

Data Protection and PECR Training

Supporting notes and further reading

Module 11 : Exemptions part 2



Introduction

These notes are designed to set out the key points covered during module 11 of our data protection online training programme. These notes are not designed to replace the online module, but are intended to be a point of reference for your follow-up study. You may find it helpful to have these notes and the relevant legislation open whilst watching the online module:

- [The UK General Data Protection Regulation \(UK GDPR\)](#)
- [The Data Protection Act 2018 \(DPA\)](#)

This document contains:

- [Supporting notes](#)
- [Further reading](#)

Supporting notes

Module 11 gives an overview of how many common exemptions work and explains where to find information about others. It covers:

- [Schedule 2 Part 2: the listed UK GDPR provisions](#)
- [Regulatory functions of certain other persons](#)
- [Parliamentary privilege](#)
- [Schedule 2 Part 3: the protections of the rights of others](#)
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Schedule 2 Part 2: the listed UK GDPR provisions

Schedule 2 Part 2 lists its own UK GDPR provisions in [paragraph 6](#). These are the rights and obligations which are affected by the exemptions in this Part of the Schedule:

- the right of access and the right to be informed, to rectification, to erasure, to restrict processing, to data portability and to object;
- the notification obligation regarding rectification/erasure/restriction; and
- the [Article 5 principles](#) – which are restricted in so far as they correspond to the rights and obligations listed.

For example, this means that a controller may not have to provide privacy information in accordance with the right to be informed and the transparency requirement in principle (a). However it will always have to comply with the security principle, because this does not correspond to a right.

Regulatory functions of certain other persons (paragraph 11)

There is a [table for this exemption](#) which lists all the persons who have a relevant function.

For example, the Information Commissioner has functions under the data protection legislation and the Freedom of Information Act to consider complaints or investigate infringements of the legislation.

This exemption means that when we receive a complaint, we don't have to give the data subjects rights such as the right to object, as doing so could prejudice our function to investigate that complaint.

Please see the [guidance](#) for further information about this exemption.

Parliamentary privilege (paragraph 13)

The [parliamentary privilege exemption](#) applies if a controller processes data as a member of the House of Commons or the House of Lords. This does not apply to their constituency work.

If a MP says something in the House of Commons about an individual (and it is recorded), parliamentary privilege applies. It isn't an infringement of data protection legislation and the data subject doesn't need to be informed.

The exemption isn't available to Members of the Scottish Parliament, Welsh Senedd or Northern Ireland Assembly.

Please see the [guidance](#) for further information about this exemption.

Judicial appointments, independence and proceedings (paragraph 14)

The [judicial appointments, independence and proceedings exemption](#) means the listed UK GDPR provisions do not apply to personal data processed for certain judicial purposes or by bodies/people acting in a judicial capacity.

A data subject cannot make a subject access request for a judge's notes which refer to them.

Please see the [guidance](#) for further information about this exemption.

Crown honours, dignities and appointments (paragraph 15)

The [crown honours, dignities and appointments exemption](#) means the listed UK GDPR provisions do not apply to personal data processed for the purposes of the conferring by the Crown of any honour or dignity, or for the purposes of assessing a person's suitability for any of a number of given offices. This could include:

- archbishops and bishops in the Church of England;
- the Poet Laureate; and
- the Astronomer Royal.

A data subject cannot make a subject access request for information about the discussions held about them when they were considered for the position of the next Poet Laureate.

Please see the [guidance](#) for further information about this exemption.

Schedule 2 Part 3: the protections of the rights of others

This [exemption for third party personal data](#) is relevant when a subject access request involves the data subject's personal data but also the personal data of another person.

For further information, please see the [guidance](#).

Schedule 2 Part 4: the listed UK GDPR provisions

Schedule 2 Part 4 lists its own UK GDPR provisions in [paragraph 18](#). These are the rights and obligations which are affected by the exemptions in this Part and only include:

- the right of access;
- the right to be informed; and
- the [Article 5 principles](#) - which are restricted only if they relate to the listed rights and obligations.

Legal Professional Privilege (LPP) (paragraph 19)

This [exemption for LPP](#) means the listed UK GDPR provisions do not apply to personal data containing information where a claim to legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings.

There are two types of privilege:

Legal advice privilege - this applies to confidential communications between a client and their legal representative.

Litigation privilege – this applies where LPP (or confidentiality of communications) could be claimed in legal proceedings

Privileged information is always exempt from disclosure and there is no prejudice test to this exemption.

Please see the [guidance](#) for further information about this exemption.

Example: an individual is in a dispute with a neighbour over their fence

- they learn that the neighbour has instructed a solicitor
- the individual requests a copy of their personal data from the solicitor. They want to see what the neighbour said to the solicitor and what advice the solicitor has provided to their neighbour
- The solicitor can refuse the request under LPP because it applies to confidential communications between a client and their legal representative

Management forecasts (paragraph 22)

The [management forecasts exemption](#) means the listed UK GDPR provisions do not apply to personal data processed for the purposes of management forecasting or management planning in relation to a business or other activity, to the extent that the application of those provisions would be likely to prejudice the conduct of the business or activity concerned.

Please see the [guidance](#) for further information about this exemption.

Example: a company has an internal document projecting how it will deal with a smaller budget and including information about possible redundancies

- one of its employees makes a SAR for their personal data in this document
- this data is exempt from disclosure because disclosing it could prejudice this business activity

Negotiations (paragraph 23)

The [negotiations exemption](#) means the listed UK GDPR provisions do not apply to personal data that consists of records of the intentions of the controller in relation to any negotiations with the data subject, to the extent that the application of those provisions would be likely to prejudice those negotiations.

It is used a lot by insurance companies.

Please see the [guidance](#) for further information about this exemption.

Example: an organisation is being sued in a personal injury claim

- it has its own note which states the maximum amount it would be willing to pay in a settlement
- disclosing this during the proceedings would obviously prejudice the negotiations, so it can be withheld under this exemption
- the exemption is less likely to apply after the negotiations are concluded

Confidential references (paragraph 24)

The [confidential references exemption](#) means the listed UK GDPR provisions do not apply to personal data consisting of a reference given (or to be given) in confidence for the purposes of:

- the education, training or employment of the data subject,
- their placement as a volunteer,
- their appointment to any office, or
- their provision of any service.

This applies even if the above are prospective.

Both the controller giving a reference and the controller receiving a reference are exempt from disclosing confidential references in response to a SAR.

If a controller hasn't made it clear a reference has been given in confidence, a receiving controller may just give it out.

A controller must consider any issues of third party confidentiality before it discloses any data. It must still be mindful of other applicable UK GDPR provisions including fairness, accuracy and the right to rectification

Please see the [guidance](#) for further information about this exemption.

Example: an individual applies for a new job in a new organisation. They ask their current employer for a reference.

- the employer provides the reference to the new organisation. It considers this is provided in confidence but doesn't make this clear in the document
- the job offer is withdrawn and so the individual makes a SAR to their current employer for a copy of the reference
- the employer refuses to provide the reference and explains the data is exempt under the confidential references exemption
- the individual asks the new organisation for a copy of the reference
- the new organisation decides to disclose the personal data in the reference because it doesn't think it's been provided in confidence
- the individual is now able to go back to their employer and ask it to check the factual accuracy of the data it holds, for example, the number of sick days taken last year
- if the reference contains a poor opinion of the individual, they can ask the organisation to take reasonable steps to check its accuracy
- they can also ask for a supplementary statement to be added to the file, showing they question this opinion
- unfortunately, if both organisations consider the reference to be provided in confidence, they can apply the same exemption and the individual has no way of finding out what the reference says

Exam scripts and exam marks (paragraph 25)

The [exam scripts and exam marks exemption](#) applies to personal data consisting of information recorded by candidates during an exam. It:

1. Prevents candidates from getting early access to their exam results, on the basis that the result is already going to be provided on a certain date.

This stops individuals from gaining any advantage from early access, and saves exam boards from having to deal with lots of individual requests.

2. Prevents candidates from getting copies of their answers under the data protection right of access. They can obtain their scripts after the results from the exam boards for a fee.

Once the results have been announced, the exemption does not cover:

- an examiner's comments on a candidate's performance in an examination (whether those comments are marked on the examination script or recorded on a separate marking sheet); or
- details of the marks awarded.

So, once the results are available, the exam board will have to provide these comments and marks (unless other exemptions apply).

Please see the [guidance](#) for further information about this exemption.

Example: an individual has taken their 'A' levels but is not happy with the grade for their History exam

- they submit a SAR and ask the exam board to provide a copy of their exam scripts and any moderation marks recorded about their paper
- the board do **not** provide a copy of the exam script because this is exempt under the data protection legislation. There are other mechanisms for obtaining this information
- because this request is made after the exam results have been published, the board provide a copy of the marks and examiner's comments on a marking sheet

- if the request had been made before results day, the board could have delayed the response so that it provided the information after the results were published

Journalistic, academic, artistic and literary purposes – the special purposes (paragraph 26)

The [special purposes exemption](#) is broad and intended to ensure that data protection does not interfere with the freedom of the press to investigate and publish stories about individuals.

The exemption in Schedule 2 Part 5 lists its own UK GDPR provisions in paragraph 26(9). These are the rights and obligations which are affected by the exemption in this Part, and they cover a wide range of exemptions from principles, rights, obligations and situations.

The list includes all the rights covered by [Articles 13 to 21](#) and [Article 5 principles \(a\) to \(e\)](#) which are the principles relating to processing.

The exemption allows other restrictions - please see [Schedule 2 Part 5](#) for more detail.

For the exemption to apply:

- the processing must be carried out with a view to the publication by a person of journalistic, academic, artistic or literary material; and
- the controller must reasonably believe that the publication of the material would be in the public interest.

This means the controller must have regard to any Codes of Practice and other guidelines such as the BBC Editorial Guidelines;

- compliance with the listed UK GDPR provisions must be incompatible with the special purposes

(for example, the controller must reasonably believe that complying with a SAR would be incompatible with journalism).

In general the ICO has left many complaints about the press to be determined by the courts. This is often tested in court as a balance between two articles in the Human Rights Act - Article 8 (the right to privacy) and Article 10 (the right to freedom of expression).

Please see the [guidance](#) for further information about this exemption.

Example: an individual discovers that a newspaper is processing their personal data with a view to printing a story about them

- they make an access request for all the data the paper holds about them
- the paper argues that the processing is being carried out with a view to the publication by the paper and involves journalistic material
- it reasonably believes that the publication of the material would be in the public interest and that to respond to the access request would be incompatible with the special purpose of journalism
- the paper applies the exemption and does not have to respond to the access request and does not have to consider any objections to processing or requests to erase the data
- if the processing meets these requirements, the controller does not need an Article 6 basis for processing, and does not need to meet the requirements of Article 9 and 10, if relevant - the exemption is wide ranging and powerful

Research, statistics and archiving (paragraphs 27 and 28)

The listed UK GDPR provisions in [Schedule 2 Part 6](#) do not apply to personal data processed for:

- scientific or historical research purposes, or
- statistical purposes,
- archiving purposes in the public interest,

to the extent that the application of those provisions would prevent or seriously impair the achievement of those purposes.

The [research, statistics and archiving exemption](#) only applies to these purposes (and not any other purpose served by the processing).

This is subject to safeguards being in place.

The listed UK GDPR provisions for this processing adapt or restrict:

- the right of access,
- the right to rectification, restriction and to object,
- plus for archiving in the public interest: the notification obligation regarding rectification / erasure / restriction and the right to data portability.

For example, research organisations do not have to respond to subject access requests when this would seriously impair or prevent them from fulfilling their purposes.

They do not have to comply with an individual's rights to rectify, restrict further processing and object to processing where this would seriously impede their ability to complete their work.

If a controller is processing for archiving purposes, it is not obliged to respond to a request for data portability from the data subject.

The controller must have appropriate organisational safeguards in place to keep the data secure.

Please see the [guidance](#) for further information about this exemption.

Research, statistics and archiving: safeguards

[Schedule 2 Part 6 paragraph 27\(3\)\(a\)](#) states that the exemption is only available if the personal data is processed in accordance with the safeguards given in [Article 89\(1\)](#) of the UK GDPR, and the conditions laid out in the [DPA Part 2 Chapter 2 section 19](#).

[Article 89](#) specifies the need for technical and organisational measures, data minimisation and pseudonymisation.

[DPA Part 2 Chapter 2 section 19](#) states that:

- safeguards must ensure that the processing must not be likely to cause substantial damage or distress to a data subject; and
- processing must not be used for measures or decisions about particular individuals, except for approved medical research.

Also, for research and statistics, [Schedule 2 Part 6 paragraph 27\(3\)\(b\)](#) states:

- as regards the right of access, the results of the research or any resulting statistics must not be made available in a way which identifies a data subject.

Example: an individual has joined a study carried out by the local hospital for scientific research purposes

- a year later, they write to the hospital to say they've now changed their mind and wish to withdraw from the study
- the individual has a rare condition and the hospital needs to carry on using their data to be able to conduct meaningful research
- the erasure of this data would prevent or seriously impair the achievement of its scientific research purposes
- the hospital has appropriate safeguards in place and the research will not identify the individual or be used to make decisions about them
- so the hospital applies the exemption and explains the right to erasure does not apply in these circumstances
- although the medical data was collected for another purpose (direct care) using it for scientific research purposes is not incompatible - see Article 5(1)(b)
- the lawful basis for the processing might be public task and the condition for processing is Article 9(2)(j) - scientific research purposes
- the hospital might reassure the individual by informing them that the data has been anonymised or pseudonymised and that they will not be identified in any reports following the research
- if the data has been anonymised, it is no longer their personal data

Health, social work, education and child abuse data (Schedule 3)

There are other exemptions concerning [health](#), [social work](#), [education](#) and [child abuse data](#) in Parts 2-5 of [Schedule 3](#). The listed UK GDPR provisions for these exemptions are in [Part 1 of Schedule 3](#).

For example, a controller might withhold an individual's health data in response to their SAR if an appropriate health professional considers disclosure will cause that person serious harm.

Please see the guidance to [health data](#), [social work data](#), [education data](#) and [child abuse data](#) for further information.

Disclosure prohibited or restricted by an enactment (Schedule 4)

If one of the enactments listed in [Schedule 4](#) prohibits disclosure, a data subject cannot obtain the data via the data protection legislation.

For example there is legislation which governs access to adoption records and reports and this is listed in Schedule 4.

Data subjects rights and other prohibitions and restrictions

The DPA gives data subject rights and data controller obligations special status.

[Part 7 section 186](#) provides that any other enactment or rule of law that seeks to prohibit or restrict the giving or withholding of information shall not apply. The only restrictions that can exist are therefore the exemptions contained in the DPA.

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Further reading

Exemptions

In the [Guide to the UK GDPR](#), have a look at the section [Exemptions](#).

Read the 'At a glance' points and the 'In brief' questions and answers:

- [What are exemptions?](#)
- [How do exemptions work?](#)

In the section [What exemptions are available?](#) Have a look at the following:

- [Other regulatory functions](#)
- [Parliamentary privilege](#)
- [Judicial appointments, independence and proceedings](#)
- [Crown honours, dignities and appointments](#)
- [Protection of the rights of others](#)
- [Legal professional privilege](#)
- [Management forecasts](#)
- [Negotiations](#)
- [Confidential references](#)
- [Exam scripts and exam marks](#)
- [Journalism, academia, art and literature](#)
- [Research and statistics](#)
- [Archiving in the public interest](#)

Find an example of an organisation applying the management forecasts exemption when planning a re-organisation involving redundancies (see the yellow boxes for examples).

Find an example of an insurance company applying the exemption for negotiations to avoid disclosing the amount of compensation it might pay a claimant.

You may also find these links for health, social work, education and child abuse data useful:

- [Health data – processed by a court](#)

- [Health data – an individual’s expectations and wishes](#)
- [Health data – serious harm](#)
- [Health data – restriction of the right of access](#)
- [Social work data – processed by a court](#)
- [Social work data – an individual’s expectations and wishes](#)
- [Social work data – serious harm](#)
- [Social work data – restriction of the right of access](#)
- [Education data – processed by a court](#)
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