

Introduction to the principles of Information Law: A briefing paper for supported housing professionals

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Introduction

This introductory document highlights the main legal issues that need to be born in mind by supported housing professionals when making decisions about information giving, sharing and keeping, while also pointing to where more detailed guidance can be found.

People working in supported housing work with a wide range of client groups and there is a huge range of legislation, which is or could be relevant. Mostly the law will lie underneath a practical issue that you are trying to resolve.

Information about clients – giving it, sharing it and keeping it – often raises important questions. What information can you keep about clients and what information can you give to clients, or other individuals, or other agencies?

Responding to these questions mostly this means understanding what the Data Protection Act - and for public authorities, the Freedom of Information Act - allow you to do or stop you from doing.

1. Data Protection Act

The Data Protection Act 1998 requires **all organisations holding personal information** to comply with a number of important principles regarding privacy and disclosure.

The Act states that anyone who processes personal information must comply with 8 principles to ensure that personal information is:

- fairly and lawfully processed
- processed for limited purposes
- adequate, relevant and not excessive
- accurate and up to date
- not kept for longer than is necessary
- processed in line with the rights of the individual
- secure

- not transferred to other countries without adequate protection.

There are tighter restrictions on the use of **sensitive personal data**, which is defined in the Act as:

- the racial or ethnic origin of the data subject
- political opinions of the data subject
- religious beliefs or other beliefs of a similar nature of the data subject
- whether the data subject is a member of a trade union
- physical or mental health or condition of the data subject
- sexual life of the data subject
- the commission or alleged commission by the data subject of any offence
- any proceedings for any offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

Organisations that hold personal information must notify the Information Commissioner and state what types of information they hold and the uses to which that information is put. An organisation cannot collect information which is not notified to the Information Commissioner or use it for a purpose which has not been notified.

When an organisation collects personal information it should explain to the individual why it wants the information and how it will be used. Organisations need to make sure that they explain this as broadly as possible so as not to fall foul of the 'fair and lawful' processing principle – you can only use information for the purpose for which you collected it.

If you intend to share information with other agencies, you must make sure this is clearly stated. You will need either to get explicit consent or state that consent is presumed unless the individual says no. You should put a notice to this effect on every form you ask someone to complete.

The Act also allows people to find out what personal information is held about them by making a subject access request. This covers information held electronically and in some paper records, and includes credit reference details.

2. Freedom of Information Act

The Freedom of Information Act 2000 deals with access to official information and gives individuals or organizations the right to request information from any public authority. There is a long list of public authorities in Schedule 1 to the Act.

Housing Associations are not classed as public authorities. Local authorities are. Section 7 below explains what information should be given or not given under Freedom of Information Act criteria.

Note also there is guidance on the Information Commissioner website. www.ico.gov.uk so use this for details.

3. What is information?

Basically 'information' is information that is recorded about your clients, your staff, statistics about your service and about your properties and includes:

- Letters
- Memos
- E mails
- Minutes
- Reports
- research
- Tape recordings
- CCTV footage.

4. Giving information to your client

Personal information about clients

What counts as 'personal information' is not always straightforward. If you want to know the detail on this go to the ICO website:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

In general, personal information has to be about an identifiable individual who is alive. This means the person has to be identifiable from the data. Generally a name plus other information or a sufficient description without a name will do. It has to count as 'data' (ie you must be holding it to use it in some way)

Individuals have a right under the Data Protection Act to make a written request for a copy of the information you hold about them on computer and in some manual filing systems. This is called a subject access request (SAR).

They are also entitled to a description of the information, what you use it for, who you might pass it on to, and any information you have about the source of the information.

If you are content to provide the information then do so as part of your normal business, rather than treating any request for personal information as if it was a formal request under the Act. But there may be times when you have to treat it formally.

The following are the sort of requests that you should treat as formal subject access requests.

- *“Please send me a copy of all the information you hold on me.”*
- *“I have a right to see all the e mails written about me for the last three years. Please send copies to me.”*
- *“I am a solicitor acting on behalf of my client and request a copy of his records. An appropriate authority is enclosed.”*

If in doubt – go back and ask what they want and why.

You need to be sure that you are giving the information to the right person – if in doubt, ask them to prove who they are. If they say they have permission from someone else – you need to see signed authority from that person.

Also this means that you must be careful not to inadvertently give one person information about another. For example – a letter might have someone else’s address on it or there might be information about other adults. You must make sure that you blank this out (or get the other person’s consent). Though note that a third person may be able access personal information about someone else under the Freedom of Information Act.

Time limit: You have to provide the information within 40 working days. That’s 8 weeks. A working day means just that – so generally there are 5 working days to each week. Bank holidays don’t count so for example in the week before and the week after Easter, there are 8 working days in total. The easiest way to work it out is just to divide the number of working days by 5. The odd bank holiday won’t make much difference

Fee: There’s a statutory fee of £10 for a subject access request but its discretionary. Check what your organisation does about this. Don’t make the decision yourself unless you know what the policy is as you need to make sure that you apply any exemptions from the fee consistently.

Exemptions: You do not always have to give someone the information they have asked for. Again this is a detailed area and if you need to know the detail go to:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_act_legal_guidance.pdf

Exemptions that are likely to be relevant are:

- Where disclosure may interfere with the prevention or detection of crime, the apprehension or prosecution of offenders; or the assessment or collection of any tax or duty or of any imposition of a similar nature.

- Where disclosure of health, education or social services/work records (and see also guidance point, below) is likely to cause serious harm to the physical or mental health or condition of the data subject or any other person or, in some circumstances, where disclosure would reveal that the data subject is, or may be at risk of child abuse.
- Where disclosure is likely to prejudice carrying out a range of regulatory functions.

If you think that some or all of the information that someone has asked may fall into an exempt category – then you must get more detailed advice as the presumption is that you must disclose. You should write to the client and explain where you decide not to disclose.

Social care records

The Information Commissioner has produced a technical guidance note on 'subject access requests' for social services records (September 2008).

The ICO recommends that because information contained in social care records comes often comes from a range of sources, social care professionals should consider consulting the relevant professionals such as teachers and doctors when dealing with client requests. In the case of records containing health information, a medical practitioner may need to be consulted before dealing with the request.

Social care records may also contain information about third parties, usually members of the family. In some cases records contain information that is so complex that it could require explanation, or so serious that its disclosure could be traumatic for the individual concerned. In such cases, the ICO states that it is advisable to offer individuals the opportunity to view the file during an interview with a social worker or counsellor.

The full guidance is available at:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/sars_social_services_v1.0_260808.pdf

Information about the organisation

A client has no more rights to 'non personal' information about your organisation than anyone else. (see section 7, below)

5. Information Sharing

When organisations talk about information sharing they are generally talking about sharing personal information about their clients or tenants. This information is covered by the Data Protection Act so in principle it is not possible to disclose this information to another agency if that disclosure breaches any of the 8 Data Protection Act principles. In most cases this

means that you need to know WHY you have collected the information and WHAT you are going to use it for. You need to know what the client has been told about the use of their information.

Data sharing might take place within organisations and across organisations. Just because an organisation may be composed of several departments or services, it is still one organisation so passing information from one service to another is not disclosing personal information. BUT – if a service has collected information for one purpose and then passes it on to another part of the organisation to use for a different purpose – then that might well be a breach of the DPA.

The key is to let individual clients know what your organisation might use the information for – and make this as wide as possible. You need to know however that there are other legal restrictions on the use of personal data – for example, information collected for the Council Tax Register can only be used for this purpose and cannot be shared for another purpose.

Data sharing across other organisations is much more problematic and you need to know what arrangements your organisation has got to do this.

6. Keeping information

You need to make sure that all information is:

- held securely
- in an orderly fashion
- for the right reasons
- only for as long as you need it.

This means that you must ensure that you have proper filing systems. Where you are holding personal or other confidential information you must make sure that it is held securely and that only people who are entitled to have access to it can do so. This is relevant to information held on computers but also held in offices. Information in a file left on a desk is not confidential.

You need to know why you are holding the information especially if its personal and you need to know what consent an individual has given to its disclosure.

Retention Policies: you need to know how long to hold onto information. All organisations have a tendency to hold information long after the need for it has gone. On the other hand, there are many instances of organisations getting rid of information when they should have kept it.

Under both the Data Protection Act and the Freedom of Information Act you have to disclose information you hold, regardless of how old it is. If you do not manage your information properly, this will make the task of finding information much harder.

You must have a proper framework for disposing of information otherwise you will be open to accusations of getting rid of information in order to avoid disclosing it.

This means your organisation must have a proper retention policy which sets out categories of information or documents and how long the organisation will keep them. There are a number of legal requirements here so you will need to get legal advice if you are developing a retention policy.

7. Giving information to others

This might be staff, external individuals or people working for other agencies.

Staff: all organisations hold personal information about their staff. Requests from staff for access to their personal information should be treated in the same way as requests from clients. See section 4 above. Requests by staff for information under the Freedom of Information Act should be treated as any other such request.

People working for other agencies: see section 5 above on information sharing

Other individuals: Requests for information from people outside the organisation are more likely to be requests under the Freedom of Information Act. If you work for a housing association, the Freedom of Information Act does not yet apply to your organisation, although it does apply to the Housing Corporation. (Note however that the Environmental Information Regulations might). This section only deals with Freedom of Information.

If you work for a local authority it's likely that you have a specialist officer dealing with information requests – use them as a source of advice.

Publication Scheme: The Freedom of Information Act gives the public a general right of access to information held by public authorities. One of the ways it does this is by requiring public authorities to have an approved publication scheme. The idea is that the publication scheme covers all categories of information which the authority publishes. It's not supposed to be a list of individual documents but a list of categories. If someone asks for information which is already published, there is no need to treat the request as a formal FOI request – you can either just direct them to the document or send it to them.

Deadlines: There is a 20 working day deadline to written requests made under the Freedom of Information Act. Under section 1(3) of the Act, however, “where a public authority (a) reasonably requires further information in order to identify and locate the information requested, and (b) has informed the applicant of that requirement, the authority is not required to comply with the request until that further information is provided. While the applicant may

have made an FOI request under the terms of the Act, by describing the information he/she seeks, the 20 working day time limit would not start until the authority had sufficient information to enable it to deal with that request.

Public authorities should not delay contacting the applicant under s1(3), in order to give themselves more time to respond to the request.

Exemptions

Public authorities should operate on the assumption that information should be disclosed but there are a very wide range of exemptions under the FOI and they are not always easy to apply. Some exemptions are absolute; others are qualified and are dependent on the public interest test.

Absolute exemptions: the right to know is wholly disappplied. In some cases there is no legal right of access at all, for instance information supplied by or relating to bodies dealing with security matters or information covered by parliamentary privilege. In other cases, for instance information available to the applicant by other means or personal information relating to the applicant, it may be possible to obtain the information by alternative means although not under FOIA.

Qualified exemptions: a public authority, having identified a possible exemption, must consider whether the public interest in maintaining the exemption is greater than that in confirming or denying the existence of the information requested and providing the information to the applicant.

The 'public interest test' is about weighing up whether the public interest is better served by releasing the information than by keeping it confidential. It's important to note that the public interest is NOT the same as 'the public are interested'.

Absolute exemptions

Relevant ones include:

- *Information accessible by other means* – generally because the organisation has already published it and it should therefore be included in the publication scheme
- *Court records* - where the court proceedings were confidential
- *Personal information* – because it is accessible under the Data Protection Act
- *Information provided in confidence* – this does not mean that a document headed 'confidential' is covered. It's a complicated area but essentially information is covered by the exemption if disclosure would lead to an action for breach of confidence. You should get legal advice on this.
- *Information whose disclosure is prohibited by law* - there are hundreds of statutory provisions preventing the release of information.

Qualified Exemptions

Relevant ones include

- *Investigations and proceedings* – this covers particular investigations
- *Law enforcement* – this covers general more general information of investigative procedures
- *Prejudice to the effective conduct of public affairs* - if the disclosure of information, in the reasonable opinion of a qualified person, would prejudice the effective conduct of public affairs through the inhibition or likely inhibition of the free and frank provision of advice or exchange of views, or any other prejudice to the effective conduct of public affairs. The qualified person is defined for local authorities as the Monitoring Officer. Consider the use of this exemption in relation to minutes of internal meetings etc. This is a very technical exemption – you should get more advice here.
- *Some personal information* – if the request is for personal information about the person making the request, then it is covered by the absolute exemption set out above. This exemption covers requests for personal information made by third parties and operates if disclosure would breach any of the 8 Data Protection Act principles. This is likely to be a breach of the ‘fair and lawful’ principle. Again, this is a complex area and you need to get more advice.
- *Legal professional privilege* – where a claim to this privilege could be established in court. Yet another technical area needing more detailed advice.
- *Commercial interests* – where the information requested is a trade secret, or release of the information is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the public authority itself or any other legal entity.)

The Information Commissioner has detailed guidance on all the exemptions here: http://www.ico.gov.uk/Home/what_we_cover/freedom_of_information/guidance.aspx

Steps to take in deciding how to respond to a FOI request

1. Does your organisation hold the information (whether it ‘belongs’ to the organisation or not)
2. If so, collect it together
3. At the same time consider whether its going to take longer than 18 hours to find and sort out (see fees above)
4. Does an exemption apply
5. If not (and subject to the fees issue) disclose it
6. If an exemption applies, is it absolute
7. If not, is it covered by a qualified exemption
8. If so – do you have a duty to confirm that you have the information. It may often be the case that a public authority will withhold information because it is exempt but still confirm to the applicant that they hold it.

What is the duty to confirm or deny?

Section 1 of the Freedom of Information Act 2000 provides two distinct but

related rights of access to information which impose corresponding duties on public authorities. These are:

- the duty to inform the applicant whether or not information is held by the authority, and, if so,
- the duty to communicate that information to the applicant.

The Act refers to the first duty as “the duty to confirm or deny”. Although, the second of these duties is the one with which most applicants will be concerned, both have equal weight and, when information is exempt but subject to the public interest test, the test is applied to each independently.

The thinking behind the separate provisions is quite straightforward. If information has been requested but is not held, it will normally be reasonable to inform the applicant of this fact. There may be some exceptional cases, however, where it would not even be right to confirm or deny that information requested was held. For instance, in the areas of policing, it would not make sense to allow criminals to discover if they were under suspicion and, if so, to discover the extent of those suspicions.

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SupportActionNet is a website dedicated to professionals working to help vulnerable people realise their social and emotional aspirations. In addition to guidance and case studies about working with identity, relationships, family and friends, SupportActionNet has detailed guidance and examples of the organisational development, including policies and procedures, that are necessary to underpin this work.

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