

EXPLANATORY MEMORANDUM TO
THE DATA PROTECTION (SUBJECT ACCESS MODIFICATION) (SOCIAL
WORK) (AMENDMENT) ORDER 2011

2011 No. 1034

1. This Explanatory Memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the Instrument**
 - 2.1 Section 7 of the Data Protection Act 1998 (DPA) enables individuals to ask to see the information about themselves that is held on computer and in some paper records by organisations (data controllers). Data controllers are obliged to comply with such requests (known as subject access requests) unless they can rely on one of the listed exemptions within or made under the DPA.
 - 2.2 The amendment in this Order enables the Children and Family Court Advisory and Support Service in Wales (CAFCASS CYMRU) to withhold certain information following a subject access request. This is in cases where disclosure of that information is likely to prejudice the carrying out of social work because of the serious physical or mental harm that disclosure would cause to the person making the request or to other persons. In addition, under section 7(4) of the DPA, Cafcass in England is not able to withhold data relating to social work on the basis that that data also contains personal information about one of its employees or contractors when they are carrying out certain social work functions. This Order addresses an anomaly in the current provisions (explained below) so that subject access requests to CAFCASS CYMRU are subject to the same provisions as the Children and Family Court Advisory and Support Service (Cafcass) in England.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative background**
 - 4.1 The Data Protection (Subject Access Modification) (Social Work) (Amendment) Order 2005 (the 2005 Order) made changes to the Data Protection (Subject Access Modification) (Social Work) Order 2000 (the 2000 Order). The 2000 Order lists a number of organisations that are partially exempt from releasing information further to subject access requests in relation to specific social services and social work functions. The 2005 Order amended the list of organisations to include Cafcass.

- 4.2 CAF/CASS CYMRU, a separate organisation falling under the legal entity of the Welsh Ministers is not covered by the existing inclusion of Caf/Cass and therefore is not currently partially exempt from releasing information further to subject access requests in relation to specific social services and social work functions. Further amendment of the 2000 Order is necessary to ensure that certain personal data processed by CAF/CASS CYMRU is partially exempt from section 7 of the DPA.

5. Territorial Extent and Application

- 5.1 Although the Statutory Instrument applies to all of the United Kingdom, the amendment only affects CAF/CASS CYMRU and therefore only affects Wales.

6. European Convention on Human Rights

- 6.1 The Rt Hon Lord McNally has made the following statement regarding Human Rights:

“In my view the provisions of the Data Protection (Subject Access Modification) (Social Work) (Amendment) Order 2010 are compatible with the Convention Rights.”

7. Policy background

- 7.1 Section 7 of the DPA gives individuals (data subjects) the right of access to personal data held about them by an organisation (the data controller), by making a subject access request. However, it is not appropriate in all circumstances that this personal data is released. Accordingly, there are some circumstances in which data controllers are exempt from the obligation to comply with such a request. Examples of these circumstances include where personal data is being processed for the purposes of crime prevention and tax collection, or for reasons of national security, where the release of information would prejudice those activities.
- 7.2 Section 30(3) of the DPA allows the Secretary of State to add exemptions to the subject access requirements in relation to health, education and social work. The 2000 Order was made exercising this power. It lists certain organisations working in the field of social work which would not have to comply with a subject access request, if the organisation considered that the disclosure would be likely to prejudice the carrying out of social work due to the serious physical or mental harm it would cause to either the data subject or a third party. This is only a partial exemption and these organisations still need to comply with subject access requests where this would not prejudice the carrying out of social work.
- 7.3 Caf/Cass was added to the list of exempt organisations in 2005. However this addition did not take into account the fact that in Wales Caf/Cass was, in 2005, and remains, a separate organisation and so CAF/CASS CYMRU is not partially exempt from section 7 of the DPA. This Order amends the 2000

Order to apply also to CAFCASS CYMRU. Since May 2007, Ministers of the Welsh Assembly Government have comprised the data controller for CAFCASS CYMRU.

- 7.4 Without the benefit of this amendment to the 2000 Order, CAFCASS CYMRU is unable to refuse disclosure of data to the data subject where disclosure would be likely to cause serious physical or mental harm to a data subject or other persons and therefore likely to prejudice the carrying out of social work. This means that social work in Wales could be impaired by any physical or mental harm which could result from a release of information to an individual. The Order will rectify this.
- 7.5 In addition, this Order adds CAFCASS CYMRU employees and contractors to the list of “relevant persons” in the 2000 Order. Where a data controller cannot comply with a subject access request without disclosing personal data relating to a relevant person who has supplied such data in an official capacity, that data cannot be withheld on the grounds that consent of the relevant person has not been obtained or on grounds of unreasonableness. This is currently the case with Cafcass in England and stems from similar provision in the Data Protection (Subject Access Modification) (Social Work) Order 1987.
- 7.6 This Order therefore brings CAFCASS CYMRU in line with Cafcass England to ensure consistency in the two bodies' approach to releasing personal data to individuals who request it under the DPA.
- 7.7 Other Government departments with an interest in this issue have been consulted. These include the Wales Office, the Welsh Assembly Government, Her Majesty's Court Service and the Department for Education. The Information Commissioner has also been consulted in preparing this draft Order.

8. Consultation Outcome

- 8.1 No public consultation has been carried out given the limited extent of the changes proposed. As noted above, the relevant Government departments, Devolved Administrations and the Information Commissioner have been consulted in preparing this draft Order.

9. Guidance

- 9.1 CAFCASS CYMRU follows the Welsh Assembly Government's "Code of Practice on Access to Information". In addition, CAFCASS CYMRU has a Lead Official who will co-ordinate and respond to all Data Protection and Freedom of Information requests received.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies as a result of this Order.

10.2 The impact on the public sector is that CAFCASS CYMRU staff will no longer need to comply with subject access requests to the extent that disclosure of personal data is likely to prejudice the carrying out of social work because of the serious physical or mental harm disclosure would cause to the data subject or other persons. The amendment may result in a very small initial administrative cost as the staff of CAFCASS CYMRU become familiarised with applying this new partial exemption. It is thought that this minimal cost will apply only in relation to staff time and is likely to reduce and even disappear in the medium term. There may also be a small impact on the Information Commissioner's Office and the justice system if data subjects complained about or appealed the decision to rely on the exemption in cases where personal data is not disclosed following a subject access request.

10.3 An Impact Assessment has not been prepared for this instrument as no impact on the private or voluntary sector is foreseen and only one public sector organisation (CAFCASS CYMRU) will be affected. This effect will be minimal.

11. Regulating small business

11.1 This amendment does not apply to small business.

12. Monitoring and Review

12.1 CAFCASS CYMRU will monitor the number of subject access requests received, and will inform the Ministry of Justice how many times this exemption has been used on an annual basis.

12.2 This policy will be reviewed by the Ministry of Justice in one year's time, alongside a review of the use of the exemption by Cafcass in England.

13. Contact

Please contact Information Policy Division at the Ministry of Justice. Tel: 0203 334 3555 or e-mail informationrights@justice.gsi.gov.uk if you have any queries about this Statutory Instrument.