

Neither confirm nor deny in relation to personal data

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 Guides, to help public authorities to fully understand their obligations and promote good practice.
6. This guidance explains to public authorities how section 40(5) of FOIA and regulation 13(5) of the EIR work. These provide an exemption from the duty to confirm or deny whether information is held, where the information is personal data, or would be if it were held.

Overview

- Section 40(5) of FOIA provides certain exemptions from the duty to confirm or deny whether personal data is held. Some of these exemptions require a public interest test.
- The exemptions in section 40(5) relate to personal data about the requester or about third parties.
- If someone requests their own personal data, there is an exemption from the duty to confirm or deny under FOIA, but the public authority should deal with the request as a subject access request under the Data Protection Act (DPA).
- A public authority is not obliged to confirm or deny whether it holds other personal data if to do so would contravene data protection principles, or a DPA section 10 notice, or if the information would be exempt from the data subject's right of access in the DPA.
- The exemptions from the duty to confirm or deny in section 40(5) correspond to exemptions from the duty to disclose information in other parts of section 40. They are absolute where the corresponding exemption is absolute but qualified (i.e. subject to the public interest test) where the exemption is qualified.
- The EIR include equivalent exemptions in regulation 13(5). They do not require a public interest test.
- If a public authority is issuing a refusal notice because it is relying on an exemption in section 40(5), it must refer to the public interest test where this is required, and it should also avoid implying that it does or does not hold the information.

What FOIA says

7. Section 40(5) states:

(5) The duty to confirm or deny—
(a) 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), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (the data subject's right to be informed whether personal data being processed).

8. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) to tell the requester whether it holds the information. This is called “the duty to confirm or deny”. However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a “neither confirm nor deny” response.
9. Section 40(5) of FOIA sets out the conditions under which a public authority can give a “neither confirm nor deny” response where the information requested is or would be personal data. It includes provisions relating to both personal data about the requester and personal data about other people.

Personal data relating to the requester

10. If the information requested constitutes personal data relating to the requester themselves (ie if someone requests their own personal data under FOIA), then that information is exempt under section 40(1). Instead, the request should be treated as a subject access request under the DPA.
11. In such a case, under section 40(5)(a) a public authority is not required to confirm whether or not it holds the information. It can respond to the request by saying that it neither confirms nor denies that it holds the information. This applies whether or

not the public authority does actually hold the information. The issue to consider is not whether the authority holds the requested information but rather, if it did hold it, would that information be personal data relating to the requester?

Example

In decision notice [FS50310701](#), the requester had asked the Metropolitan Police for information about incidents of anti-social behaviour directed at the requester's own address. The Commissioner found that the requester's address constituted personal data relating to them. It could be combined with other information to reveal their identity. Any information that may be held about incidents of anti-social behaviour directed at the requester's home would be information that related to them. The information, if it were held, would be exempt from disclosure under section 40(1) and therefore, under section 40(5)(a), the public authority was not required to confirm or deny that they held it.

12. Although under FOIA the public authority does not have a duty to confirm or deny whether it holds the information, it should then treat the request as a subject access request under the DPA. Under section 7 of the DPA, the public authority, as a data controller, is required to tell data subjects whether or not it is processing their personal data, unless a DPA exemption applies. There is more guidance on subject access requests in our [Guide to Data Protection](#).
13. There is a difference between giving a confirmation or denial under FOIA and confirming under the DPA that personal data is being processed. A disclosure under FOIA is in effect a disclosure to the world, whereas a disclosure under section 7 of the DPA is only to the data subject.

Personal data relating to third parties

14. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.

Section 40(5)(b)(i)

15. The public authority is not obliged to confirm or deny that it holds information if giving the confirmation or denial to a member of the public would contravene :
 - any of the data protection principles; or
 - section 10 of the DPA.

16. This subsection is about the consequences of confirming or denying whether the information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles or section 10 of the DPA, but whether confirming or denying that it is held would do so. There may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that personal data about an individual can itself reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

Example

In decision notice [FS50391625](#), the requester had asked Central and North West London NHS Foundation Trust (CNWL) for information about disciplinary action taken against a named nurse. CNWL refused to confirm or deny that they held the information, under section 40(5)(b)(i). In the decision notice the Commissioner considered whether to confirm or deny that the information was held would contravene data protection principles, and specifically whether it would be fair.

The Commissioner found that a nurse would have a legitimate expectation that their employer would not tell the public whether such information existed, and that the confirmation or denial would cause the nurse damage and distress. CNWL had acknowledged that there was a legitimate public interest in knowing that health professionals are fit to practice, but that public interest was adequately met by the Trust's own disciplinary procedures and those of the Nursing and Midwifery Council (NMC). It was not necessary to give the confirmation or denial to meet that public interest. Furthermore, if the Trust could not resolve a disciplinary matter internally, it had a duty to refer it to the NMC; the Commissioner did not consider there was a legitimate public interest in knowing whether internal disciplinary proceedings have or have not taken place prior to any public hearing held by the NMC.

On this basis the Commissioner agreed that to confirm or deny in this case would breach the first data protection principle.

The requester appealed to the First-tier Tribunal ([Lord Duboyne v the Information Commissioner and CNWL EA/2011/0261 & EA/2011/0303, 15 March 2012](#)).

The First-tier Tribunal agreed with the Commissioner and dismissed the appeal.

17. In some cases, if a public authority confirms that it does not hold certain data about an individual, this may itself amount to a disclosure of personal data, because it may tell the world something about that individual. Therefore, a public authority should not restrict the use of this exemption to cases where it holds the requested information. It is also appropriate for the public authority to use it where it does not hold the information, if to disclose that fact would contravene the data protection principles.

18. This subsection refers to giving the confirmation or denial “to a member of the public”. This reflects the fact that, in general terms, FOIA is concerned with disclosure to the world, and not to the particular individual who submitted the request. There may be situations in which it could be argued that giving the confirmation or denial to the requester would not necessarily contravene data protection principles because the requester already knows that the public authority holds the information.
19. An example of this could be if someone complained to their local council that their next door neighbour was creating a noise nuisance, and then submitted a FOIA request to the council for information about the investigation of that complaint. If the council confirmed that it held the information, then even if they withheld the information itself under a FOIA exemption, the confirmation alone would disclose personal data about the subject of the complaint, ie it would show that they were under investigation for causing a nuisance.
20. It may be argued that it would not be unfair to the data subject to tell the requester this, since it would simply confirm what the requester already knows. However, disclosure under FOIA is in effect disclosure to the world; the test in 40(5)(b)(i) is whether giving the confirmation or denial to “a member of the public” would contravene data protection principles. It is likely that in this hypothetical case it would be unfair to the data subject to tell the world that they are under investigation, and hence it would contravene the First Principle.

Example

The interpretation of the phrase “a member of the public” arose in [Mr A v the Information Commissioner and the Health Professions Council \(EA/2011/0223, 28 May 2012\)](#). The First-tier Tribunal said at paragraph 25:

“Counsel for HPC [the Health Professions Council] pointed out that subsection (1) of section 40 made reference to “the applicant”. He submitted that had Parliament intended subsection (5) when referring to “a member of the public” to mean the applicant or requester, then the provision would have expressly referred to “the applicant” as it had done earlier on in the section. Moreover to introduce the specific position of the requester in this way would be to undermine the overwhelming thrust of FOIA which was that requests were to be treated as ‘motive blind’ and that, when

considering the implications of disclosure, disclosure to the public at large is the test, not just disclosure to the person who has made the request. The Tribunal found both these arguments to be highly persuasive and concluded that the appropriate test was to ask whether HPC confirming or denying that it held the information requested to any member of the public, ie: the public in general, would breach the Data Protection Principles."

21. The subsection refers to a contravention of "any of the data protection principles". The principles are set out in Schedule 1 Part I of the DPA. The one that is most likely to be relevant in this context is the First Principle, and in particular the requirement that personal data is processed fairly. Our guidance on [The exemption for personal information](#) explains how to assess whether a disclosure under FOIA would be fair.
22. The subsection also refers to a contravention of section 10 of the DPA. Under section 10 of the DPA, a data subject can, subject to certain restrictions, submit a written notice to a data controller requiring them not to process their personal data because it causes or is likely to cause substantial unwarranted damage or distress. The data controller must respond and say whether or not they will comply with the notice. If the data controller in question is a public authority and they are complying with the notice, and providing a confirmation or denial in response to a FOIA request would contravene that notice, then under section 40(5)(b)(i) of FOIA they are not obliged to confirm or deny.
23. In practice, this exemption is rarely used or required. If confirming or denying would contravene a section 10 DPA notice, then it is likely that it would also be unfair, and hence contravene the First Principle of data protection. A public authority could rely on that part of section 40(5)(b)(i), rather than the need to comply with the section 10 notice, to remove the duty to confirm or deny.
24. Section 40(5)(b)(i) also provides an exemption where to confirm or deny would contravene data protection principles or section 10 of the DPA "if the exemptions in section 33A(1) of [the DPA] were disregarded". This refers to what is known as "category e" data in the DPA. This is manual data that is held by a public authority but does not fall into the other categories of data listed in section 1(1) of the DPA. Under section 33A(1) of the DPA, this type of data is exempt from many of the data

protection principles. However, those exemptions are to be disregarded for the purposes of section 40(5)(b)(i). Therefore a public authority should treat this type of data in the same way as other personal data when considering whether it would be fair to confirm or deny that it is held.

Section 40(5)(b)(ii)

25. Under section 40(5)(b)(ii) there is an exemption from the duty to confirm or deny under FOIA if the information requested is exempt from the data subject's right, under section 7(1)(a) of the DPA, to be told whether their personal data is being processed. While the DPA gives people the general right to be told that their personal data is being processed and to access that data, it also includes some exemptions from these rights, for example where it would be likely to prejudice the prevention of crime. Our FOIA guidance document on [information exempt from the subject access right](#) explains this further. If there is an exemption in the DPA from the right to be informed that personal data is being processed, then section 40(5)(b)(ii) of FOIA provides an exemption from the duty to confirm or deny that such information is held.

The public interest test

26. Exemptions in FOIA are either absolute or qualified. If a qualified exemption is engaged then the information must still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure. If an absolute exemption is engaged then there is no public interest test, and the public authority does not have to disclose the information. The absolute exemptions are listed in section 2(3); exemptions that are not listed there are qualified.
27. Most FOIA exemptions include an exemption from the duty to confirm or deny whether the information is held, as well as an exemption from the duty to disclose the information. In most cases it is clear that when an exemption is listed in section 2(3) as being absolute, this includes its 'neither confirm nor deny' provisions. If an exemption is absolute, the 'neither confirm nor deny' provisions within that exemption are also absolute.
28. However, in the case of section 40, section 2(3) only refers specifically to those subsections that relate to the *disclosure* of the information. They are: section 40(1), for information which is the personal data of the requester; and section 40(2) in

cases where disclosure of the information would contravene data protection principles. The exemptions from the duty to confirm or deny in section 40(5) are not specifically listed as being absolute.

29. This does not necessarily mean that they are therefore all qualified exemptions. The exemptions from the duty to confirm or deny in section 40(5) correspond to the exemptions from the duty to disclose information in other subsections of section 40. Our view is that they are absolute where the corresponding subsection of section 40 is an absolute exemption, and qualified where the corresponding subsection is a qualified exemption. The effect of this is shown in the following table:

Section	Exemption from duty to confirm or deny if ...	Absolute or qualified?	Corresponds to section
40(5)(a)	the information would constitute personal data of the requester.	absolute	40(1)
40(5)(b)(i)	giving the confirmation or denial would contravene DPA principles.	absolute	40(2) and 40(3)(a)(i)
	giving the confirmation or denial would contravene a section 10 DPA notice.	qualified	40(2) and 40(3)(a)(ii)
40(5)(b)(ii)	the information is exempt from the data subject's right of access.	qualified	40(4)

30. This interpretation is supported by the following decision of the Information Tribunal:

Example

The Information Tribunal case of [The Rt. Hon. Frank Field MP v the Information Commissioner \(EA/2009/0055, 25 January](#)

[2010](#)) concerned a request from the MP to the Wirral University Teaching Hospital NHS Foundation Trust for information about a counter-fraud investigation into a particular doctor. The Trust gave a 'neither confirm nor deny' response under section 40(5)(b)(i), on the basis that to confirm or deny whether the information was held would itself contravene data protection principles, ie it would not be fair.

The Tribunal linked the 'neither confirm nor deny' provision in section 40(5) with the corresponding exemption from disclosure in section 40(2). They said at paragraph 24 of their decision:

"What is also critical for present purposes is the further issue of whether exclusion of the duty is absolute or qualified. It is absolute in the present case since section 40(2) is treated as conferring an absolute exemption by section 2(3)(f)(ii) of FOIA:

"... so far as relating to cases where the first condition referred to in that subsection [ie section 40(2)] is satisfied by virtue of subsection (3)(a)(i) or (b) of that section ..."

31. Other Information Tribunals have taken different views on this point:

Example

The First-tier Tribunal in [David Young v the Information Commissioner \(EA/2009/0057 & 0089, 10 February 2010\)](#) said at paragraph 13 that the public interest test ought to be considered when section 40(5) is relied on; in other words, all the subsections of section 40(5) are qualified. They said in a footnote that:

"The omission of section 40(5) from the list in section 2(3) may well have been a legislative oversight but the Tribunal can see no way round it."

32. However, the consequence of this approach would be that, in a case where confirming whether information is held would itself breach a data protection principle, it would still be necessary to carry out a public interest test. The result of the public interest test could be that the public authority should give the confirmation or denial, even though by doing so it would

breach data protection principles. We do not think that FOIA was intended to produce this outcome.

33. Our view remains that, whether the exemption from the duty to confirm or deny in section 40(5) is absolute or qualified depends on whether the corresponding exemption from the duty to disclose the information is absolute or qualified.
34. Our guidance document on [The public interest test](#) gives further information on how to carry out the public interest test.

The Environmental Information Regulations

35. Personal data may also constitute environmental information, as defined in regulation 2(1) of the EIR. If so, the public authority must deal with the request under the EIR. There are some differences in the way that the concept of 'neither confirm nor deny' in relation to personal data is dealt with in the EIR.
36. As regards personal data of the requester, under regulation 5(3) there is no obligation at all on a public authority to provide information "to the extent that the information requested includes personal data of which the applicant is the data subject". Rather than an exemption from a 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 it is held. As explained above, if someone requests their own personal data, this should be considered as a subject access request under the DPA.
37. Personal data about other people is dealt with in regulations 12(3) and 13. Regulation 12(3) says that personal data about someone other than the requester "shall not be disclosed otherwise than in accordance with regulation 13".
38. Regulation 13(5) states:

13. (5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that

(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection

Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or

(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act.

39. It is clear from this wording that regulation 13(5)(a) corresponds to section 40(5)(b)(i) of FOIA, and regulation 13(5)(b) corresponds to section 40(5)(b)(ii). The considerations discussed above in relation to those FOIA subsections are relevant to the equivalent regulations in EIR.
40. The issue of whether a public interest test is required is resolved more clearly in the EIR than in FOIA. Under regulation 12(3) personal data about other people cannot be disclosed at all except in accordance with regulation 13, and regulation 13 makes no reference to a public interest test for confirming or denying. Furthermore, regulation 12(1) says that the public interest test relates to the exceptions in regulations 12(4) and 12(5); it does not refer to regulation 13. There is therefore no requirement to carry out a public interest test in relation to these specific exceptions in EIR.

Practical issues

41. When a public authority is issuing a refusal notice on the basis of “neither confirm nor deny”, it should carefully word the refusal notice so as to avoid implying that the information is or is not held and also avoid inadvertently disclosing any personal data.
42. If a requester submits a FOIA request for information that constitutes their own personal data, the public authority should tell the requester in its response that they will deal with the request under the DPA, rather than FOIA. It may be helpful to explain to the requester that by treating the request in this way they are protecting the requester’s rights over their own personal data, since to give even a confirmation or denial under FOIA would potentially disclose personal data to the world.
43. If the public authority is relying on a qualified exemption in section 40(5)(b), it should state in its refusal notice that the exemption is engaged and the public interest in neither

confirming not denying whether the information is held outweighs the public interest in giving a confirmation or denial.

Other considerations

44. The following guidance documents may also be helpful when using this exemption:
- [When to refuse to confirm or deny information is held](#) explains how the 'neither confirm nor deny' provisions work in FOIA exemptions in general.
 - [The exemption for personal information](#) gives an explanation of section 40 FOIA as a whole.
 - The [Guide to Data Protection](#) explains subject access requests in detail.
 - [Determining what is personal data](#) explains the definition of personal data in the DPA
45. 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

46. 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.
47. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
48. 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.