# Helpsheet: Documents and files access rights

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Introduction

Requests for access to client related documents and files held by a firm can often be received from multiple sources and is an area which often causes significant questions for a firm. When and what information can be shared is a complex topic.

Due to the complexity of factors that can come into play, the aim of this helpsheet is to introduce this issue, with high-level guidance. It is strongly recommended that legal advice should be sought if there is any doubt over the application of information within this helpsheet.

## Basic principles

### Confidentiality

Regardless of whether documents are owned by a firm or the client, confidentiality is an implied term of every client engagement. Consequently, voluntary access to information or documents should be given only:

* after obtaining the client’s consent; or
* where the duty of confidentiality to the client is overridden by the powers of third parties to require access to, or compel production of, documents (for example by court order); or
* where the member has a legal right or duty to disclose the information; or
* where the member feels obliged to volunteer information if justified by being either:
  + in the public interest; or
  + to protect the member or their firm’s own interest.

In the latter situations, care must be taken to act reasonably and in good faith when dealing with the proper authorities and caution exercised when making statements and assertions.

Firms are reminded of the overriding nature of statutory and other provisions when considering confidentiality. Where public bodies, office holders and regulators seek access to, or production of, information or documentation in a firm’s possession under the relevant statutory or regulatory powers, a firm is under an obligation to the client to take reasonable steps to be satisfied that any power is being exercised correctly.

Powers may, however, not extend to requiring the production of documents which are subject to legal professional privilege. In circumstances where it is believed that documents are held which are subject to such privilege and where the documents are being required to be produced or access given to such documentation, it is recommended that legal advice be taken.

It is recommended therefore that the entity requesting the information or documentation is asked to state the source of its power and any statutory or regulatory limitations on those powers before releasing any documentation or providing information. If the documentation sought belongs to a client and there remains uncertainty of the requesting body’s power, it will usually be possible to seek the client’s consent to disclose. However, provided that the request is made pursuant to a legitimate power, the duty of confidentiality will be overridden.

It may not be appropriate to seek the client’s consent in all circumstances. This is particularly true in matters subject to the money laundering and terrorist finance reporting regimes. If in any doubt as to whether it is appropriate to seek a client’s consent, advice can be sought from the [ICAS Technical helpdesk](https://www.icas.com/contact-us/icas-technical-helpdesk) or legal advice sought as appropriate.

In certain circumstances, where the power being exercised or the obligation to provide access is not clear, further advice may be obtained from ICAS or legal advice sought.

### Data Protection Act 2018

The Data Protection Act 2018 (DPA 2018) applies to ‘personal data’. The legislation only covers personal data and does not apply to information regarding corporate entities.

Firms must decide how and why personal data is processed and must comply with the rules set out by DPA 2018 regarding fair and lawful data processing. These rules are more commonly known as the data protection ‘Principles’. These Principles form the backbone of DPA 2018 and apply to all forms of processing. All firms decide how and why personal data is processed and have a responsibility under the DPA 2018 to comply with the Principles. It is therefore advisable to consider the DPA 2018 in the context of any requests for documents or information which may result in the transfer of personal data without the consent of those to whom the personal data relates.

Care should be exercised if requests are received from a law enforcement or other government agency citing Schedule 2, Part 1, Paragraph 2 of the Data Protection Act 2018. Such requests are discussed in more detail below.

A client who is an individual has certain rights under DPA 2018 to be provided with a copy in permanent form of all personal information that is held by a firm about them, whether contained on client files or otherwise. Copies are obtained by the client making a Subject Access Request.

Where the documents to which the data subject has requested access are subject to a lien, the data subject is generally entitled to have communicated to them a description of the data held and the type of information held in those data. Where the exercise of a lien is being contemplated in respect of an individual’s documents by a firm who receive a Subject Access Request from that individual, there is a balance to strike between compliance with data protection legislation and the legal right of lien. It may be appropriate to seek legal advice in such circumstances.

## Rights of access

### Requests for access from clients

### Access for the client themself

If a client requests access to documents which belong to them then, subject to any lien, access ought normally to be given. Where the documents requested belong to the firm, the response to such a request is more difficult to determine as the willingness to assist will depend on the circumstances in which access is being sought. Giving access may increase the risk of litigation against the firm, even where no obvious likelihood exists. However, there are circumstances where allowing access would result in the client being better informed, thereby reducing such risks.

Where a director or directors of a client company seek access to documents which either belong to the client company or contain confidential information relating to the client company in connection with the personal affairs or interests of those directors rather than in furtherance of the company’s interests, authorisation should be obtained from the board of directors or, where appropriate, from outside shareholders, before permitting access.

### Access for the benefit of a third party

Sometimes investigating accountants are engaged by a third party to review aspects of the affairs of a company for the purpose of disposals, acquisitions, or investments. Access to the working papers of the auditors or the tax advisers of such a company will frequently assist the investigating accountants to perform this task. However, in recent years, auditors and tax advisers have been reluctant to permit such access due to the risk of unintentionally creating duties of care to third parties. The audit or the tax advice will not have been planned and performed in contemplation of any particular commercial transaction and it is for the relevant third party to arrange for appropriate due diligence work to be performed.

An auditor’s working papers belong to the auditor and so an auditor is not obliged to give access to them in this situation. The position may be the same for the tax adviser depending on the nature of the work performed and the terms of any engagement letter. However, refusing access is unhelpful to the client company who is normally a willing participant in the transaction. An alternative way forward is for a policy to be developed regarding access to working papers, providing certain conditions are met.

The reluctance to permit access can be largely overcome using client authorisation and ‘release’ or ‘hold harmless’ letters which seek to limit the firm’s liabilities to third parties. The purpose of these letters is to deal with any confidentiality issues and to provide a framework within which members can make their papers available and provide explanations while limiting as far as possible any additional risks. Further advice can be sought through the [ICAS Technical helpdesk](https://www.icas.com/contact-us/icas-technical-helpdesk).

### Access on change of professional accountant

Where a change in professional accountant is being proposed it is not uncommon for an enquiry letter from the proposed accountant to request information to be provided to allow them to act going forward. Clearly there is a professional obligation to provide information which is necessary to enable the incoming accountant or professional advisor to provide services to the client. This does not however mean that they have unfettered access to information or records.

Ownership of documents and records is a useful place to start when considering what can, or should, be provided. A distinction is required between records which belong to the client and those which belong to the firm. There is a separate helpsheet which consider the issues relating to ownership and retention of documents and files.

Typically, questions arise in relation to the amount of information which the incoming accountant has a right to obtain. The basic position is that it would not be unreasonable to expect the client to have access to documents to which they own and for the incoming accountant to access those if required through the client. It may be more convenient for example to obtain a copy of the last accounts from the accountant that prepared these but the decision on whether to accede to such a request would be for the outgoing accountant to decide considering both practical and commercial factors.

There may be situations however where the client will not have access to information which is necessary for the continuation of services and which is contained within records which belong to the outgoing accountant. It generally would not be necessary or appropriate to provide access to working papers as these belong to the firm that has prepared them. For example, an incoming accountant may reasonably require a breakdown of accruals and prepayments from the last prepared accounts but this does not mean that they require or would be entitled to the detailed calculations. As a result, it may be efficient to provide the accruals or prepayments lead schedule summarising the nature and amount of the accruals or prepayments even although the lead schedule is part of the working papers of the firm in preparing the accounts.

### Requests by His Majesty’s Revenue & Customs (HMRC)

HMRC have wide powers to require information of both the taxpayer and third parties which can include their advisors. Powers of access to information and documents have been harmonised across the main taxes, namely income tax, capital gains tax, corporation tax and VAT as well as ‘relevant foreign taxes’ (as defined) and are contained in Schedule 36 to Finance Act 2008. The Schedule 36 provisions have been frequently amended since introduction by subsequent legislation.

Paragraph 25 of Schedule 36 includes provision that a tax adviser cannot be required to produce documents that are the property of the tax adviser and consist of ‘relevant communications’ with the taxpayer client for the purpose of giving or obtaining advice on that client’s tax affairs. No protection is provided in relation to information or documents that contain workings showing how a particular entry on the return or accounts was arrived at.

A separate [helpsheet](https://www.icas.com/__data/assets/pdf_file/0004/444856/D-Request-for-date-by-HMRC-helpsheet-1-March-2019.pdf) provides guidance on the application of the Professional Conduct in Relation to Tax (PCRT) Fundamental Principles and Standards for Tax Planning in relation to requests for access to data by HMRC, including informal requests addressed to the client or to the member, formal requests to the client or to the member, Sch. 36 FA 2008 statutory notices, and privileged data.

Consideration should be given to the authority cited by HMRC when seeking access and if in any doubt legal or professional advice should be sought.

### Requests by regulators including ICAS

It is likely that you will be asked to provide access to documents by ICAS as part of our regulatory activities. Requests for documents may also be made by ICAS in connection with investigations into a complaint against a member. The ICAS Rules and Regulations contain relevant provisions and by virtue of membership there is a contractual undertaking to provide documents or access to documents reasonably required on request. The general principles relating to confidentiality and DPA 2018 do not prevent documents being made available to ICAS as there is a professional duty and legitimate interest in sharing any personal data within the document.

If a request is received for documents or information from another regulator, including but not limited to the Financial Reporting Council (FRC), the Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB), it is strongly recommended that legal advice is taken.

### Requests by law enforcement agencies

If a request is received for documents or information from law enforcement agencies, it is strongly recommended that legal advice is sought as a matter of urgency.

Law enforcement agencies often request information citing Schedule 2, Part 1, Paragraph 2 of the Data Protection Act 2018. This is commonly referred to as a “DPA gateway” and is a useful and legitimate means of information and evidence gathering available to law enforcement, and in many circumstances is the simplest and most effective way of them doing so. However, this route is not appropriate when dealing with professional advisers such as accountants and lawyers, who are subject to a professional and legal obligation of confidentiality to their clients, both during and after acting for them.

To provide information sought under the DPA gateway would protect you from a complaint and committing an offence under data protection legislation but it would not protect you from a civil action brought by your client for damages for breach of confidentiality. The only way to avoid such an issue is to provide the information under compulsion by a court i.e., through obtempering a properly executed Production Order.

If you receive a properly executed Production Order, you should obtain independent legal advice without delay. It is important that you comply with the Order, but do not provide anything not specified in it.

If a police officer or HMRC attend at your premises with a search warrant, you should obtain independent legal advice without delay.

### Requests by insolvency office holders

Liquidators, administrators, administrative receivers (which includes receivers but not LPA receivers) (referred to in the following paragraphs as ‘office holders’) have the statutory right under section 234 of the Insolvency Act 1986 to require delivery to them of any documents belonging to the company. A member should therefore release such documents to the office holder (subject to any limited right of lien).

Under section 235 of the Insolvency Act 1986, office holders have a statutory right to call for ‘such information concerning the company and its promotion, formation, business dealings, affairs or property as the office holder may … reasonably require’. Such information may be required from directors and other officers of the company (which the courts have held includes auditors), or from anyone who has been in its employment (including under a contract for services) within a year before the insolvency of the entity.

The powers of the office holders under section 235 are extremely wide. Further, under section 236, an office holder is entitled to apply to the court for an order requiring any person considered ‘capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company’ to submit an affidavit or produce relevant documents. Any request from an office holder should normally be complied with unless it is considered that the information or documentation that is being sought is for a purpose unrelated to the office holder’s duties or is otherwise beyond the powers of the office holder. It can normally be assumed that an office holder is acting within their powers and requests from an office holder can be undertaken in good faith. It may be helpful to discuss a request for information or documentation with the office holder seeking it with a view to identifying the particular items sought as this can often avoid a lengthy and time-consuming process gathering information or documents that are not as relevant to the office holder’s overall objective for the request.

### Requests under the authority of the Secretary of State

The Secretary of State has powers under the Part XIV of the Companies Act 1985 (Investigation of Companies and Their Affairs; Requisition of Documents) to appoint investigators to investigate the affairs of a company. (Note this Part was not replaced by the Companies Act 2006). The inspectors operate through the Department for Business Energy and Industrial Strategy (BEIS).

Provisions with the Companies Act 1985 (CA 1985) are wide ranging and extensive. Inspectors may, for example, require documents to be produced, require attendance before the Inspectors, or allow copies of documents to be taken (see sections 434 and 447).

CA 1985 also contains provisions relating to the entry and search of premises (section 448), penalties for destroying, mutilating, or falsifying company documents (section 450), and penalties for furnishing false information (section 451). Any requests from Inspectors appointed by the Secretary of State should normally be complied with.

The Secretary of State also has power under the Company Directors Disqualification Act 1986 (CDDA 1986). Section 7 CDDA 1986 provides that the Secretary of State or the official receiver may require any person to provide information relating to the conduct of a person as a director of a company which has at any time become insolvent and to produce and permit inspection of such books, papers and other records as are considered by the Secretary of State or the official receiver to be relevant to the conduct as the Secretary of State or the official receiver may reasonably require for the purpose of determining whether to exercise, or of exercising, any function under that section. The Secretary of State’s powers are normally exercised by the Insolvency Service or another party acting on their behalf and requests for information should normally be complied with.

Recovery of costs associated with access rights

Dealing with access requests which are granted or required can be extremely time consuming. Often there will be a requirement to sift through records to identify relevant documents or to retrieve records from storage, or legal costs involved in assessing the access request or determining which records can and cannot be disclosed. Costs, both actual incurred and time costs, can be significant and it is natural to question whether such costs can be recovered.

Whether it is possible to recover costs will depend on the nature of the request for access. The general principles which apply are as follows:

* Where the request for access is required by legislative, professional, or legal process, then costs are not able to be recovered unless there is specific provision which would cover this.
* DPA 2018 Subject Access Requests - in most cases you cannot charge a fee to comply with a SAR. However, you can charge a 'reasonable fee' for the administrative costs of complying with a request if it is manifestly unfounded or excessive, or if an individual requests further copies of their data.
* Requests from clients will be subject to agreement with the client

The Practice Support team are available to provide further guidance if required.

Useful links

[Helpsheet: Documents and files – ownership and retention](https://www.icas.com/professional-resources/practice/knowledge-centre/general-practice-manual/Document-and-file-retention.docx)

[Helpsheet: Ethical matters for consideration in relation to client engagement and disengagement](https://www.icas.com/professional-resources/practice/knowledge-centre/general-practice-manual/e/Ethical-matters-for-consideration-in-relation-to-client-engagement-and-disengagement.docx)

[PCRT help sheet D: Request for data by HMRC](https://www.icas.com/__data/assets/pdf_file/0004/444856/D-Request-for-date-by-HMRC-helpsheet-1-March-2019.pdf)

Further information and assistance

Further assistance and information can be obtained from the Practice Support team. You can contact them through the Practice Support section of the [ICAS Technical helpdesk](https://www.icas.com/contact-us/icas-technical-helpdesk).

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