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Ad Hoc Information Report

Data protection: Redress mechanisms and their use

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University of Nottingham Human Rights Law Centre

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Mapping of Redress mechanisms in the area of data protection

Redress Mechanism Number	Type of possible outcomes of procedure	first Instance	Total Number of times this procedure was initiated in 2009 (please provide source of information in footnote)	Total Number of times this procedure was initiated in 2010 (please provide source of information in footnote)	Total Number of times this procedure was initiated in 2011 (please provide source of information in footnote)
1	Compensation	High Court or County Court in England and Wales; Court of Session (Outer House) or Sheriff Court in Scotland; High Court or County Court in Northern Ireland	Information Not Available¹	Information Not Available²	Information Not Available³
2	Court Order	High Court or County Court in England and Wales; Court of Session (Outer House) or Sheriff Court in Scotland; High Court or County Court in Northern Ireland	4⁴	1⁵	4⁶
3	Judicial Review	High Court in England and Wales; Court of Session	Information Not Available⁷	1⁸	1⁹

¹ Freedom of Information requests were submitted to 17 County Courts in the Greater London Region (3 May 2012). Response received 7 June 2012 from Her Majesty's Courts and Tribunals Service indicating that no case numbers were available: "I am answering all of the requests collectively as I have access to HMCT's central administrative database for the County Courts, CaseMan. I can confirm that CaseMan does not allow us to separately identify cases brought under the Data Protection Act."

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.* This applies to High Court cases also: information from the Ministry of Justice (MOJ) (2012).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ British and Irish Legal Information Institute online database search for data protection cases; available at: www.bailli.org.uk.

⁸ *Ibid.*

		(Outer House) in Scotland; High Court in Northern Ireland			
4	Enforcement Notice	Information Commissioners Office (ICO) (the UK Data Protection Authority) ¹⁰	6 ¹¹	15 ¹²	1 ¹³
5	Civil Monetary Penalty	ICO	Remedy not available in 2009	2 ¹⁴	7 ¹⁵
6	Fine	Magistrates Court or Crown Court in England and Wales; Sheriff Court or the High Court of Justiciary in Scotland; Magistrates Court or Crown Court in Northern Ireland	54 ¹⁶	18 ¹⁷	0 ¹⁸

⁹ *Ibid.*

¹⁰ The data collected from the ICO Annual Reports relates to the financial period of April – March of the respective years and as a result cannot be disaggregated further.

¹¹ Information Commissioners Office (ICO) (2009), p. 42.

¹² ICO (2010), p. 36.

¹³ ICO (2011).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Ministry of Justice (MOJ) (2012) see annex redress mechanism 6.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

Detailed information

Redress Mechanism Number 1: Compensation

- **Range of possible outcomes:** The court may award compensation to a data subject who has suffered damage or distress as a result of a contravention of the Act by a data controller (s.13 Data Protection Act (DPA) 1998). There is no statutory limit. The amount is determined in accordance with the common law rules concerning compensation for damage or distress in civil cases.
- **Legal basis:** S.13 DPA.
- **Type of procedure:** Civil court proceedings.
- **Possibilities of appeal:** England and Wales: Court of Appeal, then the Supreme Court. Scotland: (Inner House), then the Supreme Court. Northern Ireland: NI Court of Appeal, then the Supreme Court.
- **Burden of proof:** The burden of proof is the standard burden of proof in civil cases: i.e. the claimant must prove his case on the balance of probabilities (i.e. 51% or more, or 'more likely than not').
- **Available mechanism to lower the burden of proof:** None.
- **Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?** There is no such requirement; the complainant can initiate and be active on his/her own.
- **Is there free legal advice/representation available from a public body (please specify the public body)?** The ICO provides free legal advice on all aspects of the DPA.¹⁹ Legal advice and representation may be available from the Legal Services Commission (a public body) subject to the financial eligibility rules for legal aid in civil cases and the Commission's cost/benefit code. The Citizens' Advice Bureau and other civil society organisations such as 'Which' may offer advice.
- **Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?** Neither the ICO nor civil society organisations or associations may initiate civil proceedings in court in data protection cases. The court may allow a third party to intervene orally and/or in writing to give evidence, usually on an issue of public interest.²⁰ The court may order the Information Commissioner's Office to give expert evidence.
- **Cost of procedure:** No information available.
- **Average duration of procedure:** No information available.
- **Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011:** No reported cases. After making official requests to the Ministry of Justice regarding the availability of data pertaining to the number of procedures that had been initiated under Redress Mechanism 1 in the reporting period, the following formal response was received from the Ministry of Justice civil justice statistics team:

¹⁹ ICO (2012).

²⁰ Justice (2009).

"Although claims brought under each available redress mechanism of the DPA (for 2009, 2010, 2011) will be input onto the main administrative system in the county courts, they cannot be specifically identified from other types of cases."

Redress Mechanism Number 2: Court Order

- **Range of possible outcomes:** The court may order a data controller to comply with a data subject's (i) right of access to personal data (s.7 DPA); (ii) right to prevent processing likely to cause damage or distress (s.10 DPA); (iii) right to prevent processing for purposes of direct marketing (s.11 DPA); (iv) rights in relation to automated decision-making (s.12 DPA). The court may also order the rectification, blocking, erasure and destruction of inaccurate personal data (s.14 DPA).
- **Legal basis:** See the sections listed under 'range of possible outcomes' above.
- **Type of procedure:** Civil court proceedings.
- **Possibilities of appeal:** As for Redress Mechanism No 1.
- **Burden of proof:** The court must be 'satisfied' that the data controller has failed to comply with the DPA. The complainant must prove his/her case on the balance of probabilities. See Redress Mechanism No 1.
- **Available mechanism to lower the burden of proof:** None
- **Requirement of legal representation:** There is no such requirement; the complainant may initiate and be active on his/her own.
- **Is there free legal advice/representation available from a public body (please specify the public body)?** As for Redress Mechanism No 1.
- **Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?** As for Redress Mechanism No 1.
- **Cost of procedure:** No information available.
- **Average duration of procedure:** No information available.
- **Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011:** No reported County Court cases. After making official requests to the Ministry of Justice regarding the availability of data pertaining to the number of procedures that had been initiated under Redress Mechanism 2 in the reporting period, the following formal response was received from the civil justice statistics team:

"Although claims brought under each available redress mechanism of the DPA (for 2009, 2010, 2011) will be input onto the main administrative system in the county courts, they cannot be specifically identified from other types of cases."

In 2011, there were four reported High Court cases; a summary of the outcomes are detailed below:

- 1- In *Law Society v Kordowski* [2011] EWHC 3184 (QB) it was held that the defendant's processing on his website of the claimants' personal data was in breach of the data protection principles. A perpetual injunction under s. 10 DPA (prevention of data processing) was granted ordering the defendant to cease processing the claimants' personal data. An order was also made under s. 14 DPA requiring the defendant to block, erase and destroy all the data that was the subject of the claim.

- 2 In *Rugby Football Union v Viagogo Ltd* [2011] EWCA Civ 1585 it was held that a website that sold rugby match tickets in excess of the ticket price must hand over details of sales to the plaintiffs as being within the 'necessary for the purpose of legal proceedings' exception in s.35 DPA.
- 3 In *KJO v XIM* [2011] EWHC 1768 (QB) a claim for summary judgment against the defendants, who were emailing to third parties details of the plaintiff's spent conviction for fraud, allegedly amounting to 'processing' in breach of s.10 DPA, was rejected. Instead the case should go for trial.
- 4 Similarly, in *General Medical Council v Sales* [2011] EWHC 3011 (Admin) it was held that the use of patients' dental records in disciplinary proceedings under the Dentist Act was permitted by an exception in Schedule 2 DPA.

In 2010, there was one reported Court of Session (Inner House) case; a summary of the outcome is detailed below:

- 1 In *Craigdale Housing Association v Scottish Information Commissioner* [2010] CSIH 43 the Court of Session (Inner House) held that a request for statistics indicating the number of sex offenders living in a certain area was not a request for 'personal' data under the DPA, as the identity of the individuals could not be determined. Consequently, the request did not fall within a Freedom of Information (Scotland) Act exception.

In 2009, there were four reported High Court cases; a summary of the outcomes are detailed below:

- 1 An application for an order under s.10 DPA was refused in *McGuffick v Royal Bank of Scotland* [2009] EWHC 2386 (Comm) (no breach of data protection principles).
- 2 In *Quinton v Pearce and Cooper* [2009] EWHC 912 (QB) an application for an order under s.14 DPA (rectification, etc) was refused as there was no breach of the data protection principles.
- 3 In *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079 the Court of Appeal held that the retention on the national police computer of old minor convictions was not in breach of the data protection principles. The Court of Appeal allowed an appeal against a decision of the Information Tribunal that had upheld ICO enforcement notices requiring their erasure.
- 4 In the *Matter of Bernard Madoff Investment Securities LLC* [2009] EWHC 442 (Ch) it was held personal data relevant to legal proceedings could be transferred to the US as falling within the 'substantial public interest' exception in the Schedule 4 DPA.

Redress Mechanism Number 3: Judicial Review

- **Range of possible outcomes:** The standard public law remedies (decision quashed, etc) for conduct by a public authority, including the ICO, in breach of the DPA.
- **Legal basis:** Common law. Applications are made in accordance with the Civil Procedure Rules.
- **Type of procedure:** Civil court proceedings.
- **Possibilities of appeal:** As for Redress Mechanism No 1.
- **Burden of proof:** As for Redress Mechanism No 1.
- **Available mechanism to lower the burden of proof:** None.
- **Requirement of legal representation:** There is no such requirement; the complainant may initiate and be active on his/her own.

- **Is there free legal advice/representation available from a public body (please specify the public body)?** As for Redress Mechanism No 1.
- **Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?** As for Redress Mechanism No 1. Intervention is common in judicial review cases, for which there are clear guidelines in the Civil Procedure Rules (CPR 54).²¹
- **Cost of procedure:** No Information available. (Judicial review proceedings are very expensive).
- **Average duration of procedure:** No information available.
- **Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011:** No reported cases in 2009. In 2010 -2011, there are two reported cases of applications for judicial review that raise elements of data protection queries.
 1. In *Stephen Budd v Office of the Independent Adjudicator for Higher Education* [2010] EWHC 1056 (Admin) it was held that the OIA had not acted unlawfully in refusing to allow the applicant sight of his examination script as Section 9 of the DPA applied. Section 9 (1) reads: "Personal data consisting of information recorded by candidates during an academic, professional or other examination are exempt from section 7."
 2. In *BT v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin) two major internet services providers (ISPs), British Telecom and Talk Talk, challenged the lawfulness, under EU law, of the provisions of the Digital Economy Act 2010 aimed at requiring internet service providers (ISPs) to help reduce illegal 'peer to peer' file-sharing. The court rejected the challenge relating to the Digital Economy Act 2010 but found for the claimants on one ground of challenge relating to the proposed rules requiring ISPs (as well as copyright holders) to contribute towards Ofcom's costs of administering the scheme.
- 24. It is convenient here to allude briefly to the issue of data protection. The effect of section 7 of the Data Protection Act 1998 is that individuals are entitled, under certain conditions, to have disclosed to them personal details relating to them, held by institutions and others. Sections 8 and 9 relate to examinations. Section 8 relates to examination *marks* and delays the duty under the Act to prevent examination candidates having access to their marks before the publication of results. Section 9 relates to examination *scripts*:

"9(1) Personal data consisting of information recorded by candidates during an academic, professional or other examination are exempt from section 7."
- 25. As will be seen, the OU had relied on s.9 in deciding not to release the claimant's script to the OIA. At the hearing there was a difference between the parties as to whether the OIA had indicated any influence from s.9 in making its decision. It was said on behalf of the claimant that some universities do release scripts to the OIA, and that the OIA is entitled to call for whatever documents are necessary for its investigation, and to draw adverse inferences against a party who declines to produce them. However that may be, given the OIA's principle of disclosing all documents to the complainant, and that the OIA was aware of the provisions of the Act, it is obvious that the OIA would treat with

²¹ Ministry of Justice (2012).

some caution a requirement that an HEI produce to it, and hence to the complainant, a document that the complainant has otherwise no right to see.

Redress Mechanism Number 4: Enforcement Notice

- **Range of possible outcomes:** An enforcement notice may be served by the ICO requiring a data controller to take specified steps in compliance with the DPA.
- **Legal basis:** S.40 DPA.
- **Type of procedure:** Data Protection Authority.
- **Possibilities of appeal:** Appeal to the First-tier Tribunal (Information Rights).
- **Burden of proof:** The ICO must be 'satisfied' that a data controller has or is contravening one or more of the eight DPA principles. The complainant must prove his/her case on the balance of probabilities. See Redress Mechanism No 1.
- **Available mechanism to lower the burden of proof:** None.
- **Requirement of legal representation:** There is no such requirement.
- **Is there free legal advice/representation available from a public body (please specify the public body)?** The ICO provides free legal advice on all aspects of the DPA. If a complaint comes to the ICO under s.42 DPA, it is considered by the ICO free of charge. If the ICO decides to issue an enforcement notice in response to the complaint, it represents itself and the data subject in all aspects of the process. This includes any prosecution for non-compliance with the enforcement notice and in any appeal against the notice to the Tribunal by the data controller. Free legal advice from the Citizens Advice Bureau is available for data controllers appealing to the Tribunal. Legal aid for representation before the Tribunal is not available.²²
- **Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?** Not for civil society organisations or associations. The ICO as the DP authority is solely responsible for enforcement notice proceedings.
- **Cost of procedure:** Information not available. The cost comes out of the ICO budget.
- **Average duration of procedure:** Information not available.
- **Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011.** The ICO annual reports for 2009 and 2010 have indicated the number of enforcement notices that were served for the first two years of the reporting period:
In 2009, six enforcement notices were served against one local health authority, three governmental departments, one disability charity and an organisation that illegally maintained the details of a blacklist of construction workers.²³ In 2010, 15 enforcement notices were served against one city local authority and 14 private limited companies specialising in engineering and construction.²⁴ In 2011, the annual report does not provide

²² Ministry of Justice (2012a).

²³ Camden Primary Care Trust; Consulting Association; Department for Communities and Local Government; HM Revenue and Customs; Leonard Cheshire Disability; Ministry of Defence. ICO (2009), p.42.

²⁴ Glasgow City Council; Balfour Beatty Civil Engineering Limited; Balfour Beatty Construction; Northern Limited; Balfour Beatty Construction Scottish and Southern Limited; Balfour Beatty Engineering Services (HY) Limited; Balfour Beatty Engineering Services Limited; Balfour Beatty

detailed information regarding the number of enforcement notices served, however, the ICO website suggests that only one has been served for the disclosure of sensitive information related to child protection cases to the wrong recipients.²⁵

Redress Mechanism Number 5: Civil Monetary Penalty

- **Range of possible outcomes:** Monetary penalty up to a maximum of £500,000.
- **Legal basis:** S.55A DPA and Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 (SI 2010/31).
- **Type of procedure:** Data Protection Authority.
- **Possibilities of appeal:** Appeal to the First-tier Tribunal (Information Rights).
- **Burden of proof:** The ICO must be 'satisfied' that any negligent or deliberate or deliberate breach of the DPA was of a kind to cause substantial damage or distress.
- **Available mechanism to lower the burden of proof:** None.
- **Requirement of legal representation: can the complainant initiate/be active in a procedure on his own?** There is no such requirement.
- **Is there free legal advice/representation available from a public body (please specify the public body)?** The ICO provides free legal advice on all aspects of the DPA. If it decides to issue a monetary penalty, the ICO represents itself and the data subject on all aspects of the issue.
- **Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?** Not for civil society organisations or associations. The penalty will be issued by the ICO as the DP authority.
- **Cost of procedure:** Information not available.
- **Average duration of procedure:** Information not available.
- **Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011** Civil Monetary Penalties will only be imposed in the most serious circumstances of a breach of the data protection principles. Since 2010, when this redress mechanism became available, it has been used in nine instances for such breaches as sensitive personal information being sent to the wrong recipients (five instances), the loss of an unencrypted laptop (three instances) and failure to keep sensitive personal information secure (one instance).²⁶

To date, the monetary value of the penalties has varied between £1,000 and £130,000. When deciding the amount of a monetary penalty, the Commissioner will take into account not only the seriousness of the breach but also the other elements including the size, financial and other resources of the data controller.²⁷ This is reflected in the penalties served on data

Infrastructure Services Limited; CB&I UK Limited; Emcor Engineering Services Limited; Emcor Rail K Limited; Kier Limited; NG Bailey Limited; Shepherd Engineering Services Limited; SIAS Bulidng Services Limited; Whessoe Oil & Gas Limited. ICO (2010), p.15.

²⁵ ICO (2011).

²⁶ ICO (2011)

²⁷ *Ibid.*

controllers during the reporting period: smaller businesses have received lower penalties than larger public authorities such as County Councils.

Redress Mechanism Number 6: Fine

- **Range of possible outcomes:** Maximum fine of £5000 (Magistrates Court) or an unlimited fine (Crown Court).
- **Legal basis:** Sections 17(1), 21(2), 22(6), 24(4), 55(3)(4)(5), 56(1)(2)(5), 59(3) and 60(2). DPA.
- **Type of procedure:** Criminal court proceedings.
- **Possibilities of appeal:** England and Wales: Crown Court, High Court, Court of Appeal, Supreme Court. Scotland: High Court of Justiciary. Northern Ireland. NI Crown Court, NI High Court, NI Court of Appeal, Supreme Court.
- **Burden of proof:** Guilt must be proven beyond reasonable doubt.
- **Available mechanism to lower the burden of proof:** None.
- **Requirement of legal representation:** There is no such requirement; the accused may defend him or herself in person.
- **Is there free legal advice/representation available from a public body (please specify the public body)?** Legal aid provided by the Legal Services Commission may pay for some or all of the costs of legal representation in court, depending on the accused's financial resources.
- **Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?** The ICO may initiate proceedings in the courts for a violation of the DPA. Civil society organisations or associations may not intervene in proceedings.
- **Cost of procedure:** Information not available.
- **Average duration of procedure:** Information not available.

Outcomes (please provide as much disaggregated information as available) for 2009, 2010, 2011. Table 1 below (provided by the Justice Statistics Analytical Services of the Ministry of Justice) illustrates the sentencing outcomes of proceedings that have been initiated against defendants in England and Wales between 2009 and 2011.²⁸ Absorbed within this data are a number of proceedings that were initiated by the ICO. In 2009 four organisations were successfully prosecuted by the ICO for failing to notify as Data Controllers with the ICO.²⁹ In 2010, the ICO initiated proceedings against individuals and bodies, four for failing to respond to an enforcement order, three for failing to notify as data controllers with the ICO.³⁰ In 2011, the ICO initiated proceedings against five individuals for breaches of the DPA,³¹ two for unlawfully obtaining sensitive personal information, and three for failure to notify the ICO that they were processing personal data electronically.³²

²⁸ Information for Northern Ireland and Scotland not available.

²⁹ ICO (2009), p. 45.

³⁰ ICO (2010), p.36.

³¹ ICO (2011a), p.40.

³² ICO (2011).

Table 1 : Number of defendants proceeded against at magistrates' courts and found guilty at all courts, by court type and sentencing outcome, for offences under the Data Protection Act 1998⁽¹⁾, England and Wales, 2009 to 2011⁽²⁾⁽³⁾⁽⁴⁾

2009										
Court type	Proceeded against	Found guilty	Sentenced	Absolute discharge	Conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with
Magistrates' court	54	31	29	—	2	26	1	—	—	—
Crown court	—	7	9	—	4	5	—	—	—	—
2010										
Court type	Proceeded against	Found guilty	Sentenced	Absolute discharge	Conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with
Magistrates' court	18	7	7	—	2	5	—	—	—	—
Crown court	—	7	7	—	—	7	—	—	—	—
2011										
Court type	Proceeded against	Found guilty	Sentenced	Absolute discharge	Conditional discharge	Fine	Community sentence	Suspended sentence	Immediate custody	Otherwise dealt with
Magistrates' court	—	—	—	—	—	—	—	—	—	—
Crown court	—	5	6	—	2	4	—	—	—	—

(1) Includes offences under sections 17(1), 21(2), 22(6), 24(4), 55(3)(4)(5), 56(1)(2)(5), 59(3) and 60(2).

(2) The figures given relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences it is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

(3) Every effort is made to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

(4) The number of defendants found guilty in a particular year may exceed the number proceeded against as the proceedings in the magistrates' court took place in an earlier year and the defendants were found guilty at the Crown Court in the following year; or the defendants were found guilty of a different offence to that for which they were originally proceeded against.

(5) The number of offenders sentenced can differ from those found guilty as it may be the case that a defendant found guilty in a particular year, and committed for sentence at the Crown Court, may be sentenced in the following year.

Source: Justice Statistics Analytical Services - Ministry of Justice

[Ref: 385-12]

Official Exact Title EN	Official Title (original lang)	Full reference
Information Commissioners Office (ICO) (2012)		Information Commissioners Office (2012), <i>Data Protection Act: Taking a Case to Court</i> , see: http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/taking_a_case_to_court.pdf .
ICO (2011)		Information Commissioners Office (2011), <i>Taking Action: Data Protection and Privacy and Electronic Communications</i> , see: http://www.ico.gov.uk/what_we_cover/taking_action/dp_pecr.aspx (last accessed 16 May 2012).
ICO (2011a)		Information Commissioner Office (2011), <i>Annual Report 2011</i> , see: www.ico.gov.uk/about_us/...reports/annual_report_2011.ashx .
ICO (2010)		Information Commissioner Office (2010), <i>Annual Report 2010</i> , see: www.ico.gov.uk/about_us/...reports/annual_report_2010.ashx .
ICO (2009)		Information Commissioner Office (2009), <i>Annual Report 2009</i> , see: www.ico.gov.uk/about_us/...reports/annual_report_2009.ashx .
Justice (2009)		Justice (2009) <i>To Assist the Court</i> , see: www.justice.org.uk/resources.php/32/to-assist-the-court .
Ministry of Justice (2012)		Ministry of Justice (2012), <i>Civil Procedure Rules</i> , see: www.justice.gov.uk/courts/procedure-rules/civil/rules/part54 (last accessed 28 May 2012).
Ministry of Justice (2012a)		Ministry of Justice (2012), <i>How to Appeal Guidance for the Information Rights Tribunal</i> , see: www.justice.gov.uk/tribunals/information-rights/appeals/how-to-appeal (last accessed 28 May 2012)>