litigation. Fourth, section 27(5) provides that apart from the exemptions contained in the DPA, the subject information provision prevails over any other enactment or rule of law. Finally, the point is put beyond doubt by the judgment in *Dawson-Damer*.

40. In light of the latter decision, Mr Nawbatt properly abandoned any suggestion that any collateral purpose on the part of Mr Gaines-Cooper might render his request invalid, but maintained that his purpose may nevertheless be relevant when considering issues of proportionality or discretion, which stance is not accepted by Mr Pitt-Payne. I shall need to deal with that in more detail when considering these matters.

41. However, the starting point must be that Mr Gaines-Cooper made a valid request in the exercise of his fundamental right to the protection of personal data concerning him, and that, as Mr Pitt-Payne accepted, HMRC dealt with the request on the basis that it was valid. In my judgment Ms Harris adopted the right approach by accepting, although not quite articulated in this way, that Mr Gaines-Cooper had a fundamental right to privacy with respect to the processing of personal data.

42. In assessing whether that request was dealt with properly under the provisions of the 1998, Mr Pitt-Payne submits that HMRC has misunderstood or misapplied those provisions in several important ways.

43. The first is as to the nature of personal data within the meaning of section 1. I was referred to a number of authorities on this issue, but I think I may take this issue shortly in light of two matters. The first is the concession on behalf of HMRC that, at

least in respect of its solicitor's office files, some personal data concerning Mr Gaines-Cooper which is not exempt may be contained on those files. The second is the guidance given in the two recent Court of Appeal authorities and in particular *Ittihadieh.*

44. The concept of personal data was dealt with at paragraphs 61-69, in which Lewson LJ cited from the judgment of Auld LJ in *Durant* and in particular paragraph 28:

> "Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may of be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy cannot be said to be compromised. The second is one of focus. The information should have the putative subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

45. Lewison LJ then went on to examine other authorities which indicated that a person's name in conjunction with job related information, amounts to personal data. At paragraph 67, he observed that in addition, a person's whereabouts on a particular day or at a particular time may also amount to that person's personal data because those may be highly relevant in calculating sick pay or holiday pay or in the investigation of crime.

46. He then referred to the European Court decision in *YS v Minister voor Immigratie Integratie en Asie v Ml* [2015] 1 WLR 609 as justifying its conclusion that legal analysis was not "personal data" by saying at paragraph 46:

> "…extending the right of access of the applicant for a residence permit to that legal analysis would not in fact serve the Directive's purpose of guaranteeing the protection of the applicant's right to privacy with regard to the processing of data relating to him, but would serve the purpose of guaranteeing him the right of access to administrative documents, which is not however covered by Directive 95/45."

47. Lewison LJ made one further point in the ultimate paragraph in this section of his judgment:

> "Information is not disqualified from being "personal data" merely because it has been supplied to the data controller by the data subject. On the contrary, one would expect that much of the data processed by a data controller will have been supplied by the data subject himself, for instance in an application form. One of the subject access rights is a right to know to whom personal data have been disclosed, and this may be of considerable importance in a case in which the personal data have been supplied by the data subject himself."

48. In dealing with the form of response to a SAR, Lewison LJ at paragraph 93 said this:

> "The obligation under section 7(1)(c) includes an obligation to communicate in intelligible form "the information constituting any personal data of which the individual is the data subject." This goes further than section 7(1)(b) which requires a description of the personal data. It is an obligation to supply the information itself. Even so, it is not an obligation to supply documents: *Dunn v Durham CC* [2012] EWCA Civ 1654, [2013] 2 All ER 213 at [16]. It is of critical importance to distinguish between the two. Although it may be more convenient in some cases for a data controller to supply copy documents, there is no legal obligation to do so. It is very easy, however, to slip from dealing with personal data into dealing with electronically generated or stored documents in which personal data are recorded. It seems from many of the reported cases (as well as these two appeals) that individuals who make SARs are, in truth, looking for copy documents. They are in my judgment aiming at the wrong target."

49. That observation, he said, tied in with the definition of "personal data" but said that accepting that a person's name is his personal data, it does not follow that every piece of information in a document in which his name appears is his personal information. In such a case it would be enough for the data controller to inform the data subject that for instance his name and address were consistently recorded in a specified number of documents between particular dates, and that was borne out by article 12 of the Directive which requires the data controller to inform the data subject of the "categories of data concerned." On the other hand, the mere supply of copy documents may not be enough to comply with, for example, the requirement to inform the data subject to whom the personal data have been disclosed (section 7(1)(b)(iii)); or the source of that data (section 7(1)(c)(ii)).

50. In my judgment both parties in making and responding to the SAR in the present case, although each referred to personal data, focussed on the supply of documents. The overarching request in the SAR was for copy documents, and the focus of the

search was for documentation and any necessary redaction for disclosure. This it appears followed as a matter of fact from the way the SAR was framed, but in my judgment, it is incumbent upon data controllers responding to SARs to have regard to the obligations placed upon them. They may find it easier in some cases, as observed in *Ittihadieh,* to comply by simply disclosing documents but if this method of compliance is adopted, it must be kept firmly and clearly in mind that the duty is to supply information as to the categories of data concerned rather than copy documents, and that by supplying only the latter it may not be apparent to whom personal data has been disclosed or the source of the personal data in question. Such information as is contemplated in that case, for example that the name and address of Mr Gaines-Cooper in conjunction with business related information and his whereabouts at particular times, has been consistently recorded in a specified number of documents, has not been fully provided. It is likely that further such information is contained in the documentation not searched

51. On the other hand, as Mr Nawbatt acknowledged, it does not appear that in carrying out the exercise to respond to the request HMRC had clear regard to the principle that legal analysis is not personal data and the right to administrative documents is not covered by the Directive, as expounded in *YS.* It is plain from the evidence and it does not appear to be in dispute that all the information regarding Mr Gaines-Cooper held by HMRC is likely to be held for the purposes of assessment and collection of taxes. Whilst as Mr Pitt-Payne submits, that fact cannot of itself justify refusal to comply with a valid SAR request, it does make it likely having regard to the history of investigation, assessment and litigation that a great deal of the information so held comes within that principle.

52. I am comforted in reaching that conclusion by observing that many of the documents which Mr Nawbatt referred to me within D2 and D3 fall plainly within that category. I bear in mind that the documents in these bundles represent only a small fraction of the electronic documentation, and none or very little of the manual information held by HMRC in relation to Mr Gaines-Cooper. I am satisfied however on the evidence of Ms Harris that D2 and D3 amount to a reasonably representative sample of the electronic documentation.

53. However, to produce the further information which does amount to personal data and to exclude from it that which amounts to legal analysis or administrative documentation, or falls within one of the exemptions set out in the DPA, would as a first step require a search of the documentation held.

54. That leads on to the issue of proportionality of search. Neither the Directive nor section 7 contains any express reference to proportionality or indeed to a search. In *Ezsias v Welsh Ministers* [2007] EWHC B15 (QB), [2007] All ER (D) 65 (Dec), HH Judge Hickinbottom, as he then was, sitting as a High Court judge, held that on receipt of a SAR, a data controller must take reasonable and proportionate steps to identify and disclose the data which the controller is bound to disclose. That approach was endorsed in *Dawson-Damer* and *Ittihadieh*. In both cases reference was made to the principle of proportionality in EU law. In the latter, examples were given at paragraph 97 including the application of that principle to the scope of member

states to lay down time limits for the retention of personal data in *Rotterdam,* and at paragraph 96 reference was made to the recitals (15) and (27) of the Directive which make it clear that it applies to filing systems and not to unstructured files.

55. In both recent judgments, the Court of Appeal concluded that where the legal professional privilege exception referred to in section 27(2) and Schedule 7 paragraph 10 of the DPA applies, the data controller is relieved from what would otherwise be an obligation to comply with the SAR. In both, it was pointed out that if some personal data are coved by such privilege but others are not, then the data controller will have to carry out a proportionate search to separate the two. As indicated at paragraphs 102 and 103 in *Ittiadieh,* in addition one or more of the exemptions set out in Schedule 7 of the DPA might apply and moreover, the mere fact that a further and more extensive search reveals further personal data does not mean that the first search was inadequate.

56. Accordingly, a balance needs to be struck in each case and it is a question of what factors should weigh in the balance. In *Dawson-Damer v* Arden LJ at paragraph 77 said

> "It will be a question for evaluation in each particular case whether disproportionate effort will be involved in finding and supplying the information as against the benefits it might bring to the data subject."

57. In my judgment, notwithstanding the points already made about the focus of the search, that conducted in relation to electronic documentation involved substantial effort. No effort has made at all in relation to search the external correspondence, the 271 files, or the 25 boxes. Based on the evidence of Ms Harris outlined above, even a partial but representative search of this information is likely to involve a further substantial effort.

58. In assessing the benefit such further searches may bring to Mr Gaines-Cooper, I accept the submission of Mr Pitt-Payne that the starting point must be that he has a fundamental right to the protection of his privacy as I have found HMRC in effect recognised. It was a valid SAR. I reject any suggestion to the contrary now made on behalf of HMRC. However, in my judgment in weighing up this benefit it is legitimate to take into account the reasons he says he made the SAR and also the value he himself places upon being supplied further information, although there may be other benefits to be taken into account. As indicated, there is no direct evidence from him, but one concern in making the SAR as initially, at least, voiced on his behalf by Mr Rose was to see why he was singled out for scrutiny of his non-residence claim. The conclusion of the Supreme Court in the case brought by him against HMRC on the evidence adduced by the same parties as in the present proceedings was that the more frequent scrutiny of such claims was the result of a new approach by HMRC to such claims generally.

59. It is also legitimate to take into account that the vast majority of the external correspondence which has passed between HMRC and Mr Gaines-Cooper or his

advisors, the litigation bundles within the 271 files or within 9 of the 25 boxes has already been seen by him or his advisors. In respect of the 271 files it is likely that a substantial amount of what he has not seen will be protected by legal professional privilege. This of course is not to say all of it will be or that a further search of these documents will not reveal further personal data. In my judgment, it is likely that it will, particularly in relation to the consistency or otherwise of recording of Mr Gaines-Coopers name, address, business interests, movements, and the sources and recipients of his personal data.

60. I place little weight on Mr Nawbatt's submission that further information is likely to be disclosed in the ongoing proceedings before the FTT. Disclosure in such a process is a very different matter to the provision of personal data under the DPA. Although it is known what has already been disclosed in the litigation, it is not yet clear what further information may be disclosed on the remaining issues, which disclosure is due in September 2017.

61. In respect of the 25 boxes, I do not accept Mr Nawbatt's submission that these amount to unstructured files within the meaning of the Directive and the DPA so as to fall outside the provisions. It may be that without an index to each box the files are not very well structured and it is likely that they contain information relating to other persons natural and legal. However, on the evidence of Ms Harris it amounts to a working filing system under the reference of Mr Gaines-Cooper.

62. However, other exemptions are relied upon by HMRC. The first is that provided for by section 29(1)(c) which exempts from the first data protection principle personal data processed for the assessment or collect of tax. The second is paragraph 7 of Schedule 7 which exempts personal data which consist of records of intentions of the data controller in relation to any negotiations with the data subject to which the applications of the provisions would be likely to prejudice those negotiations. The point is made that in respect of the assessments already issued no tax has yet been collected and there are ongoing proceedings. Investigations are also ongoing which may lead to further assessments.

63. The evidence of the prejudice relied upon under section 29, and it is for HMRC to show such prejudice, is set out in the witness statement of Ms Harris and the only specific matter mentioned is that as she is the sole investigator responsible for completing the enquiries into Mr Gaines-Cooper and bringing the case before the FTT, her time is currently being taken up by the SAR and these proceedings and she is unable to devote her time to her duties as a tax inspector. I accept that from the viewpoint of Ms Harris, the SAR and the claim that it has not been properly dealt with does impact upon her continuing role in the process, but no further detail is given.

64. So far as negotiations are concerned, it is accepted that these have taken place prior to the present proceedings, and in my judgment, they are likely to or may well recommence as the proceedings before the FTT progress. It is clear that some of the information does relate to such negotiations. Again I find comfort in this conclusion having looked at some of the documents in D3. In my judgment, it is likely that the

documentation in the 271 files or, being updated as they are, the 25 boxes will relate to such negotiations but it is difficult on the evidence to say that this will be a substantial amount.

65. Moreover, as Mr Pitt-Payne submits, such factors do not impact uniformly on the four phases in the period set out in the SAR. The first is prior to any assessment when no assessment or collection was ongoing. He accepts that prejudice may be relevant to the two periods covered by the two sets of assessments in question and the continuing proceedings in relation thereto. Thereafter he submits that there is no ongoing assessment, but it is clear from the evidence of Ms Harris that investigation is ongoing.

66. In terms of how the exemptions, in addition to what I have said about legal professional privilege, impacted upon the proportionality of the search carried out, in my judgment they are factors to weigh in the balance but because of the uncertainty referred to above only modest weight should be accorded to them. The same applies to how the exemptions may limit further information for the benefit of Mr Gaines-Cooper which a further search may bring.

67. In dealing with this claim, it is common ground that proper regard should be had to the fact that HMRC is the decision maker of the response to the SAR and the role of the court is to review whether the decisions taken are legally flawed.

68. Weighing up all the above factors, and notwithstanding the criticisms which I have made of the process including the scope of the SAR, I have come to the conclusion that the balance comes down in favour of the search being a proportionate response. Unlike the situation in *Dawson-Damer,* in the present case HMRC has shown what it has done to identify the material and to work out a plan. I have accepted that further searches are likely to bring further information as to personal data of Mr Gaines-Cooper, but I take the view that the effort of further searches, particularly of the material so far unsearched, is out of proportion to the likely benefit to Mr Gaines-Cooper having regard particularly to his stated concerns in making the SAR and the information which he has already had both before and as a result of the SAR. I do not accept Mr Pitt-Payne's point that the latter is so heavily redacted as to be unintelligible. It means that he does not know what has been redacted, which in some instances makes it difficult to put the disclosed information in context, but that does not render it unintelligible.

69. In case I am wrong about that, I must consider the issue of residual discretion under section 7(9) where a court is satisfied that a data controller has failed to comply with its obligation. The nature of such a discretion has also been clarified by the two recent Court of Appeal cases. In both, obiter remarks of Auld LJ in *Durant* to the effect that the discretion conferred upon the court by section 7(9) is "general and untrammelled" were referred to. In *Dawson-Damer,* the court referred to it as a general discretion but went on to exercise it afresh and found that the most material considerations in that case were that the validity of the SAR was not in doubt and that the efforts to comply with it had been inadequate.

70. In *Ittihadieh* the court went further and disagreed with the obiter comments of Auld LJ, preferring the approach of Cranston J in *Roberts v Nottinghamshire Healthcare NHS Trust* [2008] EWHC 1934 (QB) [2009] PTSR 415 and Green J in *Zaw Lin v Commissioner of Police for the Metropolis* [2015] EWHC 2484 (QB) that the discretion should be exercised in accordance with the principles set out in the DPA and taking into account the background principles in the Directive and the Convention. The court at paragraphs 109-110 went on to describe some of the relevant factors by reference to previous authority, whilst making it clear that those were not intended to be prescriptive.

71. First, whether there is a more appropriate route to obtaining the requested information, such as by disclosure in legal proceedings. Second, the nature of the gravity of the breach. Third, the reason for making the SAR. Whilst the absence of a stated reason does not itself invalidate the SAR, the absence of a legitimate reason has a bearing on the exercise of the court's discretion. If the application is an abuse of rights, for example where litigation is pursued merely to impose a burden on the data controller that would be a relevant factor. Fourth, whether the real quest is for documents rather than personal data. Fifth, whether the personal data are of real value to the data subject. Sixth, whether the data subject has already received the data otherwise than under a previous SAR. Seventh, where it is clear that the data subject legitimately wishes to check the accuracy of personal data that will be a good reason for exercising the discretion in favour of the data subject. Finally, referring to *Dawson-Damer,* if there are no material factors other than a valid SAR and a breach of the data controller's obligation to conduct a proportionate search, then the discretion will ordinarily be exercised in favour of the data subject.

72. Bearing in mind that these are not prescriptive, in my judgment it is helpful to commence the exercise by reference to them.

73. First, whilst I have stopped short of concluding that further disclosure in the ongoing proceedings is a more appropriate route to obtaining the requested information, nevertheless it is clear in my judgment that a great deal of it has already been disclosed in the lengthy and multifarious dealings and proceedings between the parties. Second, the nature of the gravity of any breach is not towards the grave end of the scale. The SAR was taken seriously and a plan put into effect to deal with it and a substantial search and evaluative judgment exercise carried out. HMRC did not simply fail to search further for no reason. It has given its reasons.

74. Third, as indicated above, one reason voiced on behalf of Mr Gaines-Cooper for the SAR was a concern to know why he had, as he believed, been singled out for scrutiny of his non- residence claims. That was already apparent from his litigation in the Supreme Court. Another reason was to check the accuracy of the data held, but Mr Gaines-Cooper has already had a substantial opportunity to do this in the previous proceedings. These facts, taken with the ongoing proceedings and the negotiations in them and the very wide scope of the request, raise a suspicion at least that the real motivation was to impose a burden on HMRC so as to apply pressure to negotiate an outcome favourable to him. However, Ms Harris, who was involved in the investigation, took the request seriously and responded with a plan. In my

judgment the evidence and circumstances fall short of that needed to justify an inference of such a motivation.

75. Fourth, as I have already concluded, the overarching nature of the SAR was one for documents, although personal data was included. Fifth, further personal data, whilst it may be obtained by a further search and whilst it may be of some benefit is not likely to be of substantial benefit in light of the personal data which HMRC has already disclosed in prevsious proceedings and in response to the SAR. Sixth, there is no clear indication that Mr Gaines-Cooper has a real concern in testing the accuracy of the data. That has, to some extent been tested in the hearing before the Special Commissioners. Nor is it suggested that what has been disclosed under the SAR contains material inaccuracies. Finally, there are other factors here, as set out above, apart from a valid SAR and an inadequate response.

76. Accordingly, on balance I would exercise my discretion by not making any order against HMRC to comply with the request.

77. In light of my conclusions above the question of other remedies does not arise, and given that I have concluded that the response was proportionate, nothing useful is to be gained by dealing with damages on a hypothetical basis.

78. I am grateful to counsel for the clear and focused way each presented his arguments. They helpfully agreed that if any consequential matters remain to be determined this can be done on the basis of written submissions and I would invite such submissions to be made within 7 days of handing down.

Appendix
Relevant Provisions of the Data Protection Act 1998 and the Directive

DATA PROTECTION ACT 1998

Part I Preliminary

1 Basic interpretative provisions.
(1) In this Act, unless the context otherwise requires—
"data" means information which—
(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
(b) is recorded with the intention that it should be processed by means of such equipment,
(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d); …
"data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
"data subject" means an individual who is the subject of personal data;
"personal data" means data which relate to a living individual who can be identified—
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Part II Rights of data subjects and others
7 Right of access to personal data.
(1)Subject to the following provisions of this section and to sections 8, 9 and 9A, an individual is entitled—
(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
(b) if that is the case, to be given by the data controller a description of—
(i)the personal data of which that individual is the data subject,
(ii)the purposes for which they are being or are to be processed, and
(iii)the recipients or classes of recipients to whom they are or may be disclosed,
(c) to have communicated to him in an intelligible form—
(i)the information constituting any personal data of which that

individual is the data subject, and
(ii)any information available to the data controller as to the source
of those data, and
(d) where the processing by automatic means of personal data of which
that individual is the data subject for the purpose of evaluating matters
relating to him such as, for example, his performance at work, his
creditworthiness, his reliability or his conduct, has constituted or is likely
to constitute the sole basis for any decision significantly affecting him, to
be informed by the data controller of the logic involved in that decision taking.
(2) A data controller is not obliged to supply any information under subsection (1)
unless he has received—
(a) a request in writing, and
(b) except in prescribed cases, such fee (not exceeding the prescribed
maximum) as he may require. …
(4) Where a data controller cannot comply with the request without disclosing
information relating to another individual who can be identified from that
information, he is not obliged to comply with the request unless—
(a) the other individual has consented to the disclosure of the information
to the person making the request, or
(b) it is reasonable in all the circumstances to comply with the request
without the consent of the other individual. …

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.
(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request. …

8 Provisions supplementary to section 7.
…
(2) The obligation imposed by section 7(1)(c)(i) must be complied with by supplying
the data subject with a copy of the information in permanent form unless—
(a) the supply of such a copy is not possible or would involve
disproportionate effort, or
(b) the data subject agrees otherwise;
and where any of the information referred to in section 7(1)(c)(i) is expressed in terms which are not intelligible without explanation the copy must be accompanied by an explanation of those terms.

9A –Unstructured personal data held by public authorities.
(1) In this section "unstructured personal data" means any personal data falling within paragraph (e) of the definition of "data" in section 1(1), other than information which is recorded as part of, or with the intention that it should form part of, any set of information relating to individuals to the extent that the set is structured by reference to individuals or by reference to criteria relating to individuals.

…
(3) A public authority is not obliges to comply with subsection (1) of section 7 in relation to unstructured personal data if the authority estimates that the cost of complying with the request so far as relating to those date would exceed the appropriate limit.
…
Part II Rights of data subjects and others
10.— Right to prevent processing likely to cause damage or distress.

(1) Subject to subsection (2), 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 substantial distress to him or to another, and
(b) that damage or distress is or would be unwarranted. ...

15.—Jurisdiction and procedure.
…
(2) For the purpose of determining any question whether an applicant under subsection (9) of section 7 is entitled to the information which he seeks (including any question whether any relevant data are exempt from that section by virtue of Part IV) a court may require the information constituting any data processed by or on behalf of the data controller and any information as to the logic involved in any decision-taking as mentions in section 7 (1) (d) to be made available for tis own inspection but shall not, pending the determination of that question in the applicant's favour, require the information sought by the applicant to be disclosed to him or his representatives whether by discovery…or otherwise.

Part 1V Exemptions

29.—Crime and taxation.

(1) Personal data processed for any of the following purposes –
(a) the prevention of crime,
(b) the apprehension of prosecution of any offenders, or
(c) the assessment or collection of any tax or duty or of any imposition of a similar nature are exempt from the first data protection principle...and section 7 in nay case to which the application of those provisions would be likely to prejudice any of the matters mentioned in this subsection.

37 Miscellaneous exemptions.
Schedule 7 (which confers further miscellaneous exemptions) has effect.
SCHEDULE 1 - THE DATA PROTECTION PRINCIPLES
Arrangement of Provisions

Part I The principles

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

SCHEDULE 7 – MISCELLANEOUS EXEMPTIONS

7 Personal data which consists of records of the intentions of the data controller in relation to any negotiations with the data subject are exempt from the subject information provisions in any case to the extent to which the application of those provisions would be likely to prejudice those negotiations.

Legal professional privilege
10 Personal data are exempt from the subject information provisions if the data consist of information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications, could be maintained in legal proceedings.

DIRECTIVE 95/46/EC (THE DATA PROTECTION DIRECTIVE)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,
Having regard to the proposal from the Commission (1),
Having regard to the opinion of the Economic and Social Committee (2),
Acting in accordance with the procedure referred to in Article 189b of the Treaty (3),
[…]
(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;
(3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded;
(4) Whereas increasingly frequent recourse is being had in the Community to the processing of personal data in the various spheres of economic and social activity; whereas the progress made in information technology is making the processing and exchange of such data considerably easier;
(5) Whereas the economic and social integration resulting from the establishment and functioning of the internal market within the meaning of Article 7a of the Treaty will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social

activity in the Member States; whereas the exchange of personal data between undertakings in different Member States is set to increase; whereas the national authorities in the various Member States are being called upon by virtue of Community law to collaborate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State within the context of the area without internal frontiers as constituted by the internal market;

[…]

(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

[…]

(12) Whereas the protection principles must apply to all processing of personal data by any person whose activities are governed by Community law; whereas there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses;

[…]

(15)Whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question:

[…]

(18) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(19) Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; whereas the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;

(20) Whereas the fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; whereas in these cases, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;

[…]
(25) Whereas the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances;
[…]
(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;
(27) Whereas the protection of individuals must apply as much to automatic processing of data as to manual processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this would create a serious risk of circumvention; whereas, nonetheless, as regards manual processing, this Directive covers only filing systems, not unstructured files; whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to the personal data; whereas, in line with the definition in Article 2 (c), the different criteria for determining the constituents of a structured set of personal data, and the different criteria governing access to such a set, may be laid down by each Member State; whereas files or sets of files as well as their cover pages, which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive;
[…]
(38) Whereas, if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection;
[…]
(41) Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing; whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15 (1); whereas this right must not adversely affect trade secrets or intellectual property and in particular the copyright protecting the software; whereas these considerations must not, however, result in the data subject being refused all information;
[…]

(43) Whereas restrictions on the rights of access and information and on certain obligations of the controller may similarly be imposed by Member States in so far as they are necessary to safeguard, for example, national security, defence, public safety, or important economic or financial interests of a Member State or the Union, as well as criminal investigations and prosecutions and action in respect of breaches of ethics in the regulated professions; whereas the list of exceptions and limitations should include the tasks of monitoring, inspection or regulation necessary in the three last mentioned
areas concerning public security, economic or financial interests and crime prevention; whereas the listing of tasks in these three areas does not affect the legitimacy of exceptions or restrictions for reasons of State security or defence;
[…]
(46) Whereas the protection of the rights and freedoms of data subjects with regard to the processing of personal data requires that appropriate technical and organizational measures be taken, both at the time of the design of the processing system and at the time of the processing itself, particularly in order to maintain security and thereby to prevent any unauthorized processing; whereas it is incumbent on the Member States to ensure that controllers comply with these measures; whereas these measures must ensure an appropriate level of security, taking into account the state of the art and the costs of their implementation in relation to the risks inherent in the processing and the nature of the data to be protected;
[…]
(55) Whereas, if the controller fails to respect the rights of data subjects, national legislation must provide for a judicial remedy; whereas any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage, in particular in cases where he establishes fault on the part of the data subject or in case of force majeure; whereas sanctions must be imposed on any person, whether governed by private of public law, who fails to comply with the national measures taken under this Directive;
[…]
(59) Whereas particular measures may be taken to compensate for the lack of protection in a third country in cases where the controller offers appropriate safeguards; whereas, moreover, provision must be made for procedures for negotiations between the Community and such third countries;
[…]
THE DATA SUBJECT'S RIGHT OF ACCESS TO DATA
Article 12
Right of access
Member States shall guarantee every data subject the right to obtain from the controller:
(a) without constraint at reasonable intervals and without excessive delay or expense:
- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,
- communication to him in an intelligible form of the data undergoing processing and

of any available information as to their source,
- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1);
(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;
(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.
SECTION VI
EXEMPTIONS AND RESTRICTIONS
Article 13
Exemptions and restrictions
1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:
(a) national security;
(b) defence;
(c) public security;
(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;
(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.