

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

1. The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations (EIR) give rights of public access to information held by public authorities.
2. 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](#).
3. 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.
4. This guidance explains to public authorities how to deal with requests for information involving multiple data subjects, including the requester.

Overview

- Requested information may include the personal data of several data subjects.
- Where 'mixed' personal data is so closely linked that it is not possible to separate it out, there is no requirement to assess the relative extent or significance of the different sets of personal data. A request from any of the data subjects should be refused under section 40(5) or regulation 5(3).
- Where the personal data of a third party is clearly distinct from the other personal data it should be considered under section 40(2) or regulation 13(1) and section 40(5)(b)(i).
- Where section 40(1) (or regulation 5(3)) applies and the data subject makes a subject access request under the Data Protection Act (DPA), the public authority must consider its obligations under sections 7(4)-(6) of the DPA.

What the legislation says

5. Section 40(1) 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.

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

7. Should a request under either FOIA or the EIR include personal information of a third party which does not fall within section 40(1) or regulation 5(3), such information is exempt under section 40(2), or shall not be disclosed under regulation 13(1), if disclosure would contravene the data protection principles.

Requests involving multiple data subjects

8. In cases where the requested information comprises the personal data of more than one individual, all the individuals are to be regarded as data subjects for the purposes of section 40 and regulations 5(3) and 13. Where one of these individuals is the requester, it will be necessary to consider the extent to which the information is the personal data of the requester and so falls within section 40(1) or regulation 5(3). It is also necessary to 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

9. In circumstances where the personal data of the applicant is very closely linked to the personal data of other data subjects, there is no requirement to assess the relative extent and/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 regarding the individual whose data is more extensive or significant than the others as being the only data subject.

10. Where such a request is made, the public authority should consider the information in its entirety under either section 40(1) or regulation 5(3). The personal data of the third party (or parties) should only be dealt with under section 40(2) or regulation 13(1) where it is clearly distinct from the personal information of the data subject who has made the request. In other words, where the information is the personal data **only** of the third party (or parties).

Example

In [Nicholas George Fenney v the Information Commissioner \(EA/2008/0001; 26 June 2008\)](#) the Information Tribunal considered a request made by the appellant to Avon and Somerset Constabulary for information relating to various elements of the police investigation into allegations against him and into complaints he had made about certain police officers. This included the police complaint file.

The Commissioner decided that the approach of the police in refusing to provide the information under section 40(1), where this was Mr Fenney's personal data, was correct.

On appeal Mr Fenney argued that the police file could not be his personal data as the police officers were the "principal data subjects." However, the Tribunal rejected this, and stated the following (at paragraph 13):

"...There is no basis for arguing that the DPA [the Data Protection Act 1998] intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others. Its obligations are set out in sections 7(4) to 7(6) DPA, which require it to consider whether the information requested includes information relating to a third party and, if it does, to disclose only if that third party consents or it is reasonable in all the circumstances (by reference to the particular matters identified in subsection (6)) to comply with the request without his or her consent."

11. So, rather than isolating the personal data of the third parties, which would then be dealt with under section 40(2) (or

regulation 13(1)), public authorities should consider such requests as containing mixed personal data under section 40(1) (or regulation 5(3)). A request could be made by any one of the data subjects, which would then be considered under section 40(1) or regulation 5(3) as being the personal data of the requester.

12. If the information is exempt on the basis of section 40(1), or not within the scope of the EIR by virtue of regulation 5(3), it should be considered as a subject access request in accordance with section 7 of the Data Protection Act 1998 (DPA).

Confirmation or denial

13. However, in terms of FOIA, if the requested information is exempt under section 40(1), it is important to note that there is no requirement for the public authority to say whether or not it holds the requested information. This derives from section 40(5)(a) which states that:

40.—(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)...

This means that where a data subject requests information that is their own personal data, albeit comprising personal data of other data subjects, the public authority does not have to confirm or deny that it holds the information. This means that such a request can be refused under section 40(5) as the public authority has no obligation to confirm or deny that the information is held.

14. It is important to note that the authority should consider the **requested** information, regardless of whether or not it actually holds it. That is, whether the information, if held, would be the personal data of the applicant.
15. As regards the EIR, there is no express provision regarding the duty to confirm or deny in relation to the personal data of the applicant. It can therefore be drawn from regulation 5(3) that, as there is no requirement to consider such information under the EIR, there is equally no duty for a public authority to confirm or deny whether or not any personal data of the applicant is held. This also means that there are no express refusal provisions within the EIR where the requested

information is the personal data of the applicant. However, as a matter of good practice, the public authority should explain to the applicant that it is not required to provide confirmation or denial by virtue of regulation 5(3).

16. Although a public authority will comply with FOIA or the EIR if it neither confirms nor denies that personal data of the applicant is held, it should deal with the request as a subject access request in accordance with section 7 of the DPA.
17. However, as recognised by the Tribunal in the Fenney case, a public authority must consider whether it can disclose the third party information to the applicant making a subject access request. Its obligations in this regard are set out in sections 7(4) to 7(6) of the DPA. Further details on this can be found in our guidance on [‘Dealing with subject access requests involving other people’s information.’](#)
18. Further examples of information which may contain the personal data of more than one individual can be found in our guidance on [‘Determining what is personal data’](#).

Requests where some information relates only to third parties

19. A different approach is necessary where a document contains the personal data of several data subjects (including the applicant), but some information within the document relates only to third parties. To the extent that the request is for the applicant’s personal data, the public authority should refuse to confirm or deny whether the information is held, as explained above. The information that is only third party data should be dealt with under section 40(2) (or regulation 13(1)) and, where appropriate, section 40(5)(b). This would apply in cases where a document contains personal data that is separated into distinct sections relating to the different parties. It would be inappropriate to apply section 40(1)/regulation 5(3) or section 40(5)(a) to the information that clearly relates only to the third party (or parties) and not to the applicant.
20. In such circumstances a public authority should first consider the neither confirm nor deny requirements of section 40(5)(b) or regulation 13(5) regarding third party personal information. Further information on this is provided in our guidance on [Neither confirm nor deny in relation to personal data](#). If the information is held and the public authority is required to confirm this, consideration must then be given to section 40(2) or regulation 13(5).

Complaint files

21. As can be seen in the Fenney case, the issue of requests that comprise multiple data subjects often arises in the context of requests for information in complaint files.
22. 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. Where the complaint file is held by a public authority, a request can be made under FOIA or the EIR for the information contained in the file. The requester will often be the individual who made the complaint, and, in addition to containing his personal data, will usually contain personal data of other individuals.

Other considerations

23. You might also want to consider our guidance on [The exemption for personal information](#) which also discusses the exception for personal information under the EIR.
24. 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

25. 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.
26. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
27. If you need any more information about this or any other aspect of freedom of information, please [contact us: see our website \[www.ico.org.uk\]\(http://www.ico.org.uk\)](#).