



GIBRALTAR REGULATORY
AUTHORITY

(21) Guidance on Exemptions

Guidance on the EU General Data
Protection Regulation 2016/679 &
Data Protection Act 2004

10th June 2020

Guidance Note IR03/20

FOREWORD

The EU General Data Protection Regulation 2016/679 (the "GDPR") came into force on 25th May 2018, replacing the existing data protection framework under the EU Data Protection Directive 95/46/EC.

Her Majesty's Government of Gibraltar amended the Data Protection Act 2004 (the "DPA") on 25th May 2018, in accordance with the introduction of the GDPR. The DPA complements the GDPR and also implements the Law Enforcement Directive 2016/680. Therefore, the DPA and the GDPR must be read side by side.

It is important to note that the GDPR does not generally require transposition (EU regulations have 'direct effect') and automatically became law in Gibraltar. Therefore, organisations involved in the processing of personal data need to be aware of the obligations that the GDPR and/or the DPA will impose on them. The GDPR emphasises transparency, security and accountability by data controllers, while at the same time standardising and strengthening the right of European citizens to data privacy.

The Gibraltar Regulatory Authority, as the Information Commissioner, is aware of the increased obligations that the GDPR and DPA place on organisations. The Information Commissioner's aim is to alleviate some of the concerns for businesses, public-sector and third-sector organisations and assist them ensure data protection compliance.

SUMMARY

In some circumstances, the Data Protection Act 2004 ("DPA") provides an exemption from particular provisions in the General Data Protection Regulation 2016/679 ("GDPR"). These are detailed in Schedules 2 and 3 of the DPA and are separate to the exceptions already built in to certain GDPR provisions.

It is important to note that the exemptions relate to the GDPR regime and not personal data regulated by Part 3 of the DPA i.e. the processing of personal data by competent authorities for law enforcement purposes¹.

The following summarises the exemptions available and detailed in this guidance note.

CRIME, LAW AND PUBLIC PROTECTION

- Crime and taxation: general
- Crime and taxation: risk assessment
- Information required to be disclosed by law or in connection with legal proceedings
- Legal professional privilege
- Self incrimination
- Functions designed to protect the public
- Audit functions

REGULATION, PARLIAMENT AND THE JUDICIARY

- Regulatory functions relating to legal services, the health service and children's services
- Parliamentary privilege
- Judicial appointments, independence and proceedings

JOURNALISM, RESEARCH AND ARCHIVING

- Journalism, academia, art and literature
- Research and statistics
- Archiving in the public interest

HEALTH, SOCIAL WORK, EDUCATION AND CHILD ABUSE

- 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
- Education data – processed by a court
- Education data – serious harm
- Child abuse data

FINANCE, MANAGEMENT AND NEGOTIATIONS

- Corporate finance
- Management forecasts
- Negotiations

REFERENCES AND EXAMS

- Confidential references
- Exam scripts and exam marks

OTHER

- Subject access requests – information about other people
- Trusts

¹ In regard to the processing of personal data by competent authorities for law enforcement purposes, exceptions are built into provisions within Part 3 of the DPA.

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1. ACKNOWLEDGEMENTS

Where appropriate, Gibraltar's Information Commissioner (the "Commissioner") will seek to ensure that locally published guidance notes are consistent with those published by fellow Information Commissioners in other jurisdictions.

As well as reflecting the existing data protection standards and practices in Gibraltar, parts of this document reflect and/or incorporate the guidance from the UK Data Protection Authority.

(a) The UK's Information Commissioner's Office

'Exemptions'

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/exemptions/>

2. INTRODUCTION

In some circumstances, the Data Protection Act 2004 (“DPA”) provides an exemption from particular provisions in the General Data Protection Regulation 2016/679 (“GDPR”). If an exemption applies, you may not have to comply with all the usual rights and obligations.

There are several different exemptions; these are detailed in Schedules 2 and 3 of the DPA. They add to and complement a number of exceptions already built in to certain GDPR provisions e.g. exemptions from compliance with an access request when the request is excessive². This guidance note focuses on the exemptions in Schedules 2 and 3 of the DPA.

It is important to note that these exemptions relate to the GDPR regime and not personal data regulated by Part 3 of the DPA i.e. the processing of personal data by competent authorities for law enforcement purposes³.

The exemptions in the DPA can relieve you of some of your obligations for things such as:

- the right to be informed;
- the right of access;
- dealing with other individual rights;
- reporting personal data breaches; and
- complying with the principles.

Some exemptions apply to only one of the above, but others can exempt you from several things.

Some things are not listed here as exemptions, although in practice they work a bit like an exemption. This is simply because they are not covered by the GDPR. Here are some examples:

- **Personal or household activities** – personal data processed in the course of a purely personal or household activity, with no connection to a professional or commercial activity, is outside the GDPR’s scope. This means that if you only use personal data for such things as writing to friends and family or taking pictures for your own enjoyment, you are not subject to the GDPR.
- **Law enforcement** – the processing of personal data by competent authorities for law enforcement purposes is outside the GDPR’s scope (e.g. the Police investigating a crime). Instead, this type of processing is subject to the rules in Part 3 of the DPA.
- **National security** – personal data processed for the purposes of safeguarding national security or defence is outside the GDPR’s scope. However, it is covered by Part 2, Chapter

² Article 12(5) of the GDPR

³ In regard to the processing of personal data by competent authorities for law enforcement purposes, exceptions are built in to provisions within Part 3 of the DPA.

3 of the DPA (the 'applied GDPR'), which contains an exemption for national security and defence⁴.

⁴ Section 28 of the DPA

3. HOW DO THE EXEMPTIONS WORK?

Whether or not you can rely on an exemption generally depends on your purposes for processing personal data.

Some exemptions apply simply because you have a particular purpose. But others only apply to the extent that complying with the GDPR would:

- be likely to *prejudice* your purpose (e.g. have a damaging or detrimental effect on what you are doing); or
- *prevent* or *seriously impair* you from processing personal data in a way that is *required* or *necessary* for your purpose.

Exemptions should not routinely be relied upon or applied in a blanket fashion. You must consider each exemption on a case-by-case basis.

You must also conduct regular reviews of your use of exemptions to ensure that you do not continue to rely on the exemption after the reasons for doing so no longer apply.

If an exemption does apply, sometimes you will be obliged to rely on it (for instance, if complying with GDPR would break another law), but sometimes you can choose whether or not to rely on it.

In line with the accountability principle, you should justify and document your reasons for relying on an exemption so you can demonstrate compliance.

If you cannot identify an exemption that covers what you are doing with personal data, you must comply with the GDPR as normal.

The Commissioner has powers to request information and investigate the use of exemptions. Enforcement powers, such as information notices and penalties, may be used whenever appropriate and necessary.

4. WHAT EXEMPTIONS ARE AVAILABLE?

4.1. CRIME, LAW AND PUBLIC PROTECTION

4.1.1. CRIME AND TAXATION: GENERAL⁵

There are two parts to this exemption. The first part can apply if you process personal data for the purposes of:

- the prevention and detection of crime;
- the apprehension or prosecution of offenders; or
- the assessment or collection of a tax or duty or an imposition of a similar nature.

It exempts you from the GDPR's provisions on:

- the right to be informed⁶;
- all the other individual rights⁷, except rights related to automated individual decision-making including profiling⁸;
- notifying individuals regarding rectification or erasure of personal data or restriction of processing⁹;
- the lawfulness, fairness and transparency principle¹⁰, except the requirement for processing to be lawful;
- the purpose limitation principle¹¹; and
- all the other principles¹², but only so far as they relate to the right to be informed and the other individual rights.

But the exemption only applies to the extent that complying with these provisions would be likely to *prejudice* your purposes of processing. If this is not so, you must comply with the GDPR as normal.

Example

A bank conducts an investigation into suspected financial fraud. The bank wants to pass its investigation file, including the personal data of several customers, to the Gibraltar Financial Intelligence Unit ("GFIU") for further investigation. The bank's investigation and proposed

⁵ Schedule 2, Part 1, paragraph 2 of the DPA

⁶ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

⁷ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

⁸ Article 22 of the GDPR

⁹ Article 19 of the GDPR

¹⁰ Article 5(1)(a) of the GDPR

¹¹ Article 5(1)(b) of the GDPR

¹² Article 5 of the GDPR

disclosure to the GFIU are for the purposes of the prevention and detection of crime. The bank decides that, were it to inform the individuals in question about this processing of their personal data, this would be likely to prejudice the investigation because they might abscond or destroy evidence. Informing the individuals in question may also result in a “tipping-off” offence. The bank relies on the crime and taxation exemption and, in this case, does not comply with the right to be informed.

The second part of this exemption applies when another controller obtains personal data processed for any of the purposes mentioned above for the purposes of discharging statutory functions. The controller that obtains the personal data is exempt from the GDPR provisions below to the same extent that the original controller was exempt -

- the right to be informed¹³;
- the right of access¹⁴; and
- all the principles¹⁵, but only so far as they relate to the right to be informed and the right of access.

4.1.2. CRIME AND TAXATION: RISK ASSESSMENT¹⁶

This exemption can apply to personal data in a classification applied to an individual as part of a risk assessment system.

The risk assessment system must be operated by a government department, local authority, or another authority administering housing benefit, for the purposes of:

- the assessment or collection of a tax or duty; or
- the prevention or detection of crime or the apprehension or prosecution of offenders, where the offence involves the unlawful use of public money or an unlawful claim for payment out of public money.

It exempts you from the GDPR’s provisions on:

- the right to be informed¹⁷;
- the right of access¹⁸; and
- all the principles¹⁹, but only so far as they relate to the right to be informed and the right of access.

¹³ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁴ Article 15(1) to (3) of the GDPR

¹⁵ Article 5 of the GDPR

¹⁶ Schedule 2, Part 1, paragraph 3 of the DPA

¹⁷ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁸ Article 15(1) to (3) of the GDPR

¹⁹ Article 5 of the GDPR

But the exemption only applies to the extent that complying with these provisions would *prevent* the risk assessment system from operating *effectively*. If this is not so, you must comply with these provisions as normal.

4.1.3. INFORMATION REQUIRED TO BE DISCLOSED BY LAW OR IN CONNECTION WITH LEGAL PROCEEDINGS²⁰

This exemption has three parts. The first part can apply if you are *required* by law to make personal data available to the public.

It exempts you from the GDPR's provisions on:

- the right to be informed²¹;
- all the other individual rights²², except rights related to automated individual decision-making including profiling²³;
- the lawfulness, fairness and transparency principle²⁴, except the requirement for processing to be lawful;
- notifying individuals regarding rectification or erasure of personal data or restriction of processing²⁵;
- the purpose limitation principle²⁶; and
- all the other principles²⁷, but only so far as they relate to the right to be informed and the other individual rights.

But the exemption only applies to the extent that complying with these provisions would *prevent* you meeting your legal obligation to make personal data publicly available.

Example

The Registrar of Companies is legally obliged to maintain a public register of certain information about companies, including the names of company directors. A director asks to exercise his right to erasure by having his name and address removed from the register. The request does not need to be complied with as it would prevent the Registrar of Companies from meeting its legal obligation to make that information publicly available.

The second part of this exemption can apply if you are *required* by law, or court order, to disclose personal data to a third party. It exempts you from the same provisions as above,

²⁰ Schedule 2, Part 1, paragraph 4 of the DPA

²¹ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

²² Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

²³ Article 22 of the GDPR

²⁴ Article 5(1)(a) of the GDPR

²⁵ Article 19 of the GDPR

²⁶ Article 5(1)(b) of the GDPR

²⁷ Article 5 of the GDPR

but only to the extent that complying with those provisions would *prevent* you disclosing the personal data.

Example

An employer receives a court order to hand over the personnel file of one of its employees to an insurance company for the assessment of a claim. Normally, the employer would not be able to disclose this information because doing so would be incompatible with the original purposes for collecting the data (contravening the purpose limitation principle). However, on this occasion the employer is exempt from the purpose limitation principle's requirements because it would prevent the employer disclosing personal data that it must do so by court order.

The third part of this exemption can apply if it is *necessary* for you to disclose personal data for the purposes of, or in connection with:

- legal proceedings, including prospective legal proceedings;
- obtaining legal advice; or
- establishing, exercising or defending legal rights.

It exempts you from the same provisions as above, **but only to the extent that complying with them would *prevent* you disclosing the personal data. If complying with these provisions would not prevent the disclosure, you cannot rely on the exemption.**

4.1.4. LEGAL PROFESSIONAL PRIVILEGE²⁸

This exemption applies if you process personal data:

- to which a claim to legal professional privilege could be maintained in legal proceedings; or
- in respect of which a duty of confidentiality is owed by a professional legal adviser to his client.

It exempts you from the GDPR's provisions on:

- the right to be informed²⁹;
- the right of access³⁰; and
- all the principles³¹, but only so far as they relate to the right to be informed and the right of access.

²⁸ Schedule 2, Part 4, paragraph 14 of the DPA

²⁹ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

³⁰ Article 15(1) to (3) of the GDPR

³¹ Article 5 of the GDPR

4.1.5. SELF INCRIMINATION³²

This exemption can apply if complying with the GDPR provisions below would reveal evidence that you have committed an offence.

It exempts you from the GDPR's provisions on:

- the right to be informed³³;
- the right of access³⁴; and
- all the principles³⁵, but only so far as they relate to the right to be informed and the right of access.

But the exemption only applies to the extent that complying with these provisions would expose you to proceedings for the offence.

This exemption does not apply to an offence under the DPA or an offence regarding false statutory declarations and statements under section 466 of the Crimes Act 2011.

But any information you do provide to an individual in response to a subject access request is not admissible against you in proceedings for an offence under the DPA.

4.1.6. FUNCTIONS DESIGNED TO PROTECT THE PUBLIC³⁶

This exemption can apply if you process personal data for the purposes of discharging one of six functions designed to protect the public.

The first four functions must be conferred on a person by enactment; be a function of the Crown, a Minister of the Crown or a government department; or be of a public nature and exercised in the public interest. These functions are:

1. To protect members of the public against financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; or financial loss due to the conduct of discharged.
2. To protect members of the public against dishonesty, malpractice or other seriously improper conduct; or unfitness or incompetence.
3. To protect charities or community interest companies against misconduct or mismanagement in their administration, to protect the property of charities or community interest companies from loss or misapplication, or to recover the property of charities or community interest companies.
4. To secure workers' health, safety and welfare or to protect others against health and safety risks in connection with (or arising from) someone at work.

³² Schedule 2, Part 4, paragraph 15 of the DPA

³³ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

³⁴ Article 15(1) to (3) of the GDPR

³⁵ Article 5 of the GDPR

³⁶ Schedule 2, Part 2, paragraph 6 of the DPA

The fifth function must be conferred by enactment or be of a public nature and exercised in the public interest. This function is:

5. to protect the public from maladministration, or a failure in services provided by a public body, or from the failure to provide a service that it is a function of a public body to provide.

The sixth function, like the first four, must be conferred on a person by enactment; be a function of the Crown, a Minister of the Crown or a government department; or be of a public nature and exercised in the public interest. This function is:

6. to protect members of the public from business conduct adversely affecting them, to regulate conduct (or agreements) preventing, restricting or distorting commercial competition, or to regulate undertakings abusing a dominant market position.

If you process personal data for any of the above functions, you are exempt from the GDPR's provisions on:

- the right to be informed³⁷;
- all the other individual rights³⁸, except rights related to automated individual decision-making including profiling³⁹;
- notifying individuals regarding rectification or erasure of personal data or restriction of processing⁴⁰; and
- all the principles⁴¹, but only so far as its provisions correspond to the rights and obligations listed above.

But the exemption only applies to the extent that complying with these provisions would be likely to *prejudice* the proper discharge of your functions. If you can comply with these provisions and discharge your functions as normal, you must do so.

4.1.7. AUDIT FUNCTIONS⁴²

This exemption can apply if you process personal data for the purposes of discharging a function conferred by enactment on the Principal Auditor.

It exempts you from the GDPR's provisions on:

- the right to be informed⁴³;

³⁷ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

³⁸ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

³⁹ Article 22 of the GDPR

⁴⁰ Article 19 of the GDPR

⁴¹ Article 5 of the GDPR

⁴² Schedule 2, Part 2, paragraph 7 of the DPA

⁴³ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

- all the other individual rights⁴⁴, except rights related to automated individual decision-making including profiling⁴⁵;
- notifying individuals regarding rectification or erasure of personal data or restriction of processing⁴⁶; and
- all the principles⁴⁷, but only so far as its provisions correspond to the rights and obligations listed above.

But the exemption only applies to the extent that complying with these provisions would be likely to *prejudice* the proper discharge of your functions. If it does not, you must comply with the GDPR as normal.

4.2. REGULATION, PARLIAMENT AND THE JUDICIARY

4.2.1. REGULATORY FUNCTIONS RELATING TO LEGAL SERVICES, THE HEALTH SERVICE AND CHILDREN'S SERVICES⁴⁸

This exemption can apply if you process personal data for the purposes of discharging a function relating to legal services, the health service and children's services.

It exempts you from the GDPR's provisions on:

- the right to be informed⁴⁹;
- all the other individual rights⁵⁰, except rights related to automated individual decision-making including profiling⁵¹; and
- all the principles⁵², but only so far as its provisions correspond to the rights and obligations listed above.

But the exemption only applies to the extent that complying with these provisions would be likely to *prejudice* the proper discharge of the function.

4.2.2. PARLIAMENTARY PRIVILEGE⁵³

This exemption can apply if it is *required* to avoid the privileges of Parliament being infringed.

It exempts you from the GDPR's provisions on:

⁴⁴ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

⁴⁵ Article 22 of the GDPR

⁴⁶ Article 19 of the GDPR

⁴⁷ Article 5 of the GDPR

⁴⁸ Schedule 2, Part 2, paragraph 8 of the DPA

⁴⁹ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

⁵⁰ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

⁵¹ Article 22 of the GDPR

⁵² Article 5 of the GDPR

⁵³ Schedule 2, Part 2, paragraph 9 of the DPA

- the right to be informed⁵⁴;
- all the other individual rights⁵⁵, except rights related to automated individual decision-making including profiling⁵⁶;
- notifying individuals of personal data breaches⁵⁷; and
- all the principles⁵⁸, but only so far as they relate to the right to be informed and the other individual rights.

But if you can comply with these provisions without infringing parliamentary privilege, you must do so.

4.2.3. JUDICIAL APPOINTMENTS, INDEPENDENCE AND PROCEEDINGS⁵⁹

This exemption applies if you process personal data:

- for the purposes of assessing a person’s suitability for judicial office or the office of Queen’s Counsel;
- as an individual acting in a judicial capacity; or
- as a court or tribunal acting in its judicial capacity.

It exempts you from the GDPR’s provisions on:

- the right to be informed⁶⁰;
- all the other individual rights⁶¹, except rights related to automated individual decision-making including profiling⁶²; and
- all the principles⁶³, but only so far as they relate to the right to be informed and the other individual rights.

Additionally, even if you do not process personal data for the reasons above, you are also exempt from the same provisions of the GDPR to the extent that complying with them would be likely to *prejudice* judicial independence or judicial proceedings.

⁵⁴ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

⁵⁵ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

⁵⁶ Article 22 of the GDPR

⁵⁷ Article 34(1) and (4) of the GDPR

⁵⁸ Article 5 of the GDPR

⁵⁹ Schedule 2, Part 2, paragraph 10 of the DPA

⁶⁰ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

⁶¹ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

⁶² Article 22 of the GDPR

⁶³ Article 5 of the GDPR

4.3. JOURNALISM, RESEARCH AND ARCHIVING

4.3.1. JOURNALISM, ACADEMIA, ART AND LITERATURE⁶⁴

This exemption can apply if you process personal data for:

- journalistic purposes;
- academic purposes;
- artistic purposes; or
- literary purposes.

Together, these are known as the 'special purposes'.

The exemption relieves you from your obligations regarding the GDPR's provisions on:

- all the principles, except the security and accountability principles⁶⁵;
- the lawful bases⁶⁶;
- the conditions for consent⁶⁷;
- children's consent⁶⁸;
- the conditions for processing special categories of personal data and data about criminal convictions and offences⁶⁹;
- processing not requiring identification⁷⁰;
- the right to be informed⁷¹;
- all the other individual rights⁷², except rights related to automated individual decision-making including profiling⁷³;
- the communication of personal data breaches to individuals⁷⁴;
- consultation with the Commissioner for high risk processing⁷⁵;
- international transfers of personal data⁷⁶; and

⁶⁴ Schedule 2, Part 5, paragraph 22 of the DPA

⁶⁵ Article 5(1) (a) to (e) of the GDPR

⁶⁶ Article 6 of the GDPR

⁶⁷ Article 7 of the GDPR

⁶⁸ Article 8(1) and (2) of the GDPR

⁶⁹ Articles 9 and 10 of the GDPR

⁷⁰ Article 11(2) of the GDPR

⁷¹ Article 13(1) to (3) and 14(1) to (4) of the GDPR

⁷² Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1)(a)(b) and (d), Article 19, Article 20(1) and (2), and Article 21 of the GDPR

⁷³ Article 22 of the GDPR

⁷⁴ Article 34(1) and (4) of the GDPR

⁷⁵ Article 36 of the GDPR

⁷⁶ Article 44 of the GDPR

- cooperation and consistency between supervisory authorities⁷⁷.

But the exemption only applies to the extent that:

- **as controller for the processing of personal data, you reasonably believe that compliance with these provisions would be incompatible with the special purposes (this must be more than just an inconvenience);**
- **the processing is being carried out with a view to the publication of some journalistic, academic, artistic or literary material; and**
- **you reasonably believe that the publication of the material would be in the public interest, taking into account the special importance of the general public interest in freedom of expression, any specific public interest in the particular subject, and the potential to harm individuals.**

When deciding whether it is reasonable to believe that publication would be in the public interest, you must (if relevant) have regard to:

- the Programme Standards Code;
- the Right of Reply Code;
- the On-Demand Audiovisual Media Services Code;
- the Audiovisual Commercial Communications Code; and
- the Objectivity, Impartiality, Accuracy and Undue Prominence Code.

We expect you to be able to explain why the exemption is required in each case, and how and by whom this was considered at the time. The Commissioner does not have to agree with your view – but we must be satisfied that you had a reasonable belief.

4.3.2. RESEARCH AND STATISTICS⁷⁸

This exemption can apply if you process personal data for:

- scientific or historical research purposes; or
- statistical purposes.

It is unlikely to apply to the processing of personal data for commercial research purposes such as market research or customer satisfaction surveys, unless you can demonstrate that this research uses rigorous scientific methods and furthers a general public interest.

It exempts you from the GDPR's provisions on:

- the right of access⁷⁹;
- the right to rectification⁸⁰;
- the right to restrict processing⁸¹; and
- the right to object⁸².

⁷⁷ Articles 60 to 67 of the GDPR

⁷⁸ Schedule 2, Part 6, paragraph 23 of the DPA

⁷⁹ Article 15(1) and (3) of the GDPR

⁸⁰ Article 16 of the GDPR

⁸¹ Article 18(1) of the GDPR

⁸² Article 21 of the GDPR

The GDPR also provides exceptions from its provisions on the right to be informed (for indirectly collected data)⁸³ and the right to erasure⁸⁴.

But the exemption and the exceptions only apply:

- **to the extent that complying with the provisions above would *prevent or seriously impair* the achievement of the purposes for processing;**
- **if the processing is subject to appropriate safeguards for individuals' rights and freedoms (see Article 89(1) of the GDPR – among other things, you must implement data minimisation measures);**
- **if the processing is not likely to cause substantial damage or substantial distress to an individual⁸⁵;**
- **if the processing is not used for measures or decisions about particular individuals, except for approved medical research⁸⁶; and**
- **as regards the right of access, the research results are not made available in a way that identifies individuals.**

Additionally, the GDPR contains specific provisions that adapt the application of the purpose limitation and storage limitation principles when you process personal data for archiving purposes in the public interest.

4.3.3. ARCHIVING IN THE PUBLIC INTEREST⁸⁷

This exemption can apply if you process personal data for archiving purposes in the public interest.

It exempts you from the GDPR's provisions on:

- the right of access⁸⁸;
- the right to rectification⁸⁹;
- the right to restrict processing⁹⁰;
- the obligation to notify others regarding rectification, erasure or restriction⁹¹;
- the right to data portability⁹²; and
- the right to object⁹³.

⁸³ Article 14(5)(b) of the GDPR

⁸⁴ Article 17(3)(d) of the GDPR

⁸⁵ Section 23(2) of the DPA

⁸⁶ Section 23(3) of the DPA

⁸⁷ Schedule 2, Part 6, paragraph 24 of the DPA

⁸⁸ Article 15(1) and (3) of the GDPR

⁸⁹ Article 16 of the GDPR

⁹⁰ Article 18(1) of the GDPR

⁹¹ Article 19 of the GDPR

⁹² Article 20(1) of the GDPR

⁹³ Article 21(1) of the GDPR

The GDPR also provides exceptions from its provisions on the right to be informed (for indirectly collected data)⁹⁴ and the right to erasure⁹⁵.

But the exemption and the exceptions only apply:

- **to the extent that complying with the provisions above would *prevent or seriously impair* the achievement of the purposes for processing;**
- **if the processing is subject to appropriate safeguards for individuals' rights and freedoms (see Article 89(1) of the GDPR – among other things, you must implement data minimisation measures);**
- **if the processing is not likely to cause substantial damage or substantial distress to an individual⁹⁶; and**
- **if the processing is not used for measures or decisions about particular individuals, except for approved medical research⁹⁷.**

Additionally, the GDPR contains specific provisions that adapt the application of the purpose limitation and storage limitation principles when you process personal data for archiving purposes in the public interest.

4.4. HEALTH, SOCIAL WORK, EDUCATION AND CHILD ABUSE

4.4.1. HEALTH DATA – PROCESSED BY A COURT⁹⁸

This exemption can apply to health data (personal data concerning health) that –

- is processed by a court;
- it consists of information supplied in a report or other evidence given to the court in the course of family proceedings and proceedings involving children; and
- in accordance with those rules, the data may be withheld by the court in whole or in part from the data subject.

It exempts you from the GDPR's provisions on:

- the right to be informed⁹⁹;
- all the other individual rights¹⁰⁰, except rights related to the obligation to notify rectification or erasure¹⁰¹ and automated individual decision-making including profiling¹⁰²; and

⁹⁴ Article 14(5)(b) of the GDPR

⁹⁵ Article 17(3)(d) of the GDPR

⁹⁶ Section 23(2) of the DPA

⁹⁷ Section 23(3) of the DPA

⁹⁸ Schedule 3, Part 2, paragraph 3 of the DPA

⁹⁹ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁰⁰ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 20(1) and (2), and Article 21(1) of the GDPR

¹⁰¹ Article 19 of the GDPR

¹⁰² Article 22 of the GDPR

- all the principles¹⁰³, but only so far as they correspond with the abovementioned provisions.

4.4.2. HEALTH DATA – AN INDIVIDUAL’S EXPECTATIONS AND WISHES¹⁰⁴

This exemption can apply if you receive a request (in exercise of a power conferred by an enactment or rule of law) for health data from:

- someone with parental responsibility for an individual aged under 18; or
- someone appointed by the court to manage the affairs of an individual who is incapable of managing their own affairs.

It exempts you from the GDPR’s provisions on:

- the right to be informed¹⁰⁵;
- all the other individual rights¹⁰⁶, except rights related to the obligation to notify rectification or erasure¹⁰⁷ and automated individual decision-making including profiling¹⁰⁸; and
- all the principles¹⁰⁹, but only so far as they correspond with the abovementioned provisions.

But the exemption only applies to the extent that complying with the request would disclose information that:

- **the individual provided in the expectation that it would not be disclosed to the requestor, unless the individual has since expressly indicated that they no longer have that expectation;**
- **was obtained as part of an examination or investigation to which the individual consented in the expectation that the information would not be disclosed in this way, unless the individual has since expressly indicated that they no longer have that expectation; or**
- **the individual has expressly indicated should not be disclosed in this way.**

4.4.3. HEALTH DATA – SERIOUS HARM¹¹⁰

This exemption can apply if you receive a subject access request for health data.

It exempts you from the GDPR’s provisions on the right of access¹¹¹ regarding your processing of health data.

¹⁰³ Article 5 of the GDPR

¹⁰⁴ Schedule 3, Part 2, paragraph 4 of the DPA

¹⁰⁵ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁰⁶ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 20(1) and (2), and Article 21(1) of the GDPR

¹⁰⁷ Article 19 of the GDPR

¹⁰⁸ Article 22 of the GDPR

¹⁰⁹ Article 5 of the GDPR

¹¹⁰ Schedule 3, Part 2, paragraph 5 of the DPA

¹¹¹ Article 15(1) to (3) of the GDPR

But the exemption only applies to the extent that compliance with the right of access would be likely to cause *serious harm* to the *physical* or *mental health* of any individual. This is known as the 'serious harm test' for health data.

You can only rely on this exemption if:

- **you are a health professional¹¹²; or**
- **within the last six months you have obtained an opinion from an appropriate health professional that the serious harm test for health data is met. Even if you have done this, you still cannot rely on the exemption if it would be reasonable in all the circumstances to re-consult the appropriate health professional.**

4.4.4. HEALTH DATA – RESTRICTION OF THE RIGHT OF ACCESS¹¹³

This is a restriction rather than an exemption. It applies if you receive a subject access request for health data.

It restricts you from disclosing health data in response to a subject access request, unless:

- you are a health professional¹¹⁴; or
- within the last six months you have obtained an opinion from an appropriate health professional that the serious harm test for health data is *not* met. Even if you have done this, you must re-consult the appropriate health professional if it would be reasonable in all the circumstances.

This restriction does not apply if you are satisfied that the health data has already been seen by, or is known by, the individual it is about.

4.4.5. SOCIAL WORK DATA – PROCESSED BY A COURT¹¹⁵

This exemption can apply to social work data (personal data that is not health or education data) processed by a court. If you are unsure whether the data you process is social work data, see paragraphs 7(1) and 8 of Schedule 3, Part 3 of the DPA for full details of what this is.

The exemption relieves you from your obligations regarding the GDPR's provisions on:

¹¹² “the appropriate health professional”, in relation to a question as to whether the serious harm test is met with respect to data concerning health, means- (a) the health professional who is currently or was most recently responsible for the diagnosis, care or treatment of the data subject in connection with the matters to which the data relates; (b) where there is more than one such health professional, the health professional who is the most suitable to provide an opinion on the question; or (c) a health professional who has the necessary experience and qualifications to provide an opinion on the question, where there is no health professional available falling within subparagraphs (a) or (b).

¹¹³ Schedule 3, Part 2, paragraph 6 of the DPA

¹¹⁴ “the appropriate health professional”, in relation to a question as to whether the serious harm test is met with respect to data concerning health, means- (a) the health professional who is currently or was most recently responsible for the diagnosis, care or treatment of the data subject in connection with the matters to which the data relates; (b) where there is more than one such health professional, the health professional who is the most suitable to provide an opinion on the question; or (c) a health professional who has the necessary experience and qualifications to provide an opinion on the question, where there is no health professional available falling within subparagraphs (a) or (b).

¹¹⁵ Schedule 3, Part 3, paragraph 9 of the DPA

- the right to be informed¹¹⁶;
- all the other individual rights¹¹⁷, except rights related to the obligation to notify rectification or erasure¹¹⁸ and automated individual decision-making including profiling¹¹⁹; and
- all the principles¹²⁰, but only so far as they relate to the abovementioned provisions.

But the exemption only applies if the social work data is:

- **supplied in a report or evidence given to the court in the course of proceedings; and**
- **those proceedings are subject to certain specific statutory rules that allow the social work data to be withheld from the individual it relates to.**

4.4.6. SOCIAL WORK DATA – AN INDIVIDUAL'S EXPECTATIONS AND WISHES¹²¹

This exemption can apply if you receive a request (in exercise of a power conferred by an enactment or rule of law) for social work data concerning an individual from:

- someone with parental responsibility for an individual aged under 18; or
- someone appointed by a court to manage the affairs of an individual who is incapable of managing their own affairs.

It exempts you from the GDPR's provisions on:

- the right to be informed¹²²;
- all the other individual rights¹²³, except rights related to the obligation to notify rectification or erasure¹²⁴ and automated individual decision-making including profiling¹²⁵; and
- all the principles¹²⁶, but only so far as they relate to the abovementioned provisions.

But the exemption only applies to the extent that complying with the request would disclose information that:

- **the individual provided in the expectation that it would not be disclosed to the requestor, unless the individual has since expressly indicated that they no longer have that expectation;**
- **was obtained as part of an examination or investigation to which the individual consented in the expectation that the information would not be disclosed in**

¹¹⁶ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹¹⁷ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 20(1) and (2), and Article 21(1) of the GDPR

¹¹⁸ Article 19 of the GDPR

¹¹⁹ Article 22 of the GDPR

¹²⁰ Article 5 of the GDPR

¹²¹ Schedule 3, Part 3, paragraph 10 of the DPA

¹²² Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹²³ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 20(1) and (2), and Article 21(1) of the GDPR

¹²⁴ Article 19 of the GDPR

¹²⁵ Article 22 of the GDPR

¹²⁶ Article 5 of the GDPR

this way, unless the individual has since expressly indicated that they no longer have that expectation; or

- **the individual has expressly indicated should not be disclosed in this way.**

4.4.7. SOCIAL WORK DATA – SERIOUS HARM¹²⁷

This exemption can apply if you receive a subject access request for social work data.

It exempts you from the GDPR’s provisions on the right of access¹²⁸ regarding your processing of social work data.

But the exemption only applies to the extent that complying with the right of access would be likely to *prejudice* carrying out social work because it would be likely to cause *serious harm* to the *physical* or *mental health* of any individual. This is known as the ‘serious harm test’ for social work data.

4.4.8. EDUCATION DATA – PROCESSED BY A COURT¹²⁹

This exemption can apply to education data (personal data in an educational record) processed by a court. If you are unsure whether the data you process is ‘education data’, see paragraphs 12-14 of Schedule 3, Part 4 of the DPA for full details of what this is.

The exemption relieves you from your obligations regarding the GDPR’s provisions on:

- the right to be informed¹³⁰;
- all the other individual rights¹³¹, except rights related to the obligation to notify rectification or erasure¹³² and automated individual decision-making including profiling¹³³; and
- all the principles¹³⁴, but only so far as they relate to the abovementioned provisions.

But the exemption only applies if the education data is:

- **supplied in a report or evidence given to the court in the course of proceedings; and**
- **those proceedings are subject to certain specific statutory rules that allow the education data to be withheld from the individual it relates to.**

4.4.9. EDUCATION DATA – SERIOUS HARM¹³⁵

This exemption can apply if you receive a subject access request for education data.

¹²⁷ Schedule 3, Part 3, paragraph 11 of the DPA

¹²⁸ Article 15(1) to (3) of the GDPR

¹²⁹ Schedule 3, Part 4, paragraph 15 of the DPA

¹³⁰ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹³¹ Article 15(1) to (3), Article 16, Article 17(1) and (2), Article 18(1), Article 20(1) and (2), and Article 21(1) of the GDPR

¹³² Article 19 of the GDPR

¹³³ Article 22 of the GDPR

¹³⁴ Article 5 of the GDPR

¹³⁵ Schedule 3, Part 4, paragraph 16 of the DPA

It exempts you from the GDPR's provisions on the right of access¹³⁶ regarding your processing of education data.

But the exemption only applies to the extent that complying with the right of access would be likely to cause *serious harm* to the *physical or mental health* of any individual. This is known as the 'serious harm test' for education data.

4.4.10. CHILD ABUSE DATA¹³⁷

This exemption can apply if you receive a request (in exercise of a power conferred by an enactment or rule of law) for child abuse data. If you are unsure whether the data you process is 'child abuse data', see paragraph 17(3) of Schedule 3, Part 5 of the DPA for a definition.

The exemption applies if the request is from:

- someone with parental responsibility for an individual aged under 18; or
- someone appointed by court to manage the affairs of an individual who is incapable of managing their own affairs.

It exempts you from the GDPR's provisions on the right of access¹³⁸.

But the exemption only applies to the extent that complying with the request would not be in the best interests of the individual who the child abuse data is about.

4.5. FINANCE, MANAGEMENT AND NEGOTIATIONS

4.5.1. CORPORATE FINANCE¹³⁹

This exemption can apply if you are permitted under Gibraltar law to carry on regulated services and process personal data in connection with a "corporate finance service"¹⁴⁰.

It exempts you from the GDPR's provisions on:

- the right to be informed¹⁴¹;
- the right of access¹⁴²; and
- all the principles¹⁴³, but only so far as they relate to the right to be informed and the right of access.

But the exemption only applies to the extent that:

¹³⁶ Article 15(1) to (3) of the GDPR

¹³⁷ Schedule 3, Part 5, paragraph 17 of the DPA

¹³⁸ Article 15(1) to (3) of the GDPR

¹³⁹ Schedule 2, Part 4, paragraph 16 of the DPA

¹⁴⁰ "corporate finance service" means a service consisting in- (a) underwriting in respect of issues of, or the placing of issues of, any instrument; (b) services relating to such underwriting; or (c) advice to undertakings on capital structure, industrial strategy and related matters and advice and service relating to mergers and the purchase of undertakings.

¹⁴¹ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁴² Article 15(1) to (3) of the GDPR

¹⁴³ Article 5 of the GDPR

- **complying with the provisions would be likely to affect the price of an instrument;**
 - **you reasonably believe that complying with the provisions would affect a decision of a person -**
 - **whether to deal in, subscribe for or issue a financial instrument, or**
 - **whether to act in a way likely to have an effect on a business activity (e.g. an effect on an undertaking’s capital structure, the legal or beneficial ownership of a business or asset or a person’s industrial strategy; and**
- have a prejudicial effect on the orderly functioning of financial markets (or the efficient allocation of capital within the economy).**

4.5.2. MANAGEMENT FORECASTS¹⁴⁴

This exemption can apply if you process personal data for the purposes of management forecasting or management planning in relation to a business or other activity.

It exempts you from the GDPR’s provisions on:

- the right to be informed¹⁴⁵;
- the right of access¹⁴⁶; and
- all the principles¹⁴⁷, but only so far as they relate to the right to be informed and the right of access.

But the exemption only applies to the extent that compliance with the above provisions would be likely to *prejudice* the conduct of the business or activity.

Example

The senior management of an organisation is 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 before the management’s plans are announced).

4.5.3. NEGOTIATIONS¹⁴⁸

This exemption can apply to personal data in records of your intentions relating to any negotiations with an individual.

It exempts you from the GDPR’s provisions on:

¹⁴⁴ Schedule 2, Part 4, paragraph 17 of the DPA

¹⁴⁵ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁴⁶ Article 15(1) to (3) of the GDPR

¹⁴⁷ Article 5 of the GDPR

¹⁴⁸ Schedule 2, Part 4, paragraph 18 of the DPA

- the right to be informed¹⁴⁹;
- the right of access¹⁵⁰; and
- all the principles¹⁵¹, but only so far as they relate to the right to be informed and the right of access.

But it only applies to the extent that complying with the above provisions would be likely to *prejudice* negotiations with that individual.

Example

An individual makes a claim to his insurance company. The claim is for compensation for personal injuries he sustained in an accident. The insurance company disputes the seriousness of the injuries and the amount of compensation it should pay. An internal paper sets out the company's position on these matters including the maximum sum it would be willing to pay to avoid the claim going to court. If the individual makes a subject access request to the insurance company, it would not have to send him the internal paper – because doing so would be likely to prejudice the negotiations to settle the claim.

4.6. REFERENCES AND EXAMS

4.6.1. CONFIDENTIAL REFERENCES¹⁵²

This exemption applies if you give or receive a confidential reference for the purposes of prospective or actual:

- education, training or employment of an individual;
- placement of an individual as a volunteer;
- appointment of an individual to office; or
- provision by an individual of any service.

It exempts you from the GDPR's provisions on:

- the right to be informed¹⁵³;
- the right of access¹⁵⁴; and

all the principles¹⁵⁵, but only so far as they relate to the right to be informed and the right of access.

¹⁴⁹ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁵⁰ Article 15(1) to (3) of the GDPR

¹⁵¹ Article 5 of the GDPR

¹⁵² Schedule 2, Part 4, paragraph 19 of the DPA

¹⁵³ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁵⁴ Article 15(1) to (3) of the GDPR

¹⁵⁵ Article 5 of the GDPR

Example

Company A provides an employment reference in confidence for one of its employees to company B. If the employee makes a subject access request to company A or company B, the reference will be exempt from disclosure. This is because the exemption applies to the reference regardless of whether it is in the hands of the company that gives it or receives it.

4.6.2. EXAM SCRIPTS AND EXAM MARKS¹⁵⁶

This exemption can apply to personal data in exam scripts.

It exempts you from the GDPR's provisions on:

- the right to be informed¹⁵⁷;
- the right of access¹⁵⁸; and

all the principles¹⁵⁹, but only so far as they relate to the right to be informed and the right of access.

But it only applies to the information recorded by candidates. This means candidates do not have the right to copies of their answers to the exam questions.

However, the information recorded by the person marking the exam is not exempt from the above provisions. If an individual makes a subject access request for this information before the results are announced, special rules apply to how long you have to comply with the request. You must provide the information:

- within five months of receiving the request; or
- within 40 days of announcing the exam results, if this is earlier.

4.7. SUBJECT ACCESS REQUESTS – INFORMATION ABOUT OTHER PEOPLE¹⁶⁰

This exemption applies if you receive a subject access request for information containing the personal data of more than one individual.

The exemption does not apply where -

- (a) the other individual has consented to the disclosure of the information to the data subject; or
- (b) it is reasonable to disclose the information to the data subject without the consent of the other individual.

¹⁵⁶ Schedule 2, Part 4, paragraph 20 of the DPA

¹⁵⁷ Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁵⁸ Article 15(1) to (3) of the GDPR

¹⁵⁹ Article 5 of the GDPR

¹⁶⁰ Schedule 2, Part 3, paragraph 11 of the DPA

In determining whether it is reasonable to disclose the information without consent, the controller must have regard to all the relevant circumstances, including-

- (a) the type of information that would be disclosed;
- (b) any duty of confidentiality owed to the other individual;
- (c) any steps taken by the controller with a view to seeking the consent of the other individual;
- (d) whether the other individual is capable of giving consent; and
- (e) any express refusal of consent by the other individual.

“Information relating to another individual” includes information identifying the other individual as the source of information. An individual can be identified from information to be provided to a data subject by a controller if the individual can be identified from-

- (a) that information, or
- (b) that information and any other information that the controller reasonably believes the data subject is likely to possess or obtain.

When the data is processed in the context of health care, social care or education, you should consider Schedule 2, Part 3, paragraph 12 of the DPA, which sets out the circumstances when it is considered reasonable for a controller to disclose information to a data subject without the consent of the other individual.

4.8. TRUSTS¹⁶¹

This exemption applies if you process personal data in connection with a Gibraltar trust. However, the exemption is subject to the terms of the trust or any court order.

It exempts you from the GDPR’s provisions on:

- the right to be informed¹⁶²;
- the right of access¹⁶³; and
- all the principles¹⁶⁴, but only so far as they relate to the right to be informed and the right of access.

The exemption only applies if the application of those provisions would be likely to result in the disclosure of any document that -

(a) discloses the existence of a trust, in circumstances where one or more of the beneficiaries are not aware of the existence of the trust;

(b) discloses a trustee’s deliberations as to the manner in which the trustee has exercised a power or discretion or performed a duty conferred or imposed upon the trustee;

(c) discloses the reason for any particular exercise of such power or discretion or performance of duty referred to in subparagraph (b), or the material upon which such reason shall or might have been based;

¹⁶¹ Schedule 2, Part 4, paragraph 21 of the DPA

¹⁶² Article 13(1) to (3) and Article 14(1) to (4) of the GDPR

¹⁶³ Article 15(1) to (3) of the GDPR

¹⁶⁴ Article 5 of the GDPR

(d) relates to the exercise or proposed exercise of such power or discretion, or the performance or proposed performance of such duty, referred to in subparagraph (b); or

(e) relates to or forms part of the accounts of the trust, and a trustee is satisfied that it is in the interests of one or more of the beneficiaries, or the beneficiaries as a whole, to restrict the listed GDPR provisions.

You should ensure you evidence compliance by confirming which limb (a) to (e) is being relied on, as well as documenting the reasons for reliance. You should also conduct regular reviews to ensure you do not keep relying on exemptions after the reasons for doing so no longer apply.

IMPORTANT NOTE

This document is purely for guidance and does not constitute legal advice or legal analysis. All organisations that process personal data need to be aware that the GDPR and the DPA will apply directly to them. The responsibility to become familiar with the GDPR and the DPA and comply with its provisions lies with the organisation.

Where necessary, the Commissioner will review this Guidance Note in accordance with any updates or other developments. In the event of any conflict or inconsistencies between this Guidance Note and the GDPR and the DPA, the GDPR and the DPA will take precedence.

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