

Privileged information is generally safe from Subject Access Requests

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Subject Access Requests (“**SARs**”) are an increasingly popular weapon in litigation, because they can be used to provide a cheap and quick form of pre-action disclosure. However, courts have confirmed that information subject to legal professional privilege (“**LPP**”) does not need to be disclosed in response to a SAR, unless the person making the SAR has a “*prima facie case*” that the party relying on LPP is doing so to hide some form of wrongdoing.

In [Holyoake v \(1\) Candy \(2\) CPC Group Limited \[2017\] EWHC 52](#), the English High Court provided further clarity on the ability of individuals to use SARs as a weapon in litigation. This is a topic that has surfaced in a number of recent cases, which we have reported [here](#) (regarding the defeat of a SAR made for the dominant purpose of litigation) and [here](#) (regarding a failed attempt to invoke privilege as a defence against a SAR).

The law

Section 7 of the Data Protection Act 1998 (the “**Act**”) gives individuals (“**data subjects**”) the right to ask a business to provide them with access to their personal data by making a SAR. A SAR must be made in writing (although there is no specified format) and must be accompanied by the applicable fee (not more than £10). It should be noted that from 25 May 2018, businesses will no longer be allowed to charge such a fee in most circumstances, under the [General Data Protection Regulation](#) (the “**GDPR**”). Further guidance on that point is available in Chapter 9 of White & Case’s [GDPR Handbook](#).

There are some instances in which a business that receives a SAR is not obliged to provide the information requested. In particular, [section 8\(2\) of the Act](#) states that the obligation on a business to provide information does not apply where it would involve a disproportionate effort by the business. Further, [paragraph 10 of Schedule 7 to the Act](#) provides that information need not be provided if it is information in respect of which a claim to legal professional privilege could be maintained (the “**LPP Exemption**”). Consequently, confidential materials created for the dominant purpose of actual or contemplated litigation, or that comprise confidential communications between a business and its professional legal advisers for the purpose of giving or receiving legal advice, do not have to be disclosed in response to a SAR.

The facts

Mr Holyoake and Mr Candy were acquaintances who were both involved in the property development business. A business dealing in 2011 involving a loan to Mr Holyoake led to a serious falling out between the pair, resulting in a series of court proceedings (the “**Litigations**”).

Mr Holyoake brought the first set of High Court proceedings against Mr Candy, CPC (a company connected to Mr Candy’s brother) and various directors of CPC, in August 2015, alleging conspiracy, extortion and fraudulent misrepresentation. The second set of proceedings was brought by Mr Candy against Mr Holyoake and others in December 2015, and sought injunctions preventing the disclosure of certain information recorded by Mr Holyoake’s wife.

In April 2016, Mr Holyoake issued SARs to both Mr Candy and CPC. The SARs principally sought access to any of Mr Holyoake's personal data which Mr Candy or CPC may have passed to private investigation or surveillance companies. Despite claiming that the SARs were abusive because they were designed to obtain disclosure additional to that given in the Litigations, Mr Candy and CPC complied. They reviewed over 17,000 documents in the search process. Four emails, known as the "Knuckey Emails", were provided in response to the SAR (although, by that time, they had already been disclosed in the Litigations). They showed that the defendants had commissioned a criminal record check on Mr Holyoake. The defendants claimed that the remaining data relevant to the SAR was exempt from disclosure in response to the SAR under the LPP Exemption.

Mr Holyoake objected to the defendants' response to the SAR on two grounds:

- a) He argued that the scope of the search was insufficient because private email accounts had not been searched; and
- b) He also argued that the LPP Exemption could not be relied upon because the materials that the defendants refused to disclose in reliance on that exemption concerned the defendants' investigation of Mr Holyoake, which had been tainted by criminal conduct. This claim was based on the Knuckey Emails and other tip-offs Mr Holyoake had received of which he did not provide details.

Connected to point (b) above, Mr Holyoake also asked the court to use its power under [section 15\(2\) of the Act](#) to inspect the documents being withheld and determine whether the exemption was being validly claimed.

The decision

Mr Holyoake's claim failed on all grounds. On point (a) above, the court held that searching a private email account is an intrusion requiring justification, and that a company need not do so unless there is some sufficient reason why it should. On the facts, the court found that searching private emails would be disproportionate under [section 8\(2\) of the Act](#).

On point (b) above, the court held that "*a speculative case that the documents in question might involve evidence of iniquity will not suffice to displace LPP*". Instead, there must be a "*prima facie case*" of wrongdoing before the court would disapply the LPP Exemption.

On the facts, the defendants' decision to instruct private investigators did not necessarily indicate any criminal wrongdoing, and the Knuckey Emails did not support an inference to the contrary. Mr Holyoake also ran a further argument that the LPP Exemption should not be sustained where it disguises a breach of the data subject's fundamental rights – in this case, Mr Holyoake claimed, his right to privacy under Article 8 of the [European Convention on Human Rights](#). While the court thought that a novel argument, it rejected it on the basis that it would require a substantial extension of the iniquity principle, resulting in the erosion of legal privilege.

As to the proposed inspection of undisclosed materials under [section 15\(2\) of the Act](#), the court stated that inspection by the court should be a last resort; the court should be hesitant to embark on such action without a good reason, such as credible evidence that the defendants had misunderstood their duty or could not be trusted. The court held that the inspection proposed by Mr Holyoake in this case would not be a proper and proportionate use of judicial resources.

It is also worth noting that the court found as a fact that Mr Holyoake intended to employ any useful information gained from responses to the SARs in the Litigations. In [previous cases](#), the courts have held that SARs made for the "*dominant purpose*" of litigation are likely to amount to an abuse of process. In the present case, the court found that, although Mr Holyoake's intention to use information gained from the SARs had been a "*significant purpose*" of the SARs, it had not been the "*dominant purpose*". The court declined to rule on the question of abuse of process, noting that several cases touching on the point are currently awaiting judgment in the Court of Appeal.

Impact on businesses

The decision in *Holyoake v Candy* is advantageous to businesses for two reasons:

- First, the judgment gives comfort to businesses that receive a SAR that they are not required to expand their searches to employees' personal communications unless there is a sufficient reason to do so. In most cases, it is unlikely that such a reason exists.
- Second, the judgment strengthens the LPP Exemption, in two ways:
 - If a business relies on the LPP Exemption in refusing to disclose certain information in response to a SAR, the court will not overturn the exemption unless there is a *prima facie* case of wrongdoing.
 - The court will only use its powers under section 15(2) of the Act sparingly, and it will not look behind the veil of privilege without a good reason to do so.

The decision in *Holyoake v Candy* is largely positive for any business faced with a SAR, especially if that business wishes to rely on the LPP Exemption. However, the judgment also serves as a reminder that the available exemptions are likely to turn on the facts of each individual case, and it may be prudent to seek legal advice before responding to a SAR.

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