

## Employment news - spring: Equal pay claims and the Data Protection Act

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The laws on data protection and equal pay each provide employers with very different compliance challenges. But what happens when these two pieces of legislation overlap in the demands they place on an employer?

Dealing with Equal Pay Act questionnaires

When bringing a claim under the Equal Pay Act ('EPA'), an aggrieved employee is entitled to compare him or herself to another employee in the same circumstances (a 'comparator'). Employees who are contemplating equal pay claims may begin the process by using a statutory questionnaire to obtain information about how much is paid to comparator employees. It is up to the employer to decide whether and to what extent to disclose information about the comparators' pay and there is no legal obligation on an employer to reply. However an Employment Tribunal may draw adverse inferences from a failure to respond or an evasive response.

But isn't pay information covered by the Data Protection Act?

Information about employees' pay is personal data for the purposes of the Data Protection Act 1998 ('DPA') and it must be 'processed' in accordance with statutory principles. An employer must comply with the principles if asked to disclose to a third party details about what specific workers are paid, as this is a form of 'processing'. This might mean that there is tension between the employer's obligations to deal with the employee's request under the EPA questionnaire procedure and the employer's obligations under the DPA. How can this tension be resolved?

How to square the circle

Disclosing pay information is potentially a breach of the DPA (and may also be a breach of the employer's duty of confidentiality towards the comparator employee). To comply with the DPA in responding to equal pay questionnaires, the employer must adhere to the eight data protection principles set out in the DPA. The first of these principles requires the employer to make sure that there is in place a valid 'condition' (or reason) for processing the information in the particular way proposed.

One of the valid conditions is that the comparator employee has given consent disclosure of their pay details. This may not be forthcoming however, in which case the employer may instead be able to rely on the 'fair use' condition to enable disclosure without consent. This condition requires that the disclosure is in the employer's 'legitimate interests'. The Commission for Equality and Human Rights takes the view in its guidance that employers responding to equal pay questionnaires can justify disclosure of pay information without consent under the 'legitimate interests' fair use condition.

The DPA requires employers to balance the interests of their organisations against the interests of the individual whose pay details are being disclosed. If the comparator objects to their pay information being disclosed and the equal pay claim is weak, the employer's justification for disclosure will also be weakened. One option an employer may be able to adopt is to anonymize the pay information, at least at the questionnaire stage, to hide the identity of potential comparators. If litigation follows, the employer will then be able to rely on the condition that allows disclosure where the employer must comply with a legal obligation.

Best practice

In deciding whether to disclose pay information the employer may wish to conduct an impact assessment. This involves weighing up the conflicting interests of the comparator against those of the employee with the equal pay complaint. An employer should also consider whether the comparator has objected to their pay information being used and what level of confidentiality is already attached to pay information within the organisation. If the organisation uses published pay scales or if pay information is not confidential, withholding pay information will be difficult to justify. Where possible the employer should anonymize the data and if that is not possible, should make disclosure on the basis that the recipient treats the data as confidential information.

It is always a good idea to document decision-making processes in relation to equal pay questionnaires should they later need to be explained to an employment tribunal in an equal pay claim.