

Section 25 Absolutely exempt personal information

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 25 absolute exemption for personal information. It is not intended to be a comprehensive assessment of the law in this area and a public authority is required to assess each request on the basis of its own individual facts.

A public authority can only rely on the exemption if the information falls within it. There is no prejudice test or public interest test.

A public authority should consider whether other exemptions, in addition to this one, may also apply to the requested information, bearing in mind that other exemptions might be more appropriate (see other exemptions guidance). Different exemptions may apply to different aspects of the requested information, although only one exemption needs to be engaged for information to be withheld.

A public authority may also need to consider whether to neither confirm nor deny that the information is held, if to do so would, in itself, be absolutely exempt under this section.¹

Is the requester asking for any of the following?	
Personal data about themselves? ² (consider whether it is data and personal data following the tables below).	
Personal census information?	
A deceased person's health record?	

Is the requester asking for information relating to another living person? If so continue with the following questions.	
Is the information data?	
Is it information which-	
(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose?	
(b) is recorded with the intention that it should be processed by means of such equipment	
(c) is recorded as part of a relevant filing	

¹ s19 of the Act and further guidance on NCND

² If they are requesting personal data about themselves then it should be dealt with as a subject access request under the provisions of the Data Protection Act 2002.

system or with the intention that it should form part of a relevant filing system	
(d) does not fall within (a), (b) or (c) but forms part of an accessible record	
(e) does not fall within paragraph (a)-(d) but is recorded information held by a public authority; (note, if it doesn't fall into any of the above categories then it will fall into this one if it is recorded information held by a public authority.	

Is it personal data?	
Does it relate to a living individual? (The answer must be yes to be personal data).	
Can they be identified by the data alone? If yes, then it is personal data. If no, consider the next question.	
Can they be identified by the data and other information which is in the possession of or is likely to come into the possession of the data controller or from the data and a combination of other information? Consider the following: <ul style="list-style-type: none"> • Who is the data controller • What other information is in the possession of the data controller? • What other information is likely to come into the possession of the data controller? <p>³</p> If it is impossible for the recipient to identify the individuals that the data relates to then it is not personal data.	

Is it sensitive personal data? (this needs to be assessed as the requirements for processing sensitive personal data are more stringent than personal data).	
Ascertained first that it is personal data. It has to be personal data to be sensitive personal data.	
Does the data relating to the data subject consist of information relating to <ul style="list-style-type: none"> • Racial or ethnic origin 	

³ Note that this refers to information not data so it is much wider and can include telephone calls etc.

<ul style="list-style-type: none"> • Political opinions • Religious beliefs or other beliefs of a similar nature • Membership of a trade union • Physical or mental health or condition • Sexual life • Commission or alleged commission by him of any offence; or • Any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence by any court in such proceedings? 	
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<p>Looking back at the definition of data does it fall within (a)-(d) above? If yes consider the following. (If it falls within category (e) continue to consider the next question).</p>
<p>Would disclosure of the information contravene one of the data protection principles?</p>
<p>A public authority can only disclose the personal data if it would be fair, lawful and meet one of the conditions in schedule 2 or, if dealing with sensitive personal data, one of the conditions in schedule 2 and schedule 3. Note that the data protection principles relate to the processing of data and include obtaining, recording, holding, organising, adapting, altering, retrieving, consulting or using the data as well as disclosing it.</p>

<p>Does the data fall within category (e)</p>
<p>Would disclosure of the data contravene any of the data protection principles in the exemptions in s29A of the DPA were disregarded?</p>
<p>If the exemptions with s29A are ignored, a public authority can only disclose the personal data if it would be fair, lawful and meet one of the conditions in schedule 2 or, if dealing with sensitive personal data, one of the conditions in schedule 2 and schedule 3.</p>

<p>The first data protection principle⁴</p> <p>Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless – (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met</p>

⁴ The first DP principle deals particularly with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data

Stage 1 - Would disclosure of the information be fair to the data subject?	
<p>What are the possible consequences of disclosure on the individual's concerned?</p> <ul style="list-style-type: none"> • It must not have an unjustified adverse effect (if a public authority is arguing this, it will need to establish how the disclosure will lead to adverse consequences). 	
<p>Is it sensitive personal data? The disclosure of this is likely to be unfair as it comprises information that individuals will regard as the most private and therefore in the majority of cases it will be in the reasonable expectation of the individual that such information is not disclosed.</p>	
<p>What are the reasonable expectations of the individual taking into account:</p> <ul style="list-style-type: none"> • Their expectations at the time that the information was collected and at the time of the request: <ul style="list-style-type: none"> - Expectation of privacy. - Private v public life⁵ and if public life, the seniority of the role, whether it is public facing, whether it involves responsibility for decisions on spending public money etc. • The nature of the request/content of the information. • The circumstances in which the information was obtained. • Whether the information has been or remains in the public domain. • FOIA principles of transparency and accountability. • Was the individual given specific assurances that the data would remain confidential? <p>The public authority has to decide objectively what would be a reasonable expectation i.e. would it be reasonable for the individuals concerned to expect that their personal data would be disclosed.</p>	
<p>Assess other factors that are relevant, for example, is there any other information in the public domain that may have a bearing on the consequences of disclosure or the reasonable expectations of the individual?</p>	
<p>Are there any legitimate interests in the</p>	

⁵ It is more likely to be fair to release information that relates to the professional life of the individual as if a data subject carried out a public function they must have the expectation that their public actions will be subject to greater scrutiny than their private lives.

<p>public having access to the information and the balance between these and the rights and freedoms of the data subjects? Despite the expectations of individuals and the consequences of disclosure there still may be a legitimate interest in disclosure to the public:</p> <ul style="list-style-type: none"> • Transparency. • Public interest in the issue the information relates to. • Public interest in disclosing the specific information. 	
<p>If the disclosure would not be fair then the information MUST not be disclosed.</p>	

<p>If a public authority has decided that it is fair – ask if the information is sensitive personal data (see above)? If no, move on to the next table. If yes, ask the following -</p>	
<p>Does the disclosure meet one of the following schedule 3 conditions?</p>	
<p>Does the public authority have explicit consent? Ask, is there a record that shows that each of the data subjects concerned has specifically consented to their sensitive personal data being disclosed to the world in response to the FOIA request?</p>	
<p>Has the data subject already put the information into the public domain? Consider:</p> <ul style="list-style-type: none"> • Is it realistically accessible to a member of the public? • How authoritative is the public domain source (speculation on twitter versus confirmation by an official source)? • The extent to which published information remains in the public domain. • Was the data subject content for the information to be public or did they make it public themselves? 	
<p>If the answer to both of these is “no” then a schedule 3 condition is not met and therefore there is no need to consider the schedule 2 conditions for sensitive personal data. The information MUST not be disclosed.</p>	

<p>If a public authority is dealing with sensitive personal data and has answered yes to one of the schedule 3 questions OR it is not dealing with sensitive personal data ask, is a schedule 2 condition met which would permit disclosure?</p>	
<p>The data subject has consented to the</p>	

disclosure? Ask, has the data subject given his consent freely to the specific disclosure with the understanding that their personal data will be disclosed to the requester and the world?	
<p>Is there a legitimate interest in disclosure to the public and is disclosure necessary to meet that interest and will not cause unwarranted harm to the data subject's interests? The key consideration being whether the disclosure is necessary? Ask:</p> <ul style="list-style-type: none"> • Is there a legitimate interest in disclosure to the public? (Will have been considered in fairness)? • Is the disclosure necessary to meet that legitimate interest? • Does the disclosure cause unwarranted harm to the interests of the individual? (Will have been considered in fairness). 	
<p>If a schedule 2 condition and a schedule 3 condition (where relevant) is not met, the information must not be disclosed. If a relevant condition is met the public authority must consider whether the disclosure would be lawful?</p>	

Is the disclosure lawful?	
Can the disclosure be made under a law (think of the legislation that the public authority works with in practice and governs the work that is done)? Note that the duty to provide information under FOIA does not in itself make a disclosure lawful.	
Is there an explicit or implied duty of confidence or an enforceable contractual agreement that would make the disclosure unlawful?	
<p>If the public authority has determined that the disclosure is lawful then disclosure will not contravene the first data protection principle.</p>	

Further Information	
<p>The Information Commissioner has published guidance on the application of this exemption. https://www.inforights.im/media/1299/exempt25a_personal_data.pdf</p>	
<p>The Information Commissioner's website also provides comprehensive guidance on the Data Protection Act 2002 and associated legislation. See https://www.inforights.im</p>	