

## 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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## 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 General Data Protection Regulation (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 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 requester submits a freedom of information (FOI) or EIR request for someone else's personal data, and that other person (the 'data subject') does not have the right to obtain it themselves because of a data protection exemption, then the information may be exempt from disclosure.
- The relevant FOI/EIR exemptions are divided into separate parts, relating to the nature of the data processed. For example, there is one exemption for data processed for law enforcement purposes, another for intelligence services processing (EIR only) and a different exemption for general GDPR processing.
- These are all qualified exemptions which require you to carry out a public interest test. You must release the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
- You must therefore consider the following:
  - Is the information personal data that relates to someone other than the individual making the FOI/EIR request?
  - What is the nature of the processing and do any relevant data protection exemptions apply to the data subject's right of access?
  - If an FOI/EIR exemption is engaged, what is the balance of the public interest test?
- The main public interest arguments for maintaining the exemption are:
  - protecting the interests identified in the relevant data protection exemption; and
  - protecting the privacy of the data subject.
- You must balance these against the general public interest in transparency and accountability and any specific public interest in disclosing the information.
- If you consider the personal data to be exempt from the subject access right, it is likely that disclosure also contravenes data protection principle (a). The request may therefore fall under a different exemption - FOIA section 40(3A) or EIR regulation 13(2A). You may wish to consider this other exemption first as it does not involve a public interest test.

## What do FOIA and the EIR say?

Section 40 of FOIA provides an exemption from the right to information if it is personal data as defined in the DPA.

The EIR contains an equivalent exception. This is set out in regulations 5(3), 12(3) and 13.

These state that you should not disclose information under FOIA or the EIR if:

- it is the personal data of the requester; or
- it is the personal data of someone else; and
  - disclosure contravenes the data protection principles;
  - disclosure contravenes an objection to processing; or
  - the data is exempt from the right of subject access.

FOIA and the EIR provide an exemption for personal data if the requested data is exempt from disclosure under a subject access request. Therefore, if you would not give a copy of the requested data under the GDPR or the DPA to the data subject, in most circumstances you should also not give the data to a third party making an FOI or EIR request.

FOIA and the EIR personal data exemptions about another person's subject access rights are divided into separate parts, depending on the nature of the data processed. For example, there is:

- an FOI/EIR exemption where the data subject has a right of access to data processed under the GDPR ('general processing');
- an FOI/EIR exemption relating to a data subject's right of access to data processed for law enforcement purposes; and
- an EIR exception for intelligence services processing.

The different FOI and EIR exemptions are listed in the table below:

<b>Type of data processed</b>	<b>FOIA section</b>	<b>EIR regulation</b>
General processing under the GDPR	40(2) with 40(4A)(a)	13(1)(b) with 13(3A)(a)
Processing for law enforcement purposes	40(2) with 40(4A)(b)	13(1)(b) with 13(3A)(b)
Intelligence services processing	None	13(1)(b) with 13(3A)(c)

These are all qualified exemptions, which means they are subject to a public interest test. If the public interest test favours disclosure, you may disclose the information – as long as you have also concluded that disclosure is not in contravention of the principles.

You should consider three main issues in order to decide whether information is exempt:

- Is the information personal data that relates to someone other than the requester?
- What is the nature of the processing and do any relevant data protection exemptions apply to that other individual’s right of subject access?
- If one of these exemptions is engaged, what is the balance of the public interest test?

These issues are discussed in more detail below.

## Personal data

You must first establish that the information in question constitutes personal data, within the meaning of the DPA. Our guidance [What is personal data?](#) explains the definition of personal data.

Secondly, the personal data must relate to someone other than the requester.

If the information is the requester’s personal data, it is exempt under section 40(1) of FOIA, or under regulation 5(3) of the EIR, and you are under no obligation to make it available. Instead, the individual has the right to make a data protection subject access request in order to obtain their own data.

You must therefore handle a request for the requester’s personal data as a subject access request under the GDPR or the DPA, as applicable.

Further information about how to deal with a subject access request is available in our [GDPR guidance Right of access](#) and in our [law enforcement guidance The right of access](#).

Even if this right is limited by a data protection exemption, a requester still cannot use FOIA or the EIR as an alternative route to obtain their personal data. They simply cannot request their own personal data under FOIA or the EIR and the exemption is absolute.

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 GDPR or the DPA.

## Information exempt from the data subject’s right of access

If the information is the personal data of someone other than the requester, you must consider whether that other individual (the data subject) has the right to obtain the data if they submitted a data protection subject access request. You must therefore consider whether the personal data would be exempt from disclosure to the data subject if they asked for a copy.

The data subject has the right of subject access under different provisions of the GDPR or the DPA, depending on the nature of the data:

<b>Type of data processed</b>	<b>Right of subject access</b>
General processing under the GDPR	GDPR Article 15
Processing for law enforcement purposes	DPA Part 3 Chapter 3 section 45

Intelligence services processing	DPA Part 4 Chapter 3 section 94
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However, there are exemptions to the subject access right. These relate to the nature of the personal data and the reasons why you are holding and processing it. You can find them in various locations in the DPA:

Type of data processed	Exemptions from the right of subject access
Under the GDPR (general processing)	Section 26, and schedules 2, 3 and 4 of the DPA.
For law enforcement purposes (under DPA Part 3)	Section 45(4) of Part 3 of the DPA.
For intelligence services purposes (under DPA Part 4)	Part 4 Chapter 6 of the DPA.

There is further information on how the right of access may be restricted with respect to law enforcement processing in our guidance [The right of access](#).

You can find further information on general GDPR exemptions in our guidance to the data protection [exemptions](#).

You must check the wording of any exemption carefully to establish whether it does apply to the right of access.

The relevant exemptions relate to a number of areas including:

- crime and taxation;
- regulatory activity;
- research;
- legal professional privilege; and
- the awarding of honours.

In the following example, the data protection exemption applied because the personal data had been processed for a particular purpose - the conferring by the Crown of an honour.

Other exemptions in the DPA may be worded differently and only apply if the information is processed for certain purposes and if giving it to the data subject would prejudice these.

This can be seen in Schedule 2 Part 1, paragraph 2 of the DPA. It states that personal data processed for certain listed crime and taxation purposes is exempt from the right of access provisions to the extent that "the application of those provisions would be likely to prejudice" any of the purposes.

You must therefore consider on which basis each DPA exemption applies.

### **Example**

Under FOIA a requester asked for information about the Government's reasons for awarding a CBE to a named individual.<sup>2</sup> The Cabinet Office refused the information under FOIA section 37(1)(b) (information about "the conferring by the Crown of any honour or dignity") and also under the section 40 exemption from the right of subject access.

The Commissioner considered some information under FOIA section 37(1)(b) and then the remainder under section 40.

With respect to section 40, the Commissioner found that the requested information was exempt from the right of subject access. The exemption states that the recipients of honours do not have the right to obtain detailed information about the reasons for their award (the honours exemption). Therefore if the data subject made a subject access request for this data, they would not obtain a copy.

As the section 40 exemption was engaged, the Commissioner then conducted a public interest test. He concluded that the public interest in the maintenance of the exemption did not outweigh the public interest in disclosure.

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<sup>2</sup> Decision notice [FS50318448](#)



In this case, although the exemption was engaged, the Commissioner ordered the information to be disclosed following the consideration of the public interest test.

The criterion for engaging the exemption in FOIA section 40(4A) and the EIR regulation 13(3A) is that, because of a DPA exemption, the data subject does not have the right to obtain the same information themselves.

To engage the exemption it is not necessary for the data subject to have submitted a subject access request and to have been refused. The exemption can also be engaged even if the data subject has received the information. The data protection exemptions allow the controller to withhold information from a data subject's request. However, they do not prohibit the controller from releasing the information to them. As such, a controller may exercise its discretion to give the information to the data subject, even though they did not have the right to obtain it.

### **Example**

Under FOIA, a requester asked the Cabinet Office for information about an undertaking given by Lord Ashcroft as a condition of his receiving a peerage.<sup>3</sup> The undertaking concerned his residence in the United Kingdom. The information was exempt from the data subject's right of access under the DPA honours exemption.

However, the Cabinet Office confirmed that it had in fact already given the information to Lord Ashcroft.

Nevertheless, the Commissioner accepted that the section 40 exemption was still engaged because the Cabinet Office could have refused a subject access request – because of a data protection exemption. The Cabinet Office had exercised its discretion and Lord Ashcroft had not received his information because he had a right to it.

The discretionary provision of the information in this case

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<sup>3</sup> Decision notice [FS50197952](#)

therefore did not alter the application of the section 40 exemption which is concerned with the data protection subject access right to the information.

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

### **Manual unstructured data held by FOI public authorities**

Another exemption from the data subject's right of access concerns data relating to personnel matters which you might hold in paper form as manual unstructured data.

This is hard-copy personal data which is held on paper, but not in any organised structure. It is not held in a filing system and is not intended to form part of a filing system. The data cannot therefore be easily accessed with reference to an identifier such as a year or name.

A data subject can make a subject access request to a public authority for this data. However, under [section 24\(3\) of the DPA](#), the data protection right of access does not apply to manual unstructured data if it relates to personnel matters in connection with service in the armed forces, or service in any office or employment under the Crown or under any public authority. This includes data relating to:

- appointments;
- removals;
- pay;
- discipline;
- superannuation; or
- other personnel matters.

Therefore, if you hold personnel data about 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 data protection legislation.

This means that if someone else requested it under FOIA, the exemption in FOIA section 40(4A) would be engaged.

## The public interest test

### **The need for a public interest test**

FOIA section 40(4A) is not an absolute exemption given in section 2(3) FOIA and is therefore a qualified exemption. Having established that it is engaged, you must go on to consider the public interest test.

You can only withhold the information if the public interest in maintaining the exemption outweighs disclosure. If it does not, then you must disclose the information.

It may seem odd that the FOI exemption is subject to the public interest test, since it means that there can be cases where personal data is disclosed in response to a FOIA request from a third party, even though the subject of that data could not obtain it themselves.

However, the fact that section 40(4A) is a qualified exemption allows for the public interest to be taken into account. You must balance the interest that the data protection exemption protects against the public interest in transparency.

The data protection exemptions that prevent the data subject from obtaining their own data protect certain interests, such as crime prevention or legal professional privilege. The DPA says that the importance of protecting those interests takes precedence over the right of data subjects to access their own data.

FOIA is about whether information should be disclosed to the world. Therefore, when a third party submits an FOI request for personal data that engages section 40(4A), you must weigh the interest that the data protection exemption protects against the public interest in transparency and accountability. Making this a qualified exemption means that the public interest must be recognised.

This is an established principle under the EIR. Regulation 13(1)(b) explicitly states that the regulation 13(3A) exemption (where the requested data is exempt from disclosure under a subject access request) requires a public interest test.

### **Public interest in maintaining the exemption**

The public interest arguments for maintaining the section 40(4A) exemption and the EIR 13(3A) regulation relate to two main issues:

- Protecting the interest identified in the DPA exemption.

- Protecting the privacy of the data subject.

### **Protecting the interest identified in the DPA exemption**

The exemptions from the right of access in the DPA protect specified interests such as the:

- prosecution of offenders;
- confidentiality of the honours system; or
- 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. You should take this into account as an argument for maintaining the exemption, when carrying out the public interest test.

In doing so, it is important you are aware of the wording of the particular exemption:

- Some of the DPA exemptions apply because the personal data has been processed for a particular purpose. This is similar to an FOI class-based exemption. For example, the crown honours, dignities and appointments exemption falls into this category.
- Other DPA exemptions apply because giving a copy of the data to the data subject prejudices the purpose that the exemption protects. When considering the public interest argument for maintaining the exemption, you must therefore judge how far disclosure under FOIA prejudices that purpose. This is similar to an FOI prejudice-based exemption. For example, the crime and taxation exemption falls into this category.

### **Protecting the privacy of the data subject**

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 is affected if they only see their personal data when it is released to the world under FOIA.

Furthermore, the fact that the data subject may be prevented from accessing their personal data under the DPA may indicate that there is an issue about the data subject's privacy.

For example, the exemption in Schedule 2 Part 1 paragraph 2(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. 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 is a public interest argument for maintaining the exemption which is separate from the argument about the need to safeguard criminal investigations.

Engaging the section 40(4A) or regulation 13(3A) exemption does not depend on whether or not a data subject has submitted a subject access request that has been refused. The exemption depends on whether they have the right under DPA to obtain their data. However, if you have refused a subject access request because of a DPA exemption, this will add weight to the public interest argument for maintaining the section 40(4A) or regulation 13(3A) exemption.

## **Balancing the public interest arguments**

You must balance the public interest arguments for maintaining the exemption against the general public interest in transparency and accountability, as well as any arguments about why disclosing the information is in the public interest. The relative weight of the arguments on each side depends on the circumstances of the case. Our guidance document on [the public interest test](#) includes advice on attaching weight to these arguments.

You must disclose the information 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 such a case:

### **Example**

The requester asked the Home Office for information about an honour awarded to a named person.<sup>4</sup> The Home Office withheld the requested information under FOIA, arguing that it

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<sup>4</sup> Decision notice [FS50223685](#) paragraphs 48-51

concerned the conferring of honours and was exempt under the subject access right.

In 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 relevant DPA98 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 concerned the data subject's privacy. However, the weight of the arguments was reduced because the content of the information was 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.

If the outcome of the public interest test is that the information is disclosed, then this means that information which the data subject could not obtain themselves is released, not only to the FOIA requester but also to the world.

It is important to remember that you must consider each case on the actual content of the information and in the circumstance at the time.

Furthermore, when you release information under FOIA, it is in effect available to the data subject as well. In such a case, it may be helpful for you to also provide the information directly to the data subject at the same time.

## Other considerations

If the information engages FOIA section 40(4A) or EIR regulation 13(3A), then the exemptions in FOIA sections 40(3A) or EIR regulation 13(2A) may also be relevant.

Under these exemptions, you do not need to disclose information if this contravenes any of the data protection principles. This usually involves considering whether disclosure is lawful under principle (a) of the GDPR. These are absolute exemptions, unlike section 40(4A) and regulation 13(3A).

When dealing with a request for third-party personal data, you may find it simpler to consider these exemptions concerning contravention of the principles, before looking at whether the information is exempt from the subject access right. Further advice on these exemptions is available in our guidance document on [The exemption for personal information](#).

If you apply the exemption at section 40(4A) or EIR regulation 13(3A) and consider that the public interest favours disclosure, you must still be satisfied that this disclosure does not contravene the data protection principles and that the information is not exempt under FOIA section 40(3A) or EIR regulation 13(2A). This may be another reason to consider these other exemptions first.

Other FOIA exemptions may also be relevant to information that engages section 40(4A). 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 other FOIA exemptions, such as:

- national security;
- crime and taxation;
- the conferring of honours; and
- legal professional privilege.

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.

For further details about FOI exemptions and EIR exceptions please see 'Refusing a request' in our [Guide to freedom of information](#) and our [Guide to the EIR](#).

## More information

We have developed this guidance drawing on ICO experience. 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 see our website [www.ico.org.uk](http://www.ico.org.uk).