

GDPR EXEMPTIONS

A short guide to the exemptions from
the GDPR available via the UK Data
Protection Act 2018

DPA 2018 Exemptions Guide

A word of warning: the Data Protection Act 2018 is designed to be specific. Every detail is spelled out, every reference is precisely defined. When defining what constitutes 'Social Work Data', several pages are taken up with references to specific legislation and activities. The GDPR is a logical, clearly written guide to how personal data should be handled; the DPA 2018 makes the GDPR work, as well creating a data protection regime for law enforcement and the intelligence services and giving the ICO their powers. The GDPR can be read from start to finish; the DPA 2018 makes much more sense as a compendium of different elements doing different jobs. This guide is designed to give you a way in to one specific DPA element: how the exemptions work. It is my **very strong advice** that you consult the DPA when applying any of the exemptions in a practical situation.

Article 23 of the GDPR sets out the parameters for exemptions from normal data protection practice, but then derogates how the exemptions work to each member state. The UK decides how to implement the exemptions. The UK's vehicle to make this work is the Data Protection Act 2018; to be specific, the first four schedules of the Act (i.e. some of the sections at the back). The strategy was obviously to try to ensure that the exemptions from the GDPR are as close to those that existed in the DPA 1998 as possible. Wherever possible, the DPA 2018 exemptions are the same as those in the DPA 1998, to the extent of using the same wording.

There are two important things to note about the DPA exemptions:

- 1)** The use of exemptions is **not** mandatory – the data controller chooses how and whether to apply them in any particular case. They exist to allow the Data Controller to relax certain Data Protection provisions in order to make it easier do something that they consider to be important.
- 2)** The exemptions **do not** give you a power to do anything. You still need to know why you intend to process the personal data in question, and you need a lawful basis from the GDPR to process the data – none of the exemptions take that away. The exemptions take away some parts of some of the principles that you would otherwise have to comply with.

You might be able to refuse some or part of a subject access request. You might be able to disclose or obtain data without telling the data subject. Remember that the logic of this is that in most cases, you **do** have to do these things.

None of them are a get-out-of-fail free card, sweeping all of the GDPR away. Most of the principles are exempted, as well as all subject access rights and much of the rest of the GDPR. Aside from the National Security and special purposes exemptions, you can guarantee that the exemptions have no effect on minimisation, accuracy, retention or security. You will need to ensure that all of these are done properly.

Lawful basis

The first GDPR principle requires you to identify a condition from Article 6 (and for special categories data, an exemption from Article 9). Only the special purposes exemption might remove the need to have a lawful basis. Even if your exemption removes the requirement for fairness and transparency, you will still need a sound legal basis to use the data.

Requests from third parties

When dealing with requests for disclosure, whether a third party asking for data cites an exemption makes no difference – the exemption is not a power for them to use. Quoting an exemption does not make their request valid, and not mentioning an exemption does not make their request for data invalid.

For example, if a police force ask you to disclose data under Schedule 2, Part 1, Section 2 (the closest thing to the old S29), you can say no. You are not under a legal obligation to supply the data. The exemption does not empower you to supply the data or give them a power to demand the data. Only an Article 6 condition and / or an Article 9 exemption gives you the ability to use data. You can comply with the request, but choose to apply GDPR in the normal way (e.g. tell the subject their data is being shared).

How the exemptions work

The exemptions follow a formula. The DPA lists a series of 'provisions' (i.e. GDPR requirements). Then it sets out the exemptions to which these provisions apply. The first set of listed provisions includes all of the data subject rights including transparency, the first principle insofar as it applies to fairness and transparency, and the second principle. In effect, this means that data can be used secretly, the subject has no control over it, and the original purpose for obtaining the data is irrelevant. These provisions apply to crime

and taxation matters, immigration control and disclosures required for legal purposes (I am paraphrasing a lot here, this one is big).

The exemption only works if the two sides are in conflict. You can only set aside one or more of the listed provisions if the subject matter of the exemption will be prejudiced. This means that an exemption should not be used if doing what you would normally do (e.g. fairness or subject access) will not interfere with the stated purpose.

Citing exemptions

Staff at the Information Commissioner sometimes state or imply that when you use an exemption (particularly when dealing with a subject access request), you must explain that exemption to the data subject. This approach mirrors the Freedom of Information Act 2000, where explaining which exemption has been applied and why is nearly always a legal requirement. The Data Protection Act 2018 **does not** require you to tell the subject that an exemption has been used. This does not mean that you should not do so but it is important to understand that it is up to the organisation whether it is the right thing to do. The Information Commissioner cannot force you to do so.

SUMMARY OF THE DPA 2018 EXEMPTIONS

Section	Purpose	Exempt from	Aim of exemption	Test?
Sch2, Pt1, S2	Prevention or detection of crime, apprehension + prosecution of offenders, taxation	All rights including transparency, principle 1 (except lawful basis), principle 2 (purpose limitation), notification of data breach to subjects	Secret processing, removal of rights / control from subject, ability to reuse data regardless of original purpose	Will applying these GDPR provisions prejudice one of the named purposes? For example, will it be harder for the police
Sch2, Pt1, S4	Maintenance of immigration controls, investigation of activities that might undermine such controls	All rights including transparency, principle 1 (except legal basis), principle 2 (purpose limitation)	Secret processing, removal of rights / control from subject, ability to reuse data regardless of original purpose. Following a successful legal challenge, this exemption can only be used by the Home Secretary.	Will operating GDPR in the normal way prejudice these activities?
Sch2, Pt1, S5	Publication required by law	All rights including transparency, principle 1 (except lawful basis), principle 2 (purpose limitation)	Secret processing, removal of rights / control from subject, ability to reuse data regardless of original purpose	Publication will be prejudiced by the normal operation of these GDPR rights
	Disclosures required by law or for legal	All rights including transparency, principle 1 (except lawful basis),	Secret processing, removal of rights / control from subject,	Relevant GDPR provision will prevent the disclosure

	proceedings, or obtaining legal advice	principle 2 (purpose limitation)	ability to reuse data regardless of original purpose	
Section	Purpose	Exempt from	Aim of exemption	Test?
Sch2, Pt2, S7	Functions to protect the public (i.e. usually those of regulators)	All subject rights including transparency + principle 1 (except lawful basis)	Secret processing, removal of rights / control from subject	Prejudice to the purpose
Sch2, Pt2, S8	Functions of state appointed auditors	All subject rights including transparency + principle 1 (except lawful basis)	Secret processing, removal of rights / control from subject	Prejudice to the purpose
Sch2, Pt2, S9	Functions of the Bank of England	All subject rights including transparency + principle 1 (except lawful basis)	Secret processing, removal of rights / control from subject	Prejudice to the purpose
Sch2, Pt2, S10	Complaints processes for legal services, NHS and children's services	All subject rights including transparency + principle 1 (except lawful basis)	Secret processing, removal of rights / control from subject	Prejudice to the purpose
Sch2, Pt2, S11	Wide variety of specific regulators' purposes	All subject rights including transparency + principle 1 (except lawful basis)	Secret processing, removal of rights / control from subject	Prejudice to the purpose
Sch2, Pt2, S13	Parliamentary privilege	All subject rights including transparency	Secret processing, removal of rights / control from subject	Prejudice to the purpose

		+ principle 1 (except lawful basis)		
Section	Purpose	Exempt from	Aim of exemption	Test?
Sch2, Pt2, S14	Judicial appointments, proceedings etc	All subject rights including transparency + principle 1 (except lawful basis)	Secret processing, removal of rights / control from subject	Prejudice to the purpose
Sch2, Pt2, S15	Crown honours and appointments	All subject rights including transparency + principle 1 (except lawful basis)	Secret processing, removal of rights / control from subject	Prejudice to the purpose
Sch2, Pt3, S16	Protecting rights of third parties mentioned in data to be disclosed	Subject access	Protecting the rights esp. confidentiality of other people	Balance between subject's right and those of the other people whose data might be affected
Sch2, Pt4, S19	Legal professional privilege	Transparency and subject access	Awareness of whether and how data is being processed	Ensuring that the data is indeed privileged (i.e. from a qualified lawyer, advice on a legal matter)
Sch2, Pt4, S20	Self-incrimination	Transparency and subject access	Awareness of whether and how data is being processed	Validity of self-incrimination claim
Sch2, Pt4, S21	Corporate Finance	Transparency and subject access	Awareness of whether and how data is being processed	Likelihood of an effect on market prices
Sch2, Pt4, S22	Management forecasts	Transparency and subject access	Awareness of whether and how data is being processed	Prejudice to the conduct of the business

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Section	Purpose	Exempt from	Aim of exemption	Test?
Sch2, Pt4, S23	Records of the intentions of the data controller in any negotiations with the subject	Transparency and subject access	Awareness of whether and how data is being processed	Prejudice to the negotiations
Sch2, Pt4, S24	Confidential references	Transparency and subject access	Awareness of whether and how data is being processed	No test
Sch2, Pt4, S25	Exam scripts & marks	Transparency and subject access	Awareness of whether and how data is being processed	No test
Sch2, Pt5, S26	Journalistic, academic, artistic and literary purposes	Most GDPR provisions	Potential for very wide exemption from almost all GDPR elements except security	Incompatibility of GDPR compliance with public interest in publication
Sch2, Pt6, S27	Research and statistics	Subject access, rectification, restriction and objection	Limits on access to and control over data	Compliance with the relevant provisions will seriously impair the purpose of the research
Sch2, Pt6, S28	Archiving in the public interest	Subject access, rectification, restriction, portability and objection	Limits on access to and control over data	Compliance with the relevant provisions will seriously impair the archiving purpose
Sch3, Pt2, S3	Health data processed by a court	All data subject rights including transparency	Subject rights do not apply	Interests of subject require application of exemption
Sch3, Pt2, S4	Health data: subject right exercised by someone with parental responsibility or other responsible adult	All data subject rights including transparency	Subject rights do not apply	Interests or wishes of the subject require application of exemption

Section	Purpose	Exempt from	Aim of exemption	Test?
Sch3, Pt2, S5	Subject access requests for health data where serious harm to applicant or other may occur	Subject access	Data is not disclosed to the subject	Serious harm will be caused to the physical or mental health of the applicant or someone else in the opinion of a health professional
Sch3, Pt3, S9	Social work data processed by a court	All data subject rights including transparency	Subject rights do not apply	Interests of subject require application of exemption
Sch3, Pt3, S10	Social work data: subject right exercised by someone with parental responsibility or other responsible adult	All data subject rights including transparency	Subject rights do not apply	Interests or wishes of the subject require application of exemption
Sch3, Pt3, S11	Subject access requests for health data where serious harm to applicant or other may occur	Subject access	Data is not disclosed	Serious harm will be caused to the physical or mental health of the applicant or someone else
Sch3, Pt4, S18	Educational records processed by a court	All data subject rights including transparency	Subject rights do not apply	Interests of subject require application of exemption
Sch3, Pt4, S19	Subject access requests for health data where serious harm to applicant or other may occur	Subject access	Data is not disclosed	Serious harm will be caused to the physical or mental health of the applicant or someone else
Sch3, Pt5, s21	Child abuse data	Subject access	Data is not disclosed	Interests of subject require application of exemption

Section	Purpose	Exempt from	Aim of exemption	Test?
Sch3, Pt5, s3	Adoption records	Subject access	Data is not disclosed	Law requires data to be withheld
Sch3, Pt5, s4	Statements of special educational needs	Subject access	Data is not disclosed	Law requires data to be withheld
Sch3, Pt5, s5	Parental order records and reports	Subject access	Data is not disclosed	Law requires data to be withheld

DPA 1998 exemptions and their 2018 equivalents

DCMS tried their best to replicate the DPA 1998 exemptions where that was possible – this table shows how well they achieved that objective.

Exemption in DPA 1998	DPA 2018 equivalent
S29 – crime and taxation	Sch 2, Part 1, Section 2
S30 (and associated statutory instruments) – health, education and social work	Sch 3, Parts 1 – 4 , Sections 1 – 20
S31 – regulatory purposes	Sch 2, Part 1, Section 7, 10, 11
S32 – journalism, literature & art	Sch 2, Part 5, Section 26
S33 – research	Sch 2, Part 6, Sections 27 – 28
S34 – mandatory publication	Sch 2, Part 1, Section 5(1)
S35 – disclosures for legal purposes	Sch 2, Part 1, Section 5(2 – 5)
Section 36 – domestic purposes	<i>Article 3 of GDPR</i>
Schedule 7 exemptions – various exemptions to SARs including references and exam results	Sch 2, Part 2, Section 13 – 15 + Sch 2, Part 4, Sections 19 – 25
Exemptions in DPA 2018 that have no obvious DPA 1998 equivalent	
Sch 2, Part 1, Section 4 – immigration control	
Sch 2, Part 2, Section 8 – audit functions	
Sch 2, Part 2, Section 9 – functions of the Bank of England	
Sch 2, Part 3, Sections 16 + 17 – protection of the rights of others (but very similar to Section 7 of the DPA 1998)	
Sch 4: prohibitions on disclosure	