

Freedom of Information Act Environmental Information Regulations



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Update note

Applying the exemption for third party personal data: the Tribunal's approach in *House of Commons v IC & Leapman, Brooke and Thomas*

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) provide rights of public access to information held by public authorities. This is part of a series of guidance notes produced to help public authorities understand their obligations and to promote good practice.

This guidance is supplementary to our specialist guidance on the personal data exemption and explains how to approach the requirement to satisfy a schedule condition in the Data Protection Act 1998 (DPA). For a wider discussion of the personal data exemption, please see [The exemption for personal information](#).

What does the law say?

Section 40(2) of the FOIA and EIR 13 both provide an exemption from disclosing information about identifiable individuals where it would breach the Data Protection Act. The main consideration will usually be whether the disclosure would be fair to the individual concerned.

To comply with the DPA, a disclosure of personal data under the FOIA must:

- be fair and lawful;
- meet one of the conditions in Schedule 2 of the DPA;
- in the case of sensitive information (such as information about health or criminal activity) also meet one of the conditions in Schedule 3; and,
- take into account the reasonable expectations of the individual.

Most of the conditions in Schedules 2 and 3 are not relevant to FOIA disclosures. The Schedule 2 condition most likely to be relevant is that at paragraph 6:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.

Background

The condition at paragraph 6 of DPA Schedule 2 is often seen as being similar to a public interest test. However, the Information Tribunal took a more systematic approach when considering the disclosure of MPs' expenses claims in [House of](#)

[Commons v IC & Leapman, Brooke and Thomas](#) (EA/2007/0060 etc.; 26 February 2008.)

In considering the application of this condition to a disclosure under the FOIA, the Tribunal applied a three-stage test:

- Is there a legitimate public interest in disclosure?
- Is the disclosure necessary for that legitimate public interest?
- Is the disclosure nevertheless unwarranted because of an excessive or disproportionate adverse effect on the legitimate interests of the individual(s) concerned?

The Tribunal's decision was upheld by the High Court on appeal ([\[2008\] EWHC 1084 \(Admin\)](#))

Legitimate public interest

The first stage is to identify the legitimate interest in disclosure.

You should consider the public interest in publication to the world at large, rather than any particular purpose for which the applicant intends to use the information. This is because FOIA is applicant and purpose blind. Where the applicant legitimately requires the information for their own purposes, for example research, you may prefer to consider a discretionary release outside the FOIA.

There is likely to be some legitimate interest in any FOIA request which relates to transparency and accountability.

Necessity

The purpose of the DPA is to protect personal information from unnecessary or unauthorised use or disclosure. It will not be fair to release information which could identify individuals unless this is the only reasonable way to address the legitimate interest.

You should consider:

- whether the public interest is already fully met by other means;
- whether the personal information would add to the value of the information disclosed; and,
- whether the disclosure would be the most reasonable and proportionate way of addressing the legitimate public interest.

Example: The Tribunal found that full disclosure of MPs' expenses claims was necessary because there was a substantial shortfall in accountability and the existing safeguards were insufficient. Whilst it was generally accepted that the public interest would be best met by reforming the system, the Tribunal did not accept that this hypothetical future possibility should weigh against disclosure.

Where full disclosure is not necessary, you should consider whether it would be appropriate to release a limited amount of personal information, or a completely depersonalised version of the information.

Unwarranted prejudice

Even where disclosure is necessary to address the legitimate public interest, it may still be unwarranted if there is a disproportionate detriment to the rights and interests of the individual concerned.

- Identify any adverse effect the disclosure may have on the individual. This can include practical detriment and risk to the individual's safety as well as intrusion into their privacy.
- Bear in mind the specific circumstances of the person or people involved. Those who have chosen careers in the public eye, such as MPs, may be expected to be more robust, whereas the privacy of vulnerable individuals is likely to require greater protection.
- Determine whether the weight of the public interest arguments and the benefits of disclosure outweigh these harmful consequences.
- If the disclosure of all the information requested would be unwarranted, consider whether the balance would be different for a partial disclosure.

Example: Although the Tribunal found that full disclosure was necessary for legitimate interests, it nevertheless allowed some redactions. The Tribunal considered that “full detailed disclosure, without any restriction at all, would be unwarranted, because it would have a disproportionate adverse effect on MPs’ legitimate privacy interests.”

More information

This guidance only covers one aspect of the exemption for personal data. For further information, please see our guidance on [The exemption for personal information](#).

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunal and courts on freedom of information cases. It is a guide to our current recommended approach to this area.

If you need any more information about this or any other aspect of freedom of information, please contact us.

Phone: 08456 30 60 60
01625 54 57 45

Email: please use the online [enquiry form](#) on our website

Website: www.ico.gov.uk