



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN36: Section 40 (Information which is Personal Data whose release is governed by the Data Protection Act (DPA))

Document history

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What this is about:

This note provides an overview of the section 40 exemption in the Freedom of Information (FOI) Act. It provides general detail on section 40, the policy on release of MOD officials' names, MOD compliance points, and which other exemptions may apply to the same information. There is also an overview on requests for information on deceased personnel and MOD casework relating to section 40.

Section 40 of the FOI Act applies to:

- requests for the personal data of the applicant;
- requests for the personal data of someone else (a third party).

Section 40 is an absolute exemption and is not subject to a public interest test.

Detail:

The FOI Act and the Data Protection Act 1998 (DPA 98) are both concerned with access to information, though DPA 98 specifically relates to the processing of personal information relating to living individuals and cannot be used to protect information about people who are known to have died (if evidence of death is not provided or not already available i.e. within personnel records, death cannot be assumed and section 40 will apply). The term 'processing' includes the obtaining, holding, use or disclosure of personal data. As the name of the FOI Act suggests, [DPA 98](#) protects personal information through the application of the eight data protection principles.

'Personal data' is defined in section 1 of the DPA 98. The two main elements of personal data are that the information must "relate to" a living individual, and that individual must be identifiable. When an individual asks for his or her own personal data under the FOI Act, this should be treated as exempt under section 40(1) of the FOI Act and the individual should be advised to make a Subject Access Request (SAR) under the DPA 98 instead. This would be subject to the provision of sufficient information to locate the data and secondly confirmation of identity of the person making the request. [How to make a Subject Access Request for your personal data held by the Ministry of Defence](#)

If an individual is seeking personal information about a third party, it is exempt information under section 40(2) of the FOI Act. Section 40(2) sets out an exemption for third party data if one of the four conditions set out in section 40(3) or 40(4) is met.

It is unlikely that sensitive personal data (for example, information relating to health, ethnic status, sexual life) would be disclosable to a third party although in certain circumstances it may be permissible, subject to the relevant conditions in DPA 98.

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Personal data, such as home address, telephone number, marital status or information about an individual's personal life is also unlikely to be disclosable. However, information about public servants in their capacity as public servants (e.g. responsibilities, grade, work contact details, etc) may be disclosable, depending on the circumstances of the case, although there will be sensitive areas in MOD where this is not permitted. **Contact CIO SPP-Information Rights as other FOI Act exemptions may also apply to this information.**

Policy on release of names of officials:

It is MOD's policy that the names and contact details of officials below the Senior Civil Service (1* or equivalent), should be withheld under section 40(2) of the FOI Act, unless an individual is in an outward (public) facing post and their name is already in the public domain. The names and contact details of members of the Senior Civil Service (SCS) and their military equivalents (Commodore, Brigadier, Air Commodore and above) will normally be available in the public domain and so would not usually be withheld and their name and contact details can normally be disclosed.

MOD compliance points

- Personal data is defined in the DPA 98 and will include any recorded information in any form relating to an identifiable living person.
- If an individual makes a request for his/her own personal data under the FOI Act, the normal process is that you should cite section 40(1) of the FOI Act and advise the requester to submit a DPA SAR.
- The most common reason for refusing information under section 40 of the FOI Act is that it would contravene the first Data Protection Principle and would be unfair and unlawful to the individual concerned.
- If a particular item of information is the personal data of both the applicant and another individual this is exempt under section 40(1).
- Where information is about the applicant and information about someone else, where the 'third party' data is separable from the applicant's, only the personal data of the applicant falls within section 40(1); the other personal data would be considered separately under section 40(2).
- **Other exemptions** under the FOI Act **may apply to sensitive roles in the Department** and you should **seek CIO-CI-Access advice**.
- If an individual's personal information is wrongly released it will breach the DPA.
- Data which is personal data (applying the definition of personal data in the DPA) may be fairly and lawfully disclosed in response to an FOI request if a living person cannot be identified from the data (either from the data itself or from that data **and** other information already available to the requester) (e.g. because it is in the public domain.)
- There are two qualified exemptions under the FOI Act, which are subject to the public interest test but are rarely used i.e. for third party data if formal objections have been made under section 10 of the DPA 98 where processing is likely to cause damage or distress or if subject access exemptions apply under section 7(1)(a) of the DPA 98.
- If you are withholding personal information, issue a refusal notice explaining which subsection of the FOI Act applies and why (with details of DPA principles and schedule conditions where relevant). You should specify which part of the section 40 exemption applies (i.e. section 40(1), section 40(2) or both).

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Section 40(5) - Neither Confirm Nor Deny

If confirming or denying that information is held would itself contravene any of the data protection principles, then you are not required to do so under section 40(5) of the FOI Act. The duty to confirm or deny does not arise in connection with the personal data of the applicant because of section 40(5)(a). It does arise in connection with third party data unless the confirmation or denial itself would be exempt under section 40(5)(b). You should seek CIO-CI-Access advice (CIO-CI-AccessDP1 Tel: xxxxxxxxxxxxxx) if you are considering the use of section 40(5).

Other Exemptions that may apply:

- Section 21 exempts information which is available to the applicant by other means.
- Section 30 exempts information which is held, amongst other things, with a view to deciding whether to bring criminal proceedings.
- Section 31 protects information whose disclosure would be likely to prejudice, amongst other things, the apprehension or prosecution of offenders or the assessment or collection of any tax or duty.
- Section 38 protects information whose disclosure could endanger physical and mental health or the safety of any individual. . In order to engage this exemption, you must demonstrate that disclosure of the information would, or would be likely to, have a detrimental effect upon the physical or mental health of any individual, or the safety of any individual, that is more than trivial or insignificant. This exemption should be considered on a case by case basis.
- Section 41 protects information obtained by a public authority from another person and whose disclosure to the public, otherwise than under the FOIA, would constitute an actionable breach of confidence.

Deceased Personnel

Section 40 of the FOI Act is not available to protect personal information relating to deceased persons. Other FOI Act exemptions may apply:

- Section 38 exempts information where disclosure would, or would be likely to, endanger the physical or mental health or the safety of any individual, including relatives of the deceased. Again, this exemption should be considered on a case by case basis.
- Section 41 exempts information obtained by a public authority from another person if the disclosure of this information to the public would constitute a breach of confidence actionable by that or another person.

NB: The Information Tribunal has ruled that the Human Rights Act 1998 is not a statutory bar to the disclosure of information within the terms of section 44 of the FOI Act. (See case of [Bluck -Pauline Bluck v IC and Epsom & St Helier University Hospitals NHS Trust \(17 September 2007\)](#)) and the [ICO DN ref: FS50418798 dated 3 April 2012](#).

MOD Casework Examples:

- [ICO Decision Notice \(DN\) FS50354196](#) – The requester challenged the redaction of junior official names in UFO correspondence. MOD did not seek consent for disclosure in this case. The DN states that although there is no obligation to seek a data subject's consent to disclosure, it is good practice to inform the data subject that a request for access to information about them has been made and to take any objections into account. The Commissioner found that the requested information constitutes personal data under section 40(2) of the FOI ACT and that it would be unfair to the individual(s) to disclose the withheld information and to do so would contravene the first principle of the DPA (i.e. personal data to be processed fairly and lawfully).
- [Appeal Number: GIA/150/2011, GIA/151/2011 and GIA/152/2011 All Party Parliamentary Group on Extraordinary Rendition -v- The Information](#)

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[Commissioner and MOD](#) - The Upper Tribunal found that MOD was not entitled to rely on section 40 in relation to statistics concerning detainee information as they were either not personal data because the individuals were not identifiable from the information or it would not be unfair to those individuals to release the information. It may therefore be possible to comply with a request and disclose statistical information deriving from personal data providing that it can be anonymised.

- [ICO DN FS50354196](#) - It is a common misconception that a requester is entitled to access their own personal data under the FOI Act. In fact the exemption at section 40(1) specifically prevents this in order to encourage requesters who are primarily interested in seeking information about themselves to apply under the appropriate legislation i.e. DPA 98. However, a DN of the Commissioner largely in MOD's favour ruled that whilst technically section 40(1) permits public authorities to withhold information that constitutes the personal data of the applicant, it is less than helpful withholding it from them when the information is only a small part of what is requested and that the processing and provision of it to the requester would not breach Data Protection principles. This approach should be limited to data such as the requester's name, address details, telephone number etc and **ONLY** in cases where the response is being provided direct to the requester. **Personal Data should always be withheld from responses loaded up to the www.whatdotheyknow.com website.** If in any doubt, **contact CIO-CI-Access** in the first instance.
- A request was received for how many complaints of bullying have been made against an individual since a particular time. This information was withheld under section 40(5) of the FOI Act.

Other issues:

Help with the definition of a “public-facing role”:

The Department's policy on the withholding of junior officials' names has been challenged on more than one occasion and been upheld. The most recent case provided some useful clarification of the definition of “public facing role”.

There is no statutory test of whether a particular official's role is public facing. It has been accepted by the Tribunal that a public facing role is one where the incumbent is the public face of the authority. That may be because that person has accepted a position as a spokesperson (for example, a press officer) or because that person has accepted a position where they are accountable for the decisions taken by the authority (i.e. a senior official). However, an official who has contact with members of the public is not *de facto* in a public facing role. Few officials do not have contact with members of the public. This is particularly true of civil servants in secretariat positions, or correspondence unit positions. The fact that such individuals attached their names to correspondence, and are not completely anonymous, does not mean that their role is public facing in the sense that is relevant for DPA purposes. They may have answered correspondence, and they may have had their names reproduced in third party literature as a result (e.g. campaign websites) but they are not officially and substantively associated with departmental business. They are simply assisting with its administration and it is reasonable of them to expect a degree of anonymity as they are not responsible for the decisions taken by the department (unlike more senior officials).

Release of physical signatures

Physical signatures are an important part of an individual's personal data. With respect to the question of the disclosure of a physical signature, the Commissioner has noted in a recent case that disclosure under the FOI Act is disclosure to the public at large. Taking into account the fact that a signature is commonly used on documents as proof of identity, and may also be used, for example, to signify approval, acceptance, or obligation and given the potential for fraud or misrepresentation, he considers it would not be fair in some cases to disclose an individual's signature into the public domain. This is a useful ruling in relation to the potential release of

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signatures belonging to senior officials whose details would otherwise be provided under the FOI Act. However, you will need to check that their signature is not already in the public domain via an official website (e.g. a letter of commendation, signed by CGS or PUS, etc).

EIR considerations

- The EIRs contain similar provisions, although the personal data of the applicant is not subject to the EIRs by virtue of regulation 5(3) and so no exception is required. The exception for third party data is very similar to the FOI Act and is set out in regulations 12(3) and 13.

Links:

The following guidance should be read and taken into account:

ICO guidance

- [ICO guidance \(personal information\)](#)
- [Practical guidance - When should names be disclosed?](#)
- [Access to information about public authorities' employees](#)
- [Access to information about the deceased](#)
- [Data Protection Technical Guidance - Determining what is personal data](#)
- [Assessing Information – Is It Personal Data](#)

MOJ guidance

- [Section 40: personal information](#)

[MOD Internal DPA guidance](#)