

Information exempt from the subject access right (section 40(4) and regulation 13(3))

Freedom of Information Act Environmental Information Regulations

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- The General Data Protection Regulation (GDPR) came into effect on 25 May 2018. The Data Protection Act 1998 will be replaced in the UK with the Data Protection Act 2018.
- Our approach to considering the disclosure of personal data under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) remains largely the same and our existing guidance is still of use. We will amend it in due course. However, there are a few key points to consider.
- The definition of personal data and sensitive personal data have changed, as have the data protection principles and the rights of subject access. Please see our [Guide to the General Data Protection Regulation](#) for more detailed information.
- If the information constitutes the personal data of third parties, public authorities should consider whether disclosure would breach the data protection principles. (In the case of special category or criminal offence data, public authorities must also satisfy one of the conditions listed in Article 9 of the GDPR). Principle (a) under Article 5 is the most applicable.
- When considering whether disclosure of information is a breach of principle (a), a public authority should first consider whether disclosure is lawful and then whether it is fair. The lawful basis that is most likely to be relevant is legitimate interests under Article 6.1(f).
- The Data Protection Act 2018 amends FOIA and the EIR so that the legitimate interests lawful basis is applicable to public authorities when they are considering disclosure.
- Competent authorities for the purposes of the law enforcement provisions (law enforcement bodies) should consider the application of principle (a) of the GDPR for disclosures under FOIA and the EIR.

Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#).
3. The Environmental Information Regulations 2004 (EIR) give rights of public access to environmental information held by public authorities.
4. An overview of the main provisions of the EIR can be found in [The Guide to the Environmental Information Regulations](#).
5. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
6. This guidance explains to public authorities how to deal with requests under FOIA or the EIR for information that is exempt from the data subject's right of access under the Data Protection Act (DPA).

Overview

- If a requester submits a FOIA request for information that constitutes someone else's personal data, and that person (the 'data subject') does not have the right under the DPA to obtain it themselves because of a DPA exemption, then the exemption in section 40(4) FOIA is engaged.
- Section 40(4) FOIA is a qualified exemption and the public authority must carry out a public interest test. The information must be released unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
- The public authority must therefore consider the following:
 - Is the information personal data that relates to someone other than the FOIA requester?
 - Is it exempt under the DPA from the data subject's right of access?

- What is the balance of the public interest test under FOIA?
- The main public interest arguments for maintaining the exemption are:
 - protecting the interest identified in the DPA exemption, and
 - protecting the privacy of the data subject.
- These must be balanced against the general public interest in transparency and accountability and any specific public interest in disclosing the information.
- If section 40(4) is engaged, it is possible that other FOIA exemptions may be engaged also. In particular, if disclosure would contravene any of the data protection principles, then the information is exempt under section 40(3)(a)(i). When dealing with a request for third-party personal data, public authorities may find it simpler to consider section 40(3)(a)(i) first, before looking at section 40(4).
- If the personal data is environmental information, the public authority should consider the request under the EIR. Regulation 13(3) of the EIR corresponds to section 40(4) of FOIA.

What FOIA says

7. Section 40 of FOIA states:

40.—

...

(2) Any information to which a request for information relates is also exempt information if—

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

...

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

8. Section 7(1)(c) of the Data Protection Act 1998 (DPA) states:

7.—(1) Subject to the following provisions of this section and to sections 8, 9 and 9A, an individual is entitled—

...

(c) to have communicated to him in an intelligible form—
(i) the information constituting any personal data of which that individual is the data subject, and
(ii) any information available to the data controller as to the source of those data ...

9. Under section 7(1)(c) of the DPA, an individual (“the data subject”) is entitled to obtain the personal data that a data controller holds about them, using a subject access request. This is a powerful access right; under section 27(5) of the DPA, it overrides any restriction in another statute or rule of law. However, in certain circumstances, some types of personal data are exempt from the right of subject access and cannot be obtained in this way. The exemptions from the right of subject access are contained in Part IV of the DPA and the accompanying Schedule 7.
10. If a requester submits a FOIA request for information that constitutes someone else’s personal data, and the subject of that personal data does not have the right to obtain it themselves, because there is an exemption in the DPA from the subject access right, then the information is exempt from disclosure under FOIA because of section 40(4) FOIA.
11. However, the exemption in section 40(4) is qualified. This means that even when it is engaged, the public authority must still carry out the public interest in order to decide whether to release the information. The information must be disclosed unless the public interest in maintaining the section 40(4) exemption outweighs the public interest in disclosure.
12. A public authority should consider three main issues in order to decide whether information is exempt under section 40(4):
- Is the information personal data that relates to someone other than the requester?
 - Is it exempt under the DPA from the data subject’s right of access?

- What is the balance of the public interest test under FOIA?

These issues are discussed in more detail below.

Personal data

13. The public authority must first establish that the information in question constitutes personal data, within the meaning of the DPA. Our guidance document on [Determining what is personal data](#) explains the definition of personal data.
14. Secondly, the personal data must relate to someone other than the requester. The reason for this is that if the information is the requester's own personal data, then it is exempt from disclosure under section 40(1) of FOIA, and this is an absolute exemption. Instead, the DPA gives people the right to obtain their own data, using a subject access request. Furthermore, even if this right is limited in any particular case by an exemption in DPA, a requester still cannot use FOIA as an alternative route to obtain personal data about themselves. If they request it under FOIA, the exemption in section 40(1) still applies.
15. If a public authority receives a FOIA request where the information asked for is the requester's personal data, they should inform the requester that the information is exempt under FOIA, but at the same time deal with it as a subject access request under the DPA.

Exempt from data subject's right of access

16. To engage section 40(4) of FOIA, the personal data must be exempt from the data subject's right of access under the DPA. The public authority must therefore decide, in the terms of the DPA, whether the data subject themselves would have the right to obtain the data if they submitted a subject access request. The data subject would have that right (under section 7 of the DPA) unless an exemption applied under DPA. Personal data is exempt from the right of access if it is covered by any provision in Part IV of the DPA. Part IV lists a number of specific exemptions and, in addition, section 37 of Part IV refers to further 'miscellaneous' exemptions which are listed in Schedule 7 of the DPA.

17. Most of the provisions of Part IV and the accompanying Schedule 7 include exemptions from the data subject's right of access, but not all. It is important to check the wording of any particular DPA exemption carefully in order to establish whether it applies to the right of access. Further guidance on how the DPA exemptions work is available in our [Guide to Data Protection](#).
18. The exemptions from the right of access relate to a number of areas including crime and taxation, regulatory activity, research, legal professional privilege and the awarding of honours. The following example shows how section 40(4) of FOIA is engaged because a DPA exemption applies to the information:

Example

Decision notice [FS50318448](#) concerned a request to the Cabinet Office for information about the reasons for awarding a CBE to a named individual. The information held by the Cabinet Office included the Honours Citation Form. The full details of this are not published when an honour is awarded. The Commissioner first considered whether this information was exempt under section 37(1)(b) of FOIA, which is to do with "the conferring by the Crown of any honour or dignity" and concluded that although that exemption was engaged, the balance of public interest was in favour of disclosure.

The Commissioner then went on to consider whether the information was exempt under section 40(4) of FOIA. The relevant DPA exemption is Schedule 7 paragraph 3(b):

"Personal data processed for the purposes of-

...

(b) the conferring by the Crown of any honour, are exempt from the subject information provisions."

The subject information provisions include the data subject's right of access under section 7 DPA. The effect of the DPA exemption is that the recipients of honours do not have the right to obtain detailed information about the reasons for their award. The Commissioner found that, as the personal data in question was processed for the purposes of the conferring by the Crown of an honour, it was exempt from the data subject's right of access by virtue of Schedule 7 paragraph 3(b). The exemption in FOIA section 40(4) was therefore engaged.

The Commissioner then went on to consider the balance of public interest under FOIA.

19. In the above example, the DPA exemption applied simply because the personal data in question had been processed for a particular purpose, ie the conferring by the Crown of an honour. Other exemptions in the DPA may be worded differently. For example, under section 29(1) of the DPA, personal data processed for the prevention or detection of crime, the apprehension or prosecution of offenders or the assessment or collection of tax is exempt from the right of access provisions "in any case to the extent to which the application of those provisions to the data would be likely to prejudice" any of these purposes. This means that the exemption only applies if the information is processed for certain purposes and giving it to the data subject would prejudice those purposes. So, in order to decide whether section 40(4) FOIA is engaged, the public authority must consider on which basis the DPA exemption applies.
20. The criterion for engaging the exemption in section 40(4) FOIA is that the data subject does not have the *right* to obtain the same information themselves, because of a DPA exemption. To engage the exemption it is not necessary for the data subject to have actually submitted a subject access request and to have been refused. Furthermore, the exemption can still be engaged even if the data subject has actually received the information; the public authority may have exercised its discretion to give the information to the data subject, even though the data subject did not have the right to obtain it. The exemptions in Part IV and Schedule 7 of the DPA only remove the data subject's right to obtain their data; they do not prohibit the public authority from giving it to them. This is illustrated by the following case:

Example

Decision notice [FS50197952](#) concerned a request to the Cabinet Office for information about an undertaking given by Lord Ashcroft concerning his residence in the United Kingdom, as a condition of his receiving a peerage. The information was exempt from the data subject's right of access under Schedule 7 paragraph 3(b) of the DPA. The Cabinet Office confirmed that it had in fact given the information to Lord Ashcroft previously. Nevertheless, the Commissioner accepted that the

exemption in section 40(4) of FOIA was still engaged because the Cabinet Office could have refused a subject access request under Schedule 7 paragraph 3(b) of the DPA. The Cabinet Office had exercised its discretion and Lord Ashcroft had not received his information as of right:

"The attraction of the Schedule 7(3)(b) exemption is not dependant on whether the Cabinet Office chose to exercise its discretion to provide Lord Ashcroft with information within the scope of this case." (paragraph 67)

The Commissioner then went on to consider the public interest test under FOIA.

21. One exemption from the data subject's right of access concerns certain personnel data held by public authorities. What constitutes "data" is defined in section 1(1) of the DPA. FOIA added a new "category (e)" to this definition, namely recorded information which is held by public authorities and which does not fall within the original categories (a) to (d). The category (e) data is hard copy information that is not held in a "relevant filing system" as defined in the DPA. Furthermore, FOIA added a new section 33A to the exemptions in Part IV of the DPA, relating to category (e) data; in particular, section 33A(2) says, in effect, that category (e) data relating to personnel matters in public authorities is exempt from the data subject's right of access under section 7 of the DPA. So, if a public authority holds personnel data relating to an employee in hard copy and it is not in a "relevant filing system" then that employee does not have the right to obtain it under DPA. This means that if someone else requested it under FOIA, the exemption in section 40(4) of FOIA would be engaged.

The public interest test

The need for a public interest test

22. Section 40(4) is not in the list of absolute exemptions given in section 2(3) FOIA; it is therefore a qualified exemption, and so, having established that it is engaged, the public authority must go on to consider the balance of public interest. The public authority can only withhold the information if the public interest in maintaining the exemption outweighs that in disclosure. If it does not, then the information must be disclosed.

23. At first sight, it may seem odd that the exemption is subject to the public interest test, since it means that there can be cases where personal data is disclosed to the world in response to a FOIA request from a third party, even though the subject of that data could not obtain it themselves under the DPA or FOIA.
24. However, the fact that section 40(4) is a qualified exemption allows for the public interest to be taken into account. The interest that the DPA exemption protects must be balanced against the public interest in transparency. The DPA exemptions that prevent the data subject from obtaining their own data are intended to protect certain interests, such as crime prevention or legal professional privilege. The DPA says in effect, that the importance of protecting those interests takes precedence over the right of data subjects to access their own data. FOIA, on the other hand, is not about the rights of individuals to access their own data, but about whether information should be disclosed to the world. Therefore when a third party submits a FOIA request for personal data that engages section 40(4), it is necessary to weigh the interest that the DPA exemption protects against the public interest in transparency and accountability. Making this a qualified exemption means that the public interest must be recognised.

Public interest in maintaining the exemption

25. The public interest arguments for maintaining the section 40(4) exemption relate to two main issues: protecting the interest identified in the DPA exemption and protecting the privacy of the data subject.

- Protecting the interest in the DPA exemption

26. The exemptions from the right of access in the DPA are intended to protect specified interests such as the prosecution of offenders, the confidentiality of the honours system or the intentions of a party in negotiations. Under the DPA the importance of protecting these interests can take precedence over the right of a data subject to access their personal data. This implies that there is also a public interest in protecting these interests, and the public authority should take this into account, as an argument for maintaining the exemption, when carrying out the public interest test under FOIA.
27. In doing so it is important to be aware of the wording of the particular exemption in Part IV or Schedule 7. Some of the DPA

exemptions (eg the honours system) apply simply because the personal data has been processed for a particular purpose, while others (eg crime prevention) apply because, in addition, giving it to the data subject would prejudice that purpose. If the exemption is of the latter type, then, in the public interest test, the weight of the argument for maintaining the exemption will depend on how far disclosure under FOIA would prejudice that purpose.

- Protecting the data subject's privacy

28. The need to protect the data subject's privacy is also an issue in the public interest test. There is an argument that the data subject's privacy would be affected if they only see their personal data when it is released to the world under FOIA. Furthermore, the fact that under the DPA a particular interest prevents the data subject from accessing their personal data may indicate that there is an issue about the data subject's privacy. For example, the exemption in section 29(1)(b) of the DPA, relating to the apprehension or prosecution of offenders, may be relevant if the data subject is a suspect in a criminal investigation. Clearly, disclosing this to the world under FOIA may affect the data subject's privacy, apart from any effect it may have on the investigation. This would be a public interest argument for maintaining the exemption which is separate from the argument about the need to safeguard criminal investigations.
29. As noted above (paragraph 20), engaging the section 40(4) exemption does not depend on whether or not a data subject has submitted a subject access request that has been refused, because the exemption depends on whether they have the right under DPA to obtain their data. However, if the public authority has actually refused a subject access request because of a DPA exemption, this will add weight to the public interest argument for maintaining the section 40(4) exemption.

Weighting the public interest arguments

30. These public interest arguments for maintaining the exemption must be balanced against the general public interest in transparency and accountability, as well as any arguments as to why disclosing the specific information would be in the public interest. The relative weight of the arguments on each side will depend on the circumstances of the case. Our guidance document on [the public interest test](#) includes advice on attaching weight to these arguments.

31. The information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure. The following is an example of how the Commissioner has carried out the public interest test in a section 40(4) case:

Example

Decision notice [FS50223685](#) concerned a request to the Home Office for information about an honour awarded to a named person. The Home Office withheld the Honours Citation Form under exemptions including section 40(4). The relevant DPA exemption was Schedule 7 paragraph 3(b), to do with the conferring of honours. The public interest test is discussed at paragraphs 48-51 of the decision notice.

The Commissioner first considered the public interest in openness and transparency about the honours system versus the public interest in maintaining the DPA exemption. The Commissioner did not accept that disclosure of the information would prejudice the operation of the honours system. The content of the information was significant here; it was essentially a recitation of the person's achievements, and so disclosing it would not erode the safe space needed to consider the awarding of honours, or have a chilling effect on such discussions. On the other hand, concerns had been expressed elsewhere about the transparency and accountability of the honours system in general, and so disclosing information would help to address these.

The Commissioner accepted that there was a public interest in maintaining the principle that information which was not accessible by the data subject should not be made public. This is an issue about the data subject's privacy. However, the weight of the arguments was reduced because the content of the information was essentially benign, and so disclosure would not be unfair to the data subject.

The result was that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

32. If the outcome of the public interest test is that the information is disclosed, then this means that personal data which the data subject could not obtain themselves is released, not only to the FOIA requester but also to the world. This may at first appear paradoxical, but it is important to remember that the public

authority must consider each case on the actual content of the information and in the circumstance at the time. Furthermore, when information is released under FOIA, it is in effect available to the data subject as well. In such a case, it may be helpful for the public authority to also provide the information directly to the data subject at the same time.

Environmental Information Regulations

33. When information requested from an authority is environmental information as defined in the regulation 2(1) of the Environmental Information Regulations (EIR), then the request must be dealt with under the EIR, and, if that information includes personal data, then the personal data must also be considered under EIR. The EIR contain provisions regarding personal data which correspond to those in section 40 of FOIA. Regulation 5(3) of the EIR says that the duty to make environmental information available on request does not apply to personal data where the requester is the data subject. Regulation 12(3) says that if the information is personal data about someone other than the requester, the public authority cannot release it if it is exempt under regulation 13. The relevant parts of regulation 13 are as follows:

13.—(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

...

(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

34. Regulation 13(3) therefore corresponds to section 40(4) of FOIA, and furthermore the requirement for a public interest test is made explicit in the EIR regulation. If the public authority is dealing with a request under regulation 13(3), the approach and the issues to consider will be the same as those discussed above in relation to section 40(4) of FOIA.

Other considerations

35. If information that has been requested engages section 40(4), then the exemptions in sections 40(3)(a)(i) or 40(3)(b) of FOIA may also be relevant. Under these sections, information is exempt if disclosing it would contravene any of the data protection principles. This usually involves considering whether disclosure would be fair in terms of the first principle of the DPA. Unlike section 40(4), these are absolute exemptions. When dealing with a request for third-party personal data, public authorities may find it simpler to consider these sections first, before looking at section 40(4). Further advice on these exemptions is available in our guidance document on [the exemption for personal information](#).
36. Other FOIA exemptions may also be relevant to information that engages section 40(4). This is because some of the exemptions from the data subject's right of access in the DPA relate to interests that are also protected by FOIA exemptions, for example national security, crime and taxation, the conferring of honours and legal professional privilege. So, if information is exempt from the data subject's right of access because of one of these DPA exemptions, it may also engage a corresponding exemption in FOIA.
37. 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

38. This guidance has been developed 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. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
39. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
40. 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.