

When an individual makes a subject access request, ("request"), they are entitled to be supplied with (among other things):

- the information which is their personal data; and
- any information available to the data controller about the source of the data.

Responding to a request may occasionally involve providing the requester with "third party information", i.e. personal information relating to another individual, or identifying another individual as the source of the information sought by the requester.

This guidance note deals with the potential conflict between an individual's right of access and a third party individual's right to privacy or confidentiality which can arise when responding to a request.

The fact that third party information is present does not disengage the right of access. On the contrary, section 5(5) of the Data Protection Act (DPA) requires that as much personal data of the requester as possible must be provided without disclosing third party information.

This guidance sets out the main factors you need to consider when you receive a request that involves information relating to other individuals as well as the individual making the request. A flowchart is attached at the end of this document to assist you to make decisions regarding the disclosure of third party personal data in response to a request.

Deciding whether to disclose third party information

Your obligation is to provide the requester with their personal data, i.e. **information about them**. This is not an entitlement to copies of documents etc.

In most circumstances, therefore, compliance with the request can be achieved without disclosing third party information by, for example, redacting the document, removing the third party information, or copying and pasting the personal data of the requester into a new document.

Each of these actions will comply with the requirement to supply the requester with their personal data in permanent form.

If you are unable to separate, or remove, the third party information from the personal data of the requester, you should consider the following:

Is there a professional relationship between the identified third party and requester?

There are circumstances where third party information should not be removed. These circumstances include where the request has been made to a relevant data controller for particular types of records, i.e. health, education or social work records, and the third party has a particular professional relationship to the requester, such as social worker, health professional or teacher.

In practice, this means that if the third party is the requester's education, health or social

services professional, information relating to the third party should be disclosed, unless it is likely that serious harm would be caused. (See Note 1 for the relevant Modification Orders)

Is the third party information already known by the requester?

If the third party information:

- has previously been provided to the requester by you,
- is already known by them, or
- is generally available to the public,

it will be more likely to be reasonable for you to disclose that information.

It follows that third party information relating to a member of staff (acting in the course of their duties), who is well known to the requester through their previous dealings, would be more likely to be disclosed than information relating to an otherwise anonymous private individual.

However, it will always depend on the circumstances of the case. In the *Durant v Financial Services Authority* case ([2003] EWCA Civ 1746) the Court of Appeal decided it would be legitimate for the Financial Services Authority (the data controller) to withhold the name of one of its employees who did not consent to disclosing the requested information because Mr Durant (who made the request) had abused them on the telephone.

Where the third party is the source of the information held about the requester, there may be a strong case for their identification if the requester needs to correct some damaging inaccuracy. This is often a consideration where a complaint has been lodged about the requester. The guidance note "Subject Access Requests and complaint files" provides further advice.

If the disclosure of third party information is still unavoidable, subsection 5(4) of the DPA states that you do not have to comply with the request if it means disclosing third party information unless:

- the third party has consented to the disclosure; or
- it is reasonable in all the circumstances to comply with the request without the consent of the third party.

However, subsection 5(4) is **only relevant** if third party information forms part of the information that the requesting individual is entitled to, i.e. the personal data of the requester, and the personal data of the requester and the third party are intertwined and/or inextricable. In such a case, subsections 5(4) – 5(6) set out what you should consider.

Has the third party consented?

The practical effect of subsection 5(4)(a) is that the clearest ground for disclosing the third party information is to get the third party's consent.

If the third party has consented, you would be obliged to comply with the request and disclose all the relevant information, including the third party information.

However, there is no strict obligation to try to obtain consent.

There will also be circumstances where it will clearly be reasonable to disclose the third party information without consent, for example, where the third party information concerned is

already known to the requester.

Indeed in some cases it may not be appropriate to try to get consent (for instance, if to do so would inevitably involve a disclosure of personal data about the requesting individual to the third party).

In practice, it may be difficult to get consent. The third party may be difficult to find, they may refuse to give consent, or it may be impractical or costly to try to get their consent in the first place. In these situations, you would then need to consider whether it was 'reasonable in all the circumstances' to disclose the third party information anyway (subsection 5(4)(b)).

Is it "reasonable in all the circumstances" to disclose without consent?

Subsection 5(6) provides a non-exhaustive list of factors to be taken into account when deciding what would be 'reasonable in all the circumstances'.

These include:

- any "duty of confidentiality" owed to the third party;
- any steps you have taken to try to get the consent of the third party;
- whether the third party is capable of giving consent; and
- any express refusal of consent by the third party.

Confidentiality

One factor to be considered in assessing how reasonable a disclosure would be is whether a duty of confidence exists for the third party information.

This would arise where genuinely 'confidential' information, i.e. information that is not generally available to the public, has been disclosed to you with the expectation that it will remain confidential. This expectation might result from the relationship between the parties. For instance, the following relationships would generally carry a duty of confidence in relation to information disclosed:

- Medical (doctor/patient)
- Employment (employer/employee)
- Legal (solicitor/client)
- Financial (bank/customer)
- Caring (counsellor/client)

However, you should not always assume confidentiality: just because a letter is marked 'confidential', a duty of confidence does not necessarily arise (although this marking may indicate an expectation of confidence). It may be that the information in such a letter is widely available elsewhere and so does not have the 'necessary quality of confidence', or there may be other factors, such as the public interest, which mean that an obligation of confidence does not arise.

However, in most cases where a clear duty of confidence does exist, it will usually be reasonable to withhold the third party information unless you have the consent of the third party to disclose it.

Circumstances relating to the requester

These will also be relevant in assessing how reasonable it is to disclose third party information - in particular, how critical access to the third party information is in preserving the privacy rights of the requester.

This approach reflects the judgment in the Gaskin case (see Note 2). In this case, the individual, who had been in local authority care for most of his childhood, wanted to see the local authority records relating to him as they were the only coherent record of his early childhood and formative years. The court held that the local authority had to weigh the public interest in preserving confidentiality against the individual's right to access information about his life, even where consent to release the information had been withheld.

Disclose or withhold?

In practice, circumstances where it is impossible to extract third party information from the requester's personal data occur infrequently and when it does occur, will usually only relate to personal data in one or two sentences.

However, you must still communicate as much of the remaining personal data relating to the requester as you can without disclosing the identity of the third party. This can be achieved by redaction, or other method of removing the third party information, or copying and pasting the requester's personal data into a new document.

You should only withhold the requester's personal data that contains the third party information if:

- The third party is NOT a relevant professional; or
- You cannot extract the third party identifying information, and
 - the third party information is not already known to the requester;
 - you have not sought or obtained the consent of the third party for disclosure of their personal data; or
 - you are not satisfied that it would be reasonable in all the circumstances to make that disclosure without consent, for example a duty of confidentiality exists.

The Information Commissioner would therefore expect you to be able to justify, and keep a record of, your course of action and reasoning, including, for example, why you chose not to try to obtain consent or why it was not reasonable in the circumstances to supply the requester with the third party information in those particular circumstances.

Note 1 SD19/03, SD20/03, SD21/03 (<http://www.tynwald.org.im/links/tls/SD/Pages/default.aspx>)

Note 2 *Gaskin v United Kingdom* [1990] 1 FLR - this was a case before the European Court of Human Rights which looked to balance competing rights under Article 8 of the European Convention on Human Rights and which provides the basis for section 7(4) and associated provisions of the DPA.

Subject Access Requests - Third party personal data flowchart

