



The **Constitution** Unit

**Access to Personal
Information**

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Access to Personal Information

A handbook for officials

What is this handbook?

1. This is a handbook for officials in public authorities who have to make decisions on access to, or disclosure of, personal information.
2. Chapters 1 to 4 analyse the relevant provisions of the Data Protection Act 1998 and the Freedom of Information Act 2000 and gives advice on practical interpretation. Chapter 5 then applies this advice to real case studies.
3. Although the handbook is intended to be self-contained, it does assume a degree of familiarity with the terminology used in both Acts and, in particular, with the definitions in the Data Protection Act. The focus of this handbook is on access to and disclosure of personal information.
4. If you are unfamiliar with the Data Protection Act or the Freedom of Information Act you should first read the Constitution Unit's two earlier publications—*A Practical Guide to the Data Protection Act* and *A Practical Guide to the Freedom of Information Act*.
5. We would welcome any comments on the handbook and, in particular, any suggestions for case studies for inclusion in later versions.

Access to personal information—the legislative framework

1. Access to information is governed by the Freedom of Information Act 2000 (FoI Act) and the Data Protection Act 1998 (DP Act). The DP Act is fully in force. The FoI Act will be fully in force by January 2005.
2. This chapter explains why it is important to consider both Acts when dealing with a request for access to personal information.

The Freedom of Information Act

- 3.

reviewing their procedures for access by data subjects to manual data, disclosure of personal data about third parties and charging, in light of the FoI Act.

Subject access to manual data

11. The definition of *data* contained in Section 1(1) of the DP Act includes information which is processed manually (manual data) as well as electronically. In most respects, the DP Act now applies in full to all processing of personal data. In particular, a data subject's right of access applies equally to data processed in manual form and electronic form.
12. There is limited transitional relief for certain manual data up to 23 October 2007, but that does not relieve a data controller from the obligation to provide subject access.
13. Manual data are covered by the Act if they form 'part of a relevant filing system'. Broadly speaking, this means that information or data must be structured in such a way as to facilitate the processing of specific information about an individual.
14. The current approach in government, as explained in advice issued by the Lord Chancellor's Department, is to interpret this requirement narrowly. This approach leads to anomalies where the same information may be 'in' or 'out' depending on how the records are structured.
15. The Information Commissioner takes a broader view and we agree with her approach. Our advice is not to worry unduly about structure and to treat all information as data covered by the Act, in which case the boundaries are unimportant.
16. Section 68 of the FoI Act will amend the definition of personal data in the DP Act to include anything not already covered. It is hard to see how a narrow approach can be sustained once section 68 is in force.

Disclosure of third party information

17. The DP Act governs access to personal information and is primarily concerned with protecting the privacy of individuals. The DP Act does not impose any obligation on a data controller to disclose information to anyone other than the data subject.
18. Public authorities, therefore, have a discretion, when disclosure is not explicitly prohibited, as to whether to disclose personal information or not. Given that the overall objective of the DP Act is to protect privacy, more often than not that discretion is exercised in favour of non-disclosure.
19. The FoI Act changes this by setting out a framework within which public authorities must deal with requests for access to third party information. The effect is that the authority must release information about a third party unless the Data Protection Principles are contravened by the release of that information or if the rights of the data subject are breached in any other way.

20. The FoI Act comes fully into force in 2005. Public authorities need to be aware of the impact of the FoI Act on the release of personal information and anticipate this in records management policies and other procedures.

Time limits and fees

21. The DP Act currently sets a time limit of 40 da

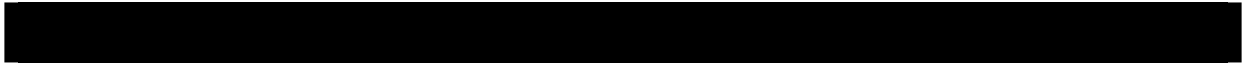
Disclosure of personal information

1. This Chapter considers the provisions of the FoI Act and the DP Act which cover disclosure of personal information.
2. There are two types of request for personal information:
 - a subject access request (a request by the data subject for information about himself or herself)
 - a third party request (a request by someone who is not the data subject for personal information about a data subject)

A subject access request

3. Access to an individual's own personal information is dealt with by the DP Act. When an individual requests information about him or herself it is called a *subject access request*. The FoI Act directs all subject access requests to the DP Act.
4. Section 7(1) of the DP Act sets out the right of access. An individual is entitled, on request:
 - to be informed by a data controller whether that data controller is processing personal data about him
 - if so, to be given a description of the data and certain other information about the processing
 - to have communicated to him or her (in an intelligible form) the information constituting the data and any information available regarding the source of the data
 - to be given certain information about any purely automated decision taking
5. Under Section 7(3), a data controller may ask fo

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16. The information [must] be released unless:

- disclosure would **contravene any of the data protection principles** (see below)
- the information would be

21. Processing data fairly means that at a minimum, the data subject needs to know who is processing their data and how and for what purposes. At best, data subjects should be given the opportunity to exercise control over non-essential processing.

22. When processing of personal data is contemplated, a judgement is needed as to whether the processing involved is fair and lawful. The expectations of the data subjects, what they have been told about the processing, what commitments have been given by the authority and the

religious or other beliefs, membership of trade unions, health, sexual life or commission of offences.

Table 4—Summary of conditions for processing sensitive personal data—Schedule 3¹

- with the explicit consent of the data subject (paragraph 1)
- to perform any right or obligation under employment law (paragraph 2)
- to protect the vital interests of the data subject or another person (paragraph 3)
- for the legitimate activities of certain not-for-profit bodies (paragraph 4)
- when the data have been made public by the data subject (paragraph 5)
- in connection with legal proceedings (paragraph 6)
- for the exercise of certain functions of a public interest nature (paragraph 7)
- for medical purposes (paragraph 8)
- for equal opportunity ethnic monitoring (paragraph 9)
- for the prevention or detection of any unlawful act (paragraph 10)
- for protecting the public against dishonesty or malpractice (paragraph 11)
- for publication in the public interest (paragraph 12)
- for providing counselling, advice or any other service (paragraph 13)
- for carrying on insurance business (paragraph 14)
- for equal opportunity monitoring other than ethnic monitoring (paragraph 15)
- by political parties for legitimate political activities (paragraph 16)
- for research (paragraph 17)
- for any lawful functions of a constable (paragraph 18)

30. A public authority cannot justify release on the basis that it has a 'legitimate interest' in disclosing the information, as it can where it is disclosing non sensitive data.

31. On the other hand, authorities which have a legitimate interest in disclosure may find that the disclosure fits within one of the specific exceptions listed in Schedule 3. For example, one of the conditions for processing sensitive data is that the processing is necessary for the lawful functions of a constable. Applying this test to disclosure, if an authority needs to release sensitive personal data and it is necessary for the lawful functions of a constable, it will be able to do so.

¹ Schedule 3 as amended by Statutory Instrument 2000 No. 417: The Data Protection (Processing of Sensitive Personal Data) Order 2000

32. But in general, you are even more likely to need the data subject's consent to disclose, than you do with other data.

Principle 1—give an explanation to the data subject

33. If you disclose information to a third party and have not previously explained that you will be doing this to a data subject, you may be breaching principle 1.

34. In essence, the data subject must be put in a position where he or she knows at least the identity of the data controller, the purpose or purposes of the processing and any further information necessary to make the processing fair. A direct explanation must be given if the information is not already known to the data subject. The timing of giving that explanation depends on how the data are obtained and what further processing is done with it (Schedule 1, Part II, Paragraph 2(2)).

35. The DP Act is not specific about the further information necessary to make the processing fair; it could be information about disclosure of the data, information about the data subject's rights, or clarification about which information is mandatory (being requested under a statutory authority) and which is voluntary. A public authority subject to the Act could include a statement that the authority is under a general duty to provide access to information.

Principle 2—Compatible processing

36. Principle 2 says that personal data shall not be processed in any manner incompatible with the purposes for which the data were obtained. There is a strong link to Principle 1 in that it is difficult to see how if the processing is fair it can at the same time be incompatible. Equally, incompatible processing must be inherently unfair.

37. The DP Act also says, however, that in determining whether any disclosure is compatible, regard shall be had to the purposes for which the data are intended to be processed by the recipient (Schedule 1, Part II, Paragraph 6). This would entitle an authority to enquire of a person making a request for personal data, for what purposes he wanted the data. So the legitimate interests of the recipient come into play again, as they do under the paragraph 6(1) schedule 2 provisions.

38. In some circumstances the recipient and the data controller may have different purposes which are nevertheless compatible.

Principle 8—Adequate protection for transfer overseas

39. Disclosure of personal data to a recipient outside the European Economic Area is restrained by Principle 8 unless there is an adequate level of protection in the destination country.

40. This does not mean that there must be a datais t ont (Schedained

The right to prevent processing

42.

What if I get it wrong?

1. In some circumstances, the effect of the legal provisions is clear, and the obligation on the data controller is straightforward. For example, a straightforward request by the data subject when you are asked to provide subject access and no third party data are involved is unlikely to raise any difficult issues.
2. In other circumstances you will be faced with

accessible). The manual documents, as well as the electronic ones, should be treated as personnel data.

3. Can you refuse to release all the information Mrs Malade has requested because of the impending Employment Tribunal hearing?

No. You can refuse to release any information which is covered by legal professional privilege (DP Act, Schedule 7, Paragraph 10) but the mere fact that there is a case before the Employment Tribunal does not give you reason to withhold all Mrs Malade's personal information. You can withhold the advice from the department's solicitor.

4. Do any DP Act exemptions apply?

If an exemption applies you can withhold the information it covers from Mrs Malade. If there was a confidential reference on her file **given** by your department. (for example to the DTI) you could withhold it under Schedule 7 Paragraph 1. The exemption does not apply to references on file **received** by your department (for example from Mrs Malade's previous employers).

5. How should you treat the third party data on the personnel file?

You should not reveal information identifying a third party individual without their consent, unless it is reasonable to do so in all the circumstances. In deciding whether it is reasonable, you have to have regard to any duty of confidentiality to the third party.

The file contains third party information provided by Mrs Malade herself (e.g. about next of kin) and also information which is likely to be known to her already (e.g. about her managers or colleagues). You may disclose such information without seeking the consent of those third parties.

The file also contains information supplied by third parties in confidence. You should not reveal such information without consent. If you do not already have consent, you should seek it, if practicable to do so. If you get consent, then the information should be disclosed.

If you do not seek consent, or if consent is refused, then you must edit the information so as to blank out anything which would disclose the identity of any third parties to Mrs Malade.

6. How wide should your search for personal data be?

There is nothing to prevent you from asking Mrs Malade if she can refine her request. But her entitlement is to 'the information constituting personal data'. Mrs Malade has asked for all the personal data, and if she maintains that comprehensive request, then you have to provide everything.

7. Should you contact the DTI to discuss?

Nothing in the DP Act obliges you to inform other departments of Mrs Malade's request. It would be helpful to Mrs Malade, though, to tell her that if she wants information from the DTI she should apply separately.

8. What about the department's policy on sick leave?

The sick leave policy is not personal information. You should consider whether to release it under the FoI Act. Unless there is an applicable FoI Act exemption you should provide Mrs Malade with a copy of the policy. If it were available through the Corporation's publication scheme you could refer Mrs Malade to the scheme.

Staff seconded to government departments from private companies

The facts

There have been a series of recent press stories alleging that the employers who have seconded staff to a government department free of charge have won substantial contracts or benefited from favourable policy changes. Ministers are known to be sensitive about the unfavourable publicity which PFI projects have been attracting recently.

Cabinet Office guidance on the handling of secondments says that individuals on secondment should ensure that in the course of their duty there is no conflict of interest that will cause embarrassment either to their organisation or to the department or agency.

The identity of staff on secondment from the private sector has sometimes been published in parliamentary answers, but this has not been done for at least 18 months. Sj/14entabithe

Principle 1—fair and lawful processing

Principle 2—processing for specified, lawful and compatible purposes

Under Principle 1 there are the general conditions of fair and lawful processing and also the specific conditions in Schedules 2 and 3. There are no sensitive data in this case, so you need to look at Schedule 2 only. Disclosure would fall under Para 6(1)—processing for the legitimate interests of the third party—the journalist.

As regards the general conditions of fair and

New evidence

The facts

Mrs J is a British citizen. Her husband, Mr N, is a foreign national who obtained leave to enter the UK for 12 months as a foreign spouse. He has applied to the Home Office Immigration and Nationality Directorate for indefinite leave to remain as a spouse. Mrs J has written to your department stating that Mr N is no longer living with her, that he has threatened violence against her and that he is having a relationship with a neighbour, Miss A.

Mrs J's letters were not attached to the correct file and Mr N was granted indefinite leave to remain. Mrs J has found out that Mr N has received permission to stay indefinitely.

The request

You work for the Home Office.

Mrs J has now telephoned to ask why her letters were ignored and to ask for the return of those letters. She has also asked you to provide her with details of why Mr N was granted indefinite leave to remain, for copies of any letters he may have written explaining his domestic circumstances, and copies of any police reports which may have been received by your department, including advice on where he is currently living.

Questions and comments

1. How much of the information is personal data and who is the data subject?

Mrs J is asking for information about Mr N. The information requested—her letters, his letters, police reports, why he was granted leave to remain—is all personal data all relating to Mr N, but may also, in part, relate to other individuals. J0000cki

Mrs J as norgues J ha h9 9 Tct43N has re7d who is9ac mssalso as0.00k for the he46orris 40 mai

Subject access to information which Mrs J has herself provided in the first place is straightforward. You should provide her with copies of her letters, though public records policy is that the originals should remain on the file and should not be returned to her.

Other information about herself is likely to be mixed up with information about Mr N, which she has requested anyway. The issue is what personal data about Mr N can be released.

3. What information about Mr N should you release?

Mrs J is requesting information about someone else. This means that you should not reveal information identifying Mr N without his consent unless it is reasonable to do so in all the circumstances. In deciding whether it is reasonable, you have to have regard to any duty of confidentiality to him.

In the present case, except for information which you know is already known to Mrs J, it would not be reasonable to release information relating to Mr N without his consent.

You do not have to seek Mr N's consent, but without it you cannot release the information to Mrs J.

4. Should any fears which Mrs J may have for her safety influence your decision whether or not to disclose information?

If asking Mr N's consent would put Mrs J's safety at risk, then you should take that into account when deciding whether to seek his consent or not.

Biased research

The facts

Over the last few months your department has responded helpfully to a series of requests from Dr John Smith, an academic interested in the department's research programme. He has now published a severely critical paper about the research, claiming that reports underpinning major initiatives are biased, and were deliberately constructed to reflect favourably on contentious policies.

The researchers whose work has been questioned are furious. So are Ministers, who have told officials to provide no further assistance to Dr Smith. However, the minister's special adviser, known for his combative response to criticism, has decided to take an interest. He has emailed several of the researchers, inviting them to scrutinise Dr Smith's past research work and let him have any evidence, in confidence, of shortcomings of Dr Smith' own work. He presumably intends to use this to question Smith's own credibility.

Several email responses have been received, reflecting a mix of academic tittle-tattle and professional rivalry. One response goes further and suggests that Smith was once accused of fabricating data. The department's lawyers have warned that this material could be defamatory, and should be treated with great caution.

The Request

Out of the blue, Dr Smith has written asking for copies of any information held about him or his report.

Questions and comments

1. To what extent is the information requested personal data?

The information requested includes academic tittle-tattle, remarks arising from professional rivalry, accusations about quality of research. This, as well as information about his report, is all personal data relating to Dr Smith. The definition of personal data in the DP Act includes opinions about an individual.

2. How should you deal with the request?

You should deal with Dr Smith's request for information about himself as a subject access request under the DP Act. It will certainly be mixed within information about third parties, in particular, other researchers and critics of Dr Smith's work. For the most part, this will not be cleanly separated from information about him.

In responding to a subject access request, you should not reveal information identifying third party individuals without their consent unless it is reasonable to do so in all the circumstances.

In this case, it would not be reasonable to reveal information relating to third parties to Dr Smith without their consent. You should edit the information so as to blank out anything which would disclose the identity of the th

Looking all over the world

The facts

Madame D'Amour is the Minister of Finance in the coalition Ruritanian Government. Madame

argument in the present case that much of the data does not have the necessary structure so that specific information relating to a particular individual is readily accessible. Eventually, though, Section 68 of the FoI Act will extend the definition of data to include anything which is not already covered.

3. Are there any DP Act exemptions that apply?

There is no exemption covering prejudice to international relations in the DP Act.

There is no exemption to protect against embarrassing the government.

4. Should you liaise with the other departments which have received similar requests?

There is no legal obligation to liaise with other departments, though it would be sensible to do so via their FoI/DP co-ordinators.

5. How much of the cost of dealing with this request can be passed on to Madame D'Amour?

You can not pass on the full cost of dealing with the request. Even for unstructured data where the cost limit is applied, the maximum fee for subject access is £10.

Sources of further information and advice

For more information, see the reference sources below.

HMSO

The text of Acts of Parliament and Statutory Instruments is accessible via the following web site:

www.legislation.hmso.gov.uk

The Information Commissioner

The Commissioner publishes general guidance on the interpretation of the Act and more detailed guidance on specific issues. For the latest information and guidance, see the 'Guidance and other publications' section on Commissioner's web site:

www.informationcommissioner.gov.uk

The Public Record Office

The PRO publishes guidance on records management for public authorities:

www.pro.gov.uk/recordsmanagement/

The Lord Chancellor's Department

The LCD is responsible for government policy on data protection, freedom of information and public records:

www.lcd.gov.uk

