

Section 39 Qualified exempt personal information

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 39 qualified 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.

Section 39 is a class based qualified exemption and **cannot** be engaged unless the information concerned falls within the class of information described by the exemption.

The first step in applying class based qualified exemptions is to establish whether the information concerned falls within the class of information described by the exemption. If a public authority cannot establish this then it will not be able to rely upon the exemption when answering a freedom of information request. If a public authority is satisfied that the information does fall within this class, it will then have to carry out the public interest test to determine whether the public interest in withholding the information is equal to or greater than the public interest in releasing the information (see part 3 of the Freedom of Information Act 2015 Code of Practice).

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 or qualified exempt information 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).	If yes, this is an absolute exemption under s25. (Refer to the s25 guidance).
Is the requester asking for information relating to another living person? If so continue with the following questions.	

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.

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 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? ³ If it is impossible for the recipient to identify the individuals that the data relates to then it is not personal data?	
If the information is personal data continue to consider the following-	

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

s8 Data Protection Act 2002	
<p>Has the public authority accepted a notice⁴ given by the data subject under s8 of the DPA 2002 which requires the data controller, holistically or for a specified purpose or in a specified manner –</p> <ul style="list-style-type: none"> • To stop processing the personal data of the data subject; or • To not start processing the personal data of the data subject, <p>on the basis that the processing is likely to cause damage or distress?</p>	
<p>In considering this, consider that processing includes releasing information in response to a freedom of information request.</p>	

If the exemption is engaged continue to assess the public interest test and whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test⁵	
Public interest factors in favour of disclosure	Public interest factors in favour of maintaining the exemption
Where there is particular public concern regarding the information.	The processing (release) of the information would be likely to cause harm or distress to the data subject and/or family.
To promote accountability.	Where, if released, the nature of the information could be misconstrued.
To promote transparency and openness.	Where there is no public concern.

Further Information
<p>The Information Commissioner has published guidance on the application of this exemption. https://www.inforights.im/media/1171/exemptq39_personal_data.pdf</p>

⁴ A public authority can accept a notice, under s8 DPA 2002, after a freedom of information request has been received but before it has been answered.

⁵ Examples of public interest arguments are listed for illustrative purposes and each request should be looked at on the basis of its own individual facts. Further guidance on carrying out the public interest test can be found in Part 3 of the Freedom of Information Act 2015 Code of Practice.