

This document does not constitute legal advice. If you require a legal opinion or legal advice you should contact a Manx Advocate.

PLEASE NOTE THAT THIS GUIDANCE HAS BEEN PARTIALLY REVISED TO INCLUDE REFERENCE TO THE RELEVANT RESTRICTIONS/EXEMPTIONS IN SCHEDULE 9 TO THE GDPR AND LED IMPLEMENTING REGULATIONS 2018.

The paragraphs of Schedule 9 confuse exemptions from compliance with principles with restrictions on the right of access - and in some cases extends to restriction on other rights, such as the right to erasure, restriction on processing etc.

Controllers should exercise caution when seeking to apply either restrictions on rights OR exemptions from complying with principles.

However, the general obligation in respect of rights is to “facilitate the exercise of those rights”.

The application of any restrictions/exemption must be considered on a case-by-case basis as departure from the general requirements to comply with rights and principles is only to the minimum extent necessary.

This guidance cross-references some relevant provisions of the DPA2002 and the associated paragraphs in Schedule 9.

Existing references in this document to:

“non-disclosure provisions” generally means compliance with principles

“subject information provisions” means the requirement to give transparency information and the right of access to personal data.

Restrictions/exemptions

Crime and taxation – Paragraph 1 of Schedule 9 (formerly Section 25 DPA 2002)

Sometimes appropriate to disclose personal data for certain purposes to do with criminal justice or the taxation system. In these cases, individuals’ rights may occasionally need to be limited.

In particular, the paragraph deals with several situations in which personal data is processed for the following “crime and taxation purposes”:

- the prevention or detection of crime;
- the apprehension or prosecution of offenders; and
- the assessment or collection of tax or duty.

Personal data processed for any of these purposes is exempt from:

- an organisation's duty to comply with transparency; and
- an individual's rights.

However, the restriction/exemption applies, in any particular case, only to the extent that applying those provisions would be likely to prejudice the crime and taxation purposes.

The police process an individual's personal data because they suspect him of involvement in a serious crime.

If telling the individual they are processing his personal data for this purpose would be likely to prejudice the investigation (perhaps because he might abscond or destroy evidence) then the police do not need to do so.

You need to judge whether or not prejudice is likely in each case – you should not use the exemption to justify withholding subject access to personal data if the crime and taxation purposes are unlikely to be prejudiced.

An individual makes a subject access request to the Treasury Income Tax Division (ITD) for personal data they hold about him in relation to an ongoing investigation into possible tax evasion.

If disclosing the information which ITD have collected about the individual would be likely to prejudice their investigation (for example, the information may reveal a source of evidence), ITD could refuse to grant subject access to the extent that doing so would be likely to prejudice their investigation.

If, however, the individual does not make the subject access request until some years later when the investigation (and any subsequent prosecution) has been completed, it is unlikely that complying with the request would prejudice the crime and taxation purposes – in which case ITD would need to comply with it.

The exemption will not justify withholding *all* the personal data about an individual when *only part* of the personal data would be likely to prejudice those purposes.

In the above example about an ongoing investigation into possible tax evasion, ITD would be entitled to refuse subject access to personal data which would be likely to prejudice their investigation.

However, this would not justify a refusal to grant access to other personal data they hold about the individual.

Personal data is also exempt from the non-disclosure provisions if:

- the disclosure is for any of the crime and taxation purposes; and

- applying those provisions in relation to the disclosure would be likely to prejudice any of the crime and taxation purposes.

“likely to prejudice” is not define but case law has indicated that this implies there would have to be a substantial probability (rather than a mere risk) that complying with the provision would noticeably damage one or more of the crime and taxation purposes.

The police ask an employer for the home address of one of its employees as they wish to find him urgently in connection with a criminal investigation. The employee is absent from work at the time.

The employer had collected the employee’s personal data for its HR purposes, and disclosing it for another purpose would ordinarily breach the first and second data protection principles.

However, applying those principles in this case would be likely to prejudice the criminal investigation. The employer may therefore decide to disclose its employee’s home address without breaching the DPA.

In the above example the exemption has applied to the disclosure of the employees address *only*. The exemption does not extend to all information in the employee’s HR file.

If challenged, you must be prepared to defend your decision to apply an exemption to the Information Commissioner or the court. We would therefore suggest that any such decisions are taken at a senior level in your organisation and the reasons for the decisions are documented.

It is important to understand that this exemption *does not* oblige you to disclose personal data to the police or to other law enforcement agencies. More advice can be found in our guidance note *Releasing information to prevent or detect crime*.

Another limb of the crime and taxation exemption is set out in paragraph 2 of Schedule 9 (formerly DPA 2002 section 25(2)).

Personal data which

- is processed for the purpose of discharging statutory functions; and
- consists of information obtained for this purpose from someone who held it for any of the crime and taxation purposes

is exempt from the subject information provisions to the extent that applying those provisions to the personal data would be likely to prejudice any of the crime and taxation purposes.

This prevents the subject information provisions applying to personal data which is passed to statutory review bodies by law enforcement agencies, and ensures that the exemption is not lost when the information is disclosed during a review.

A formal complaint has been received by the Police Complaints Commissioner (PCC) by Mr A who is also the subject of a criminal investigation.

Documents provided to the PCC for the purposes of the investigation contain personal data about Mr A which the Isle of Man Constabulary would not have been obliged to disclose to Mr A in response to a subject access request – because doing so would be likely to prejudice its criminal investigation.

If Mr A makes a subject access request to the PCC, he has no greater right of access to the personal data in question.

There is another exemption set out in paragraph 3 of Schedule 9 (formerly DPA 2002 section 25(4)) that is designed to prevent the data protection legislation being misused to force public authorities to disclose information about the operation of crime detection and anti-fraud systems, where such disclosure may undermine the operation of those systems.

Regulatory activity – paragraph 20 of Schedule 9 (formerly DPA 2002 section 27)

Paragraph 20 provides an exemption from the subject information provisions for processing personal data in connection with regulatory activities.

The exemption is not available to all organisations, and applies only to the core functions of bodies that perform public regulatory functions concerned with:

- protecting members of the public from dishonesty, malpractice, incompetence or seriously improper conduct, or in connection with health and safety;
- protecting charities; or
- fair competition in business.

The 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 *“for any function which is of a public nature and is exercised in the public interest”*.

The exemption does not apply to investigatory or complaint-handling functions that may benefit the ‘public’ but which are undertaken by organisations when investigating their own activities. Functions such as complaint handling, which are subsidiary activities of most organisations, do not fall within the scope of this exemption.

Publicly available information – paragraph 6(1)(a) (formerly DPA 2002 section 30)

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 subject information provisions;
- the non-disclosure provisions;
- the organisation’s duty to comply with the fourth data protection principle (accuracy); and
- an individual’s right in certain circumstances to have inaccurate personal information rectified, blocked, erased or destroyed.

The provisions mentioned in the third and fourth bullet points form part of the non-disclosure provisions. However, they are mentioned separately here because there is an automatic exemption

in these circumstances. There is no need for the organisation to show that the provisions are inconsistent with the disclosure.

Companies Registry is legally obliged to maintain a public register containing certain information about companies, including the names and (subject to certain restrictions) addresses of company directors.

Companies Registry may therefore refuse to comply with a subject access request if the personal data sought forms part of the information which Companies Registry is required to make publically available.

The exemption only applies to the information that the organisation *is required to publish*. If it holds additional personal data about the individuals, the additional data is not exempt even if the organisation voluntarily publishes that data.

Disclosures required by law – paragraph 6(1)(b) & (c) (formerly DPA 2002 section 31(1))

Personal data is exempt from the non-disclosure provisions if you are required to disclose it:

- by or under any statutory provision;
- by any rule of law; or
- by an order of a court

In these circumstances, the legal obligation overrides any objection the individuals may have.

Legal advice and proceedings – section 31(2)

Personal data is exempt from the non-disclosure provisions where the disclosure of the data is necessary:

- for or in connection with any legal proceedings (including prospective legal proceedings);
- for obtaining legal advice; or
- for establishing, exercising or defending legal rights.

You do not have to disclose personal data in response to a request from a third party simply because this exemption can be applied. You can choose whether or not to apply the exemption to make a disclosure, and you should do so only if you are satisfied that the disclosure falls within the scope of the exemption.

In other words:

- it is necessary for one of the above purposes; and
- applying the non-disclosure provision would be inconsistent with the disclosure.

When faced with a request for disclosure, it can be difficult to decide whether the necessity test can be satisfied. You may also be reluctant to make a disclosure of personal data because of the nature of your business, in particular your relationship with the individual. In such circumstances you may decide not to comply with the request, unless obliged to do so under a court order.

Confidential references - paragraph 17 (formerly DPA 2002 Schedule 7, paragraph 1)

Personal data is exempt from an individual's right of subject access if it comprises a confidential reference that an organisation gives (or is to give) in connection with education, training or employment, appointing office holders, or providing services.

The exemption only applies to references you give, and not to references you receive. For further information, please see the guidance note on subject access requests and job references.

Company A provides an employment reference for one of its employees to company B. If the employee makes a subject access request to company A, the reference will be exempt from disclosure.

If the employee makes the request to company B, the reference is not automatically exempt from disclosure and the usual subject access rules apply.

Management information- paragraphs 15 (formerly DPA 2002 Schedule 7, paragraph 5)

A further exemption applies to personal data that is processed for management forecasting or management planning. Such data is exempt from the subject information provisions to the extent that applying those provisions would be likely to prejudice the business or other activity of the organisation.

The senior management of an organisation are planning a re-organisation. This is likely to involve making certain employees redundant, and this possibility is included in management plans.

Before the plans are revealed to the workforce, an employee makes a subject access request.

In responding to that request, the organisation does not have to reveal its plans to make him redundant if doing so would be likely to prejudice the conduct of the business (perhaps by causing staff unrest in advance of an announcement of the management's plans).

Negotiations - paragraph 16 (formerly DPA 2002 Schedule 7, paragraph 7)

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.

An individual makes a claim to his insurance company. The claim is for compensation for personal injuries which he sustained in an accident.

The insurance company disputes the seriousness of the injuries and the amount of compensation they should pay.

An internal paper sets out the company's position on these matters and indicates the maximum sum they would be willing to pay to avoid the claim going to court.

If the individual makes a subject access request to the insurance company, they would not have to send him the internal paper – because doing so would be likely to prejudice the negotiations to settle the claim.

Legal professional privilege – paragraph 10 (formerly DPA 2002 Schedule 7, paragraph 10)

Personal data is exempt from the subject information provisions if it consists of information for which legal professional privilege could be claimed in legal proceedings.

Are there any further exemptions?

Yes. Exemptions are also available in relation to:

- national security and the armed forces; (Regulation 22)
- personal data that is processed only for journalistic, literary or artistic purposes; (para. 22 Schedule 9)
- personal data that is processed only for research, statistical or historical purposes; (para.23 Schedule 9)
- personal data relating to an individual's physical or mental health. This applies only in certain circumstances and only if granting subject access would be likely to cause serious harm to the physical or mental health of the individual or someone else; (para 26 Schedule 9)
- personal data that consists of educational records or relates to social work; (para 27 Schedule 9)
- personal data processed for, or in connection with, a corporate finance service involving price-sensitive information; (para 19 Schedule 9)
- examination marks and personal data contained in examination scripts; (para 18 Schedule 9) and
- personal data processed for the purposes of making judicial, Crown, or Ministerial appointments or for conferring honours (paras 11 & 12 Schedule 9).

Updated 25 June 2020