

Exemptions from the right of access to personal data

Individuals have a fundamental right to be supplied with a copy of the personal data being processed about them upon written request, i.e. a subject access request is made.

There are, however, some restrictions and exemptions from this right in limited circumstances.

Restrictions apply to the supply of other people's information when complying with a subject access request. Third party identifying information should not be supplied to the person making the subject access request unless:

- the third party agrees to the disclosure
- it is reasonable in all the circumstances to make the disclosure without the consent of the third party
- Regulations provide that third party details are not to be withheld.

Matters to consider:

- Information that identifies a third party - this could include not only the name, address, or email contact details, but information such as the date and time of a meeting or telephone call
- reasonable in all the circumstances - this can only be judged on a case-by-case basis. For example if a complaint has been lodged by the third party against the person making the request, and the person making the request knows the identity of the third party, it is generally reasonable for the identifying information to be disclosed

Regulations apply in limited circumstances and generally require the disclosure of personal data which identifies certain third party individuals to the data subject when complying with a subject access request.

These circumstances include:

- Educational records - information identifying employees of the Department of Education and Children, or teachers, or other employees, of maintained schools
- Social work records - this generally applies to information identifying any person providing "social work" services, such as those employed by the Department of Health and Social Care, probation service, etc
- Physical or mental health records - information identifying a health professional who has compiled or contributed to the health record or has been involved in the care of the data subject in his capacity as a health professional.

The relevant Regulations also include some consideration as to whether the supply of personal data would be likely to cause significant harm. Copies of the Regulations are available on the Legislation page and should be consulted, and applied, as necessary.

Exemptions

Part 4 of the Act contains exemptions from certain requirements or obligations. Exemption from the "subject information provisions" includes exemption from the obligation to comply with a subject access request made under section 5 of the Act.

The exemptions are not mandatory, and a data controller can decide whether they wish to refuse to comply with a subject access request by relying on that particular exemption.

The exemptions from the right of access include those that have an element of prejudice to consider and those which are based on the type, or class, of information, but do not require any consideration of prejudice.

Prejudice Test

Crime and taxation

This exemption applies, in any particular case, only to the extent that applying those provisions would be likely to prejudice the crime and taxation purposes. You need to judge whether or not this effect is likely in each case – you should not use the exemption to justify withholding subject access to whole categories of personal data if for some individuals the crime and taxation purposes are unlikely to be prejudiced.

Regulatory activity

This exemption applies to public functions exercised by various watchdogs whose regulatory role is recognised by the public and the sector they oversee. Such regulators may be established by law or as a result of mutual agreement between the participants in their sector of business. Functions like complaint handling, which are subsidiary activities of most organisations, do not fall within the scope of the exemption. There is no blanket exemption for regulatory activities – not even for the activities that fall within the scope of the exemption. This is because personal data that is processed to perform such activities is exempt from the subject information provisions only to the extent that applying those provisions would be likely to prejudice the proper performance of the activities.

Negotiations

Personal data that consists of a record of your intentions in negotiations with an individual is exempt from the subject information provisions to the extent that applying those provisions would be likely to prejudice the negotiations.

Management information

Applies to information in management plans, such as details of planned redundancies, before the plans are revealed, to the extent that applying those provisions would be likely to prejudice the business or other activity of the organisation.

Class Exemptions

Domestic Purposes

This exemption applies when personal data is processed by a data controller who is an individual (not an organisation) only for the purposes of their personal, family or household affairs. None of the data protection principles apply in these circumstances, nor do any of the rights which the Act gives to

	data subjects.
Publicly available information	Where an organisation is obliged by or under an enactment to make information available to the public, personal data that is included in that information is exempt from the right of access.
Confidential References	Only applies to confidential references <i>given</i> by the data controller
Legal professional privilege	Information for which legal professional privilege could be claimed in legal proceedings

Exemption from the right of access also apply in relation to national security and the armed forces, personal data that is processed only for journalistic, literary or artistic purposes, personal data that is processed only for research, statistical or historical purposes, avoiding an infringement of the privileges of Tynwald, the Council or the Keys, judicial appointments and honours, Crown employment and appointments, corporate finance, management forecasts, examination marks and scripts.

Asserting Exemptions

When applying an exemption, the data controller has to bear the burden of proving that the exemption applies and that, where a consideration of proportionality and necessity is required, to evidence where that balance lies.

"It is for those who seek to assert the exemption ... to bring themselves within it, and, moreover, to do so convincingly, not by mere assertion but by evidence that establishes the necessity contemplated in the Directive [95/46/EC]". ([2003] EWHC 2073 (Admin) (Lord))

When considering whether an exemption applies, the data controller must review each item of personal data separately and *"must apply the balancing proportionality test to each item of personal data. There is no one cap that fits all". ([2015] EWHC 2484 (QB))*

