

# Personal data of both the requester and others (section 40 FOIA and regulations 5(3) and 13 EIR)

## Freedom of Information Act Environmental Information Regulations

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## Introduction

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) give the public rights to access information held by public authorities.

An overview of the main provisions of FOIA and the EIR can be found in [The Guide to Freedom of Information](#) and [The Guide to the Environmental Information Regulations](#).

This is part of a series of guidance, which goes into more detail than the guides, to help public authorities to fully understand their obligations and promote good practice.

This guidance explains in more detail how to apply FOIA exemptions and EIR exceptions relating to personal data. It therefore refers to the processing of personal data in accordance with the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA). It is a guide to our general recommended approach, although decisions will always be made on a case by case basis.

The DPA and UK GDPR set out the UK data protection regime. The DPA also sets out separate data protection rules for the processing of personal data by competent authorities<sup>1</sup> for law enforcement purposes (DPA Part 3); and for processing by the intelligence services (DPA Part 4). For more information see our [Guide to Data Protection](#).

This guidance is based on precedents established under the Data Protection Act 1998 (DPA98). It will be regularly reviewed and kept in line with new decisions of the Information Commissioner, tribunals and courts. Additional guidance is available on [our guidance pages](#).

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<sup>1</sup> A competent authority for the purposes of law enforcement means a person specified in Schedule 7 of the DPA and any other person if, and to the extent that, the person has statutory functions to exercise public authority or public powers for the law enforcement purposes.

## Overview

- If a freedom of information (FOI) or EIR request asks for information which is solely the personal data of the requester, you should refuse the request under FOIA section 40(1) or under EIR regulation 5(3). You should then handle the request as a data protection subject access request.
- Under FOIA section 40(5A), you are not obliged to confirm or deny whether you hold the information if this would disclose personal data relating to the requester. Under EIR regulation 5(3) there is no duty to confirm nor deny that you hold information which is the personal data of the requester.
- Where the request includes information which is both the personal data of the requester and a third party, and is so closely linked that it is not possible to separate it out, you should refuse that information under FOIA section 40(1) or EIR regulation 5(3) and consider it as a subject access request, as outlined above.
- You should then consider whether to disclose the mixed data in your subject access response, in accordance with your data protection obligations about third-party personal data.
- Where the information requested includes the requester's personal data and also the separate (and clearly distinct) personal data of a third party, you should first handle the requester's personal data as a subject access request, as outlined above. You should then consider disclosure of the remaining information and any third-party data separately under FOIA or the EIR.
- If the information request includes the personal data of a third party (and no data relating to the requester), you should consider the whole request under FOIA or the EIR.
- If you wish to neither confirm nor deny whether the requested third-party data is held, you should consider the relevant FOIA and EIR 'neither confirm nor deny' exemptions.

- Otherwise, in most cases, you should consider whether disclosure of the third-party personal data would contravene the data protection principles.

## What the legislation says

Section 40(1) and 40(5A) of FOIA states:

**40.—(1)** Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

**40.—(5A)** the duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

Regulation 5(3) of the EIR states:

**5.—(3)** To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Paragraph (1) of the EIR, as referred to in regulation 5(3), requires that environmental information shall be made available by the public authority holding it on request.

FOIA section 40(2) with 40(3A) and EIR regulation 13(1) with 13(2A) state that personal data which is not the personal data of the requester (ie third-party personal data) should not be disclosed if this would contravene the data protection principles. This is the exemption you will consider in most cases.

## The requester's personal data

If the requested information is the requester's personal data, it is exempt under section 40(1) of FOIA and, under regulation 5(3) of the EIR, there is no obligation to make it available.

You must handle a request for the requester's personal data as a subject access request under the UK GDPR or the DPA, as applicable. Further information about how to deal with a subject access request is available in our UK GDPR guidance [Right of access](#) and in our law enforcement guidance [The right of access](#).

You should only use these exemptions if the identity of the requester is clear and you can confirm that the information is their personal data. If there is any doubt about the identity of the requester, you should deal with it as a request for someone else's data.

You must comply with the subject access request without undue delay and in any event within one month of receipt of the request. Strictly speaking, however, the time limits of FOIA and the EIR still apply, and you are still technically required to issue a refusal notice even though you do not have to confirm or deny whether you hold the information.

Therefore, for practical purposes when a subject access request has been made as an FOI or EIR request, you should respond within 20 working days or else explain within this time limit that you are dealing with the request under the UK GDPR or the DPA.

## Confirmation or denial

In terms of FOIA, if the requested information is exempt under section 40(1), it is also important to note that under section 40(5A) there is no requirement for you to say whether or not you hold the requested information if this would itself disclose personal data relating to the requester.

This means that when an individual requests information that is their own personal data under FOIA, you can respond by saying that you neither confirm nor deny that you hold it. This applies whether or not you do actually hold the personal data. The issue to consider is not whether you hold it but rather, if you did hold it, would

confirming or denying that it was held in itself disclose personal data relating to the requester? This applies even if the information is also the personal data of other individuals (mixed data).

Under the EIR, there is no express provision regarding the duty to confirm or deny in relation to the personal data of the applicant. Under regulation 5(3) there is no obligation to provide information “to the extent that the information includes personal data of which the applicant is the data subject”. Rather than an exemption from the duty to provide information (as in section 40(1) of FOIA), there is simply no duty to provide such information, and therefore there is no duty to confirm or deny whether you hold it.

This also means that there are no express refusal provisions within the EIR when the requested information is the personal data of the applicant. However, as a matter of good practice, you should explain to the applicant that you are not required to provide confirmation or denial by virtue of regulation 5(3).

Although you will comply with FOIA or the EIR if you neither confirm nor deny that you hold the requester’s personal data, you should also go on to deal with the request as a subject access request.

There are also separate FOI and EIR exemptions which allow you to neither confirm nor deny whether you hold third-party personal data. For further details, please see our guidance [Neither confirm nor deny in relation to personal data](#).

## Requests involving multiple data subjects

In cases where the requested information comprises the personal data of more than one individual, you should regard all the individuals as data subjects for the purposes of section 40 and regulations 5(3) and 13.

Where one of these individuals is the requester, you should consider the extent to which the information is their personal data and so falls within section 40(1) or regulation 5(3). You should also consider whether the personal data of all the data subjects is inextricably linked or whether it can be clearly differentiated.

## Requests where information comprises mixed personal data

If the applicant's personal data is inextricably linked to that of other data subjects, this mixed data is either exempt on the basis of FOIA section 40(1), or is not within the scope of the EIR by virtue of regulation 5(3). You should consider this part of the request in its entirety as a data protection subject access request.

There is no requirement to assess the relative extent or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for considering whether one individual's data is more extensive or significant than the others.

### **Example**

If an individual makes a FOI request to the police for information about a complaint they have made against a number of police officers, the details about the complaint itself will be the personal data of both the requester and the police officers concerned.

The requester's personal data will be exempt under FOIA section 40(1) and the complaints data about the officers will therefore be considered for disclosure under data protection obligations with respect to the subject access request. The requester cannot argue that the file is not their personal data because the police officers are the 'principal' data subjects<sup>2</sup>.

Note that in this example, a request could be made by any one of the data subjects. In these circumstances, each request would be considered as a subject access request and would therefore be exempt under FOIA section 40(1) or EIR regulation 5(3).

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<sup>2</sup> Nicholas George Fenney v the Information Commissioner (EA/2008/0001; 26 June 2008)

It is also important to note that if the individual requests information about a complaint they have made regarding the treatment of someone else by the police officers, the details of the complaint will be the requester's personal data but much of the requested information may be the personal data of that other person. If the other person's data is separate to the requester's, that part of the request will be handled under FOIA.

## Considering the disclosure of third-party personal data under a data protection subject access request

If the requested information includes the mixed personal data of the requester and a third party which cannot be separated, you should automatically deal with this part of the request as a data protection subject access request.

You must consider under the DPA whether you can disclose the third-party information to the requester. The test you apply will depend upon the nature of the personal data requested and the reasons why you are holding it and processing it:

<b>Type of personal data processed</b>	<b>Exemptions for third-party personal data under the subject access right</b>	<b>Test for disclosure</b>  (See exemption for full details)
General processing under the UK GDPR	Schedule 2 Part 3 paragraph 16(1) of the DPA.	(a) has the third party consented to the disclosure?  (b) is it reasonable in the circumstances to disclose the third-party data without their consent?



Processing for law enforcement purposes (under DPA Part 3)	Part 3 Chapter 3 Section 45(4)(e) of the DPA.	Is it a necessary and proportionate measure to refuse disclosure in order to protect the rights and freedoms of others?
Intelligence services processing (under DPA Part 4)	Part 4 Chapter 3 section 94(6) of the DPA.	(a) has the third party consented to the disclosure?  (b) is it reasonable in the circumstances to disclose the third-party data without their consent?

For further information, please see our UK GDPR guidance [Right of access](#) and our law enforcement guidance [The right of access](#). There is also further detail in the guidance [What is personal data?](#)

## FOIA and EIR requests where information relates only to third parties

You need to take a different approach if a document contains the personal data of the applicant, but also some separate information which relates only to third parties.

You should handle the part of the request that relates to the applicant's personal data separately as a subject access request. You should consider whether to refuse to confirm or deny you hold the information, as explained above.

You should deal with the remaining information that is distinct third-party data under FOIA section 40(2) or EIR regulation 13(1), or under the relevant neither confirm nor deny provisions, as appropriate.

This also applies if the information request relates only to the personal data of a third party (and not to the requester). In these circumstances, you should consider the whole request under FOIA or the EIR.

With respect to the third-party personal data, you should first consider the neither confirm nor deny provisions under FOIA sections 40(5B) or EIR regulations 13(5A) and (5B). Further information is provided in our guidance [Neither confirm nor deny in relation to personal data](#).

If the information is held and you do not wish to apply the neither confirm nor deny exemption, you must then consider whether to disclose the third-party personal data under FOIA or the EIR, or whether to apply the exemptions at section 40(2) or regulation 13(5).

In most cases, you should consider whether disclosure of the third-party personal data would contravene the data protection principles. For further information, please see our guidance: [Personal information](#).

## Complaint files

The personal data of multiple data subjects is often an issue in requests for information contained in complaints files, particularly in circumstances where a complaint has been made by one person against other individual(s).

A person making a request for a complaint file will often be the individual who made the complaint and, in addition to containing their personal data, the file will usually contain personal data of other individuals.

We have produced guidance on [Access to information held in complaint files](#) which, in addition to considering the extent to which such information comprises personal data, provides examples of requests that relate to the personal data of more than one individual.

## Other considerations

You might also want to consider our guidance on [Personal information](#) which discusses the exemption for personal information under FOIA and the EIR.

Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.

## More information

We have developed this guidance drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. We will regularly review the guidance and keep it in line with new decisions of the Information Commissioner, tribunals and courts.

It is a guide to our general recommended approach, although we will always assess individual cases on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please contact us, see our website [www.ico.org.uk](http://www.ico.org.uk).