

## Guidance Note B2: Data Protection Act 1998 & Access to Personal Data

### Scope of the Data Protection Act 1998 (DPA98)

1. DPA98 relates to the regulation of the processing of information relating to living individuals, including the obtaining, holding, and use of disclosure of such information. It provides rights to the individual who is the subject of the information (data subject) and responsibilities to the Data Controller that processes it. Before 1 January 2005, the Data Protection Act provided four categories of “data” i.e. information held electronically (in computerised systems or recorded with the intention that it should be processed by such means), manual (i.e. paper) records held (or intended to be held) in a ‘relevant filing system’<sup>1</sup> and accessible records e.g. health, educational, housing and social services records. From 1 January 2005, the Freedom of Information Act (FOI Act) provided an additional category of data to include “*is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d).*” i.e. all manual records held by those public authorities, which fall within the scope of the FOI Act. In essence, this creates two new classes of data i.e. structured and unstructured personal data (sometimes known as “category ‘e’ data”) which may be open to subject access and for which an exemption from disclosure may apply. *For further information see DPA98 Guidance Note No 19.* This additional category of “data” will only apply to public bodies that come within the scope of the FOI Act; other bodies will not be affected.

1.1 This additional category of “data” is subject to the FOI Act Fees Regulations (Statutory Instrument (SI) 2004 3244). MOD is not obliged to respond to Subject Access Requests (SAR) (see paragraph 2.2) for category ‘e’ data unless a description of the data sought is provided. Even when so provided, if the cost of providing the information exceeds the appropriate limit then MOD is not obliged to respond. But there is an obligation to inform the data subject if category ‘e’ data is being processed unless the cost of doing this alone exceeds the appropriate limit. An exemption from disclosure also applies to category ‘e’ data if it relates to appointments or removals, pay discipline, superannuation or other personnel matters in respect of service in the Armed forces of the Crown, service in any office or employment under the Crown or any public authority, or service or employment under any contract for services, in respect of which power to take action, or to determine or approve the action taken, in such matters is vested in Her Majesty, any Minister of the Crown, the National Assembly for Wales, any Northern Ireland Minister (within the meaning of FOI Act) or any public authority. While DPA98 permits a minimum fee of £10 to be levied for Subject Access Requests, MOD policy is not to charge for SARs. For further information see *Data Protection Guidance Note 6 – paragraph 7.*

1.2 “Personal data” means data which relate to a living individual who can be identified:

- from those data, or
- from those data and other information which is in the possession of, or likely to come into the possession of, the data controller and includes any expression of opinion about the individual

and any indication of the intentions of the data controller or any other person in respect of the individual.

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<sup>1</sup> A relevant filing system is a set of manual records or files that is structured, either by reference to individuals or reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible

# Ministry of Defence Access to Information Guidance Note

Version 6

June 2009

## Interface between the Acts

2. Both the Freedom of Information Act 2000 and the Data Protection Act 1998 are concerned with access to information, although the DPA98 relates to the, processing of information relating to living individuals, including the obtaining, holding, use or disclosure of personal data. As the name of the Act suggests, DPA98 protects and processes personal information through the application of the eight data protection principles e.g. Fairly and lawfully processed; Processed for a limited purpose; Adequate, relevant and not excessive; Accurate and kept up to date; Not kept longer than necessary; Processed in accordance with the individual's rights; Kept secure; Not transferred to other countries without adequate protection .

2.1 One of the provisions included in the Act is the right of the data subject to see any personal data about themselves – this process is called a Subject Access Request (SAR) and disclosure is subject to any exemptions which may apply and third party confidentiality considerations. DPA 98 and the FOI Act are interlinked; requests under FOI that involve personal information relating to a living individual are to be considered under s40 of the FOI Act. In effect, s40 means that personal information relating to the data subject (i.e. SARs) and third parties will normally be exempt from the FOI Act and will be dealt with in accordance with DPA98. FOI may apply to the personal information relating to deceased individuals – see paragraph 6.1 and *Data Protection Guidance Note 20*.

## Legal Provisions

3.

- Section 40(1) of the FOI Act exempts from its provisions, information, which is personal data, of which the applicant is the data subject. Access to such information is therefore available only through Section 7 of the Data Protection Act 1998.
- Section 40(2) of the FOI Act exempts personal information, which is not about the applicant (that is, third party **personal** information) if the conditions set out in section 40(3)(a) or (b) or 40(4) apply. These are that disclosure of personal information would contravene the Data Protection Principles (section 40(3) (a) (i), or section 10 of the Data Protection Act (section 40(3) (b)). Information is also exempt if the data subject could not gain access to it (section 40(4)) through a SAR and it was subject to a DPA98 exemption.
- Section 68(2) of the FOI Act, inserts an additional category of data into the definition of personal data in Section 1(1)(e) of the DPA98: “recorded information held by a public authority which does not fall within any other definition”, sometimes called category ‘e’ data. This creates two new classes of personal information structured and unstructured personal data (i.e. personal data that is not held in any of the following categories of “data”: computerised systems or recorded with the intention that it should be processed by such means, manual (i.e. paper) records held (or intended to be held) in a ‘relevant filing system’ and accessible records e.g. health, educational, housing and social services records) which may be open to subject access. For further information, see paragraphs 1.1 and 1.2 above and *Data Protection Guidance Note No 19*.
- Section 69(2) of the Freedom of Information Act 2000 inserts a new section 9A into the Data Protection Act 1998, which applies the Freedom of Information Act 2000 disproportionate cost provisions. A sub-section of 9A requires that requests for the new classes of personal data must be accompanied by a description of the data sought.
- Section 70(1) of the FOI Act inserts after section 33 DPA98 a new section 33A – *manual data held by public authorities*. This provides the exemption relating to category ‘e’ data described at paragraph 1.2, above.
- If you are not sure whether the information under consideration is personal data you should seek advice

## **Access to Personal Data**

4. If the applicant is seeking information about him/herself, **the information is exempt from the right of access under the FOI Act and access is granted under the provisions of the DPA98**. Subject to provision of sufficient information to locate the data sought, and confirmation of identity, a data subject may seek access to personal data processed (or intended to be processed automatically, or recorded (or intended to be recorded) in a relevant filing system, as part of an accessible record, or as structured or unstructured personal data.

4.1 If the applicant is seeking personal information about a third party, it is exempt information if it meets one of the following two conditions:

- The information is held electronically (i.e. in computerised systems or recorded with the intention that it is to be processed by such means), manual (i.e. paper) records held (or intended to be held) in a relevant filing system (i.e. set of information relating to individuals structured either by reference to individuals or reference to criteria relating to individuals, and in such a way so that information relating to a particular individual is readily accessible) is an accessible record (health, educational, housing and social services records), and that disclosure to a member of the public other than under DPA98, would contravene -
- Any of the data protection principles (see Schedule 1 of DPA98)
- Any of the data protection principles if the exemptions relating to disclosure of category “e” personal data (unstructured or structured manual personal data) were disregarded.
- By virtue of Section IV DPA98 – Exemptions, the information is exempt from s7(1)(c) DPA98 (i.e. the data subject’s right of access to personal data).

4.2 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 DPA98. 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 areas in MOD where this is not permitted e.g. Defence Intelligence, Special Forces Secretariat, Northern Ireland etc.

## **Releasing names of Individuals**

5. For redaction of personal data (which includes when disclosure is permitted) *see FOI Guidance Note E9 Redacting personal information and Data Protection Guidance Note 12*. The following guidance provided by the Legal Adviser relates to photographs (which are sensitive personal data in accordance with DPA98) and its principles may also assist when considering disclosure of names.

### **Photographs**

Whether publishing names and photographs, is of significance to any one particular person, will depend on their circumstances. Certain categories of MOD personnel and employees may be affected by the proposal less than others and it may be convenient to consider them under the following broad categories:

- First category: Individuals who have a public profile outside the MOD and who are regularly referred to in the media and in external publications
- Second category: Individuals who have a limited public profile, perhaps with an internal MOD audience without any, or with only limited and occasional external media exposure, or publicity (e.g. publication in a regimental or departmental magazine such as Focus, which may occasionally find its way into the outside world, or, by virtue of attending the occasional public event).

**Ministry of Defence Access to Information  
Guidance Note**

Version 6

June 2009

- Third category: Individuals who have no external public profile and no, or only very limited internal MOD profile. Such individuals may have had their photograph taken for security or personnel reasons.

In relation to all these categories, it is quite possible that photographs and names may have appeared on the MOD Intranet, possibly even in relation to the third category, by reference to a purely internal matter.

As may be apparent from the above, the three principle areas of law; data protection; confidence and human rights/privacy, tend to overlap in terms of the issues they raise and their application produces a relatively consistent result in relation to the three categories.

I summarise my conclusions in relation to each category, in each case on the assumption that in principle, photographs accompanied by names constitute personal data for the purposes of the DPA and, the DPA applies because they are held in automated form, or in a relevant filing system. I stress that each case would need to be considered on its own individual facts and my advice (and the categories I have identified) is intended to be a guide only.

In relation to the first category, where an individual has a public profile:

- It will probably not be a breach of the DPA to publish his name and photograph on the Internet, as the MOD may be able to rely on Schedule 3, paragraphs 5 and 7
- It will probably not be a breach of confidence because it will be difficult for the person to show that the information is confidential, given that it is already in the public domain
- It will probably not be a breach of any right to privacy because the information will already be in the public domain

In relation to the second category, where an individual has some limited exposure to the media:

- It will almost certainly be a breach of the DPA to publish his name and photograph on the Internet without his express consent
- It may constitute a breach of confidence because the photograph may have been taken for a specific purpose in the context of a confidential employer/employee relationship, without any intention by the individual that it be used for any other purpose. In the absence of express consent, the MOD will not have any authorisation to use the photograph and the individual may suffer as a result
- It may also constitute a breach of privacy and a breach of the HRA, although this is more uncertain, partly because the law is less well developed here and because the circumstances are less clear cut, thus making the law less straightforward to apply

In relation to the third category, where the person has no public exposure of any kind:

- There will be a breach of DPA98 unless the express consent of the individual is obtained to the publishing, in advance
- There is likely to be a breach of confidence because the photograph will presumably have been taken for a specific purpose, in the context of a confidential employer/employee relationship, without any intention by the individual that it be used for any other purpose
- There is likely to be a breach of privacy and of Article 8 of the Human Rights Act 1998 (HRA 98) – right to respect for private and family life.”

*Extract from D/LA (GEN)/17/3/6/LMD dated 28 Feb 02*

Children: Special care needs to taken in relation to photographs depicting children (persons under 18 years of age), when it would be appropriate to seek parental consent.

### **Deceased Individuals**

**Ministry of Defence Access to Information  
Guidance Note**

Version 6

June 2009

6. Personal information relating to deceased persons may be subject to FOI Act exemptions, Article 8 of the Human Rights Act (right to respect for Private and Family Life), Access to Health Records Act 1990 and other legislation. See *Data Protection Guidance Note 20*.

**Extended Access to Information**

7. The European Court of Human Rights decided (Roche case) that certain persons have a legal right to timely and structured release of information from the Department, under Article 8 of the European Convention on Human Rights (the Convention). These rights are over and above those provided by the Data Protection Act 1998, the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 (**but the requirements of those Acts and Regulations must still be met**). Guidance on compliance with the Court's ruling is set out in *2006DIN02-207 - July 2006*.

Further details can be found on the Data Protection Team website. [See also ICO guidance on Personal Information](#)