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**CHAPTER 25
SECTION 12**

**USE OF EXEMPTIONS IN RESPECT OF PERSONAL
INFORMATION AND INFORMATION PROVIDED IN
CONFIDENCE**

1. PERSONAL INFORMATION

1.1 Background

The exemption under section 40 of Freedom of Information Act 2000 (“the Act”) governs the way in which decisions about the disclosure of **personal information** need to be approached.

The detail of these guidelines is complex and this guidance is intended to help navigate the application of section 40 to requests for personal information – but should only be read by IND staff after they have read the IDI Chapter 24 ‘**Disclosing Personal Information**’. In most cases it will be sufficient for staff to only read Chapter 24 which provides an introduction to the general principles of the Data Protection Act.

Staff should also note that application of certain parts of this exemption require approval from the IND Central FOI Team

1.2 Key considerations for staff when seeking to apply this exemption

What constitutes personal data?

This exemption applies only to ‘personal data’ within the meaning of the DPA. In summary, personal data is information which relates to a living individual. That cannot be given an artificially narrow meaning, but on the other hand it is not the case, for example, that all information generated in the course of an enquiry in response to a complaint will amount to the personal data of the original complainant – that material may ‘relate to’ their complaint, but it does not necessarily ‘relate to’ them personally. IDI Chapter 24 ‘**Disclosing Personal Information**’ has further details.

Deceased persons

The definition of “personal data” is restricted to information relating to living individuals. Information which relates solely to a deceased person is not covered by this exemption and the exemption here will only apply if the information relating to the deceased person is also the personal data of a living individual. For example, genetic information about a deceased person may also be the personal data of that person’s ancestors and descendants. Other exemptions under the Act which may be applicable to personal information relating to deceased persons may however be applied, including:

- **Section 38** which exempts information whose disclosure would or would be likely to endanger the physical or mental health or the safety of any individual (for example by means of shock or distress). For further details see the DCA website at <http://www.dca.gov.uk/foi/guidance/exguide/sec38/index.htm>

- **Section 41** which exempts information obtained by a public authority from another person if the disclosure of this information to the public would constitute a breach of confidence actionable by that or another person. See point 2 below for further details.
- **Section 44** which exempts information where disclosure is prohibited by or under any enactment, including the Human Rights Act 1998 (the “HRA”). If disclosure of information relating to a deceased person would breach the right to a private and family life of a living person (as protected by Article 8 of the European Convention on Human Rights), it will be exempt under section 44 because it would breach section 6 of the HRA . See Section 13 of this IDI Chapter for further guidance on the application of this exemption.

The identity of the applicant

Unusually for the Act, the application of this exemption depends to some degree on whether the applicant is seeking their own personal data or the personal data of a third person. If responding to a request will involve the disclosure of personal data, the first question to ask is, who is seeking the disclosure of the data? Is the information:

- (1) personal data of the applicant or has been requested on behalf of the applicant, with their consent, by their legal representative or constituency MP, or
- (2) personal data of another person?

In summary, the application of the exemption then applies as follows:

(1) if the information requested is the personal data of the applicant, it is exempt from the Act under section 40 (1) and falls to be dealt with exclusively under the DPA subject access regime (see section 10 of Chapter 24 for details on subject access requests).

(2) if the information requested is the personal data of someone else, it may be exempt from the Act under section 40 (2) and 40 (3) in the following circumstances:

- (a) If disclosing the information to a third party would breach any of the data protection principles;
- (b) If disclosure would contravene a notice received under section 10 of the DPA -the right to prevent processing likely to cause damage or distress. Note that this only applies to information held on computer records, on relevant and structured filing systems and that this does **not** apply to IND’s paper case files); or
- (c) If the person who is the subject of the data would not be entitled to access the information disclosed to the third party themselves under the DPA access regime because one of the DPA subject access exemptions would apply.

1.3 Structure of the exemption

The exemption under section 40 is mixed in structure. The exemption under part 1, when the applicant requests their own personal data, is an absolute exemption which

does not require the application of a public interest test. In addition the exemption in part 2, which relates to the refusal to disclose personal data because it will breach the data protection principles, is also an absolute exemption which does not require consideration of the public interest test. In contrast, the other provisions of this exemption are qualified and require consideration of the public interest balancing test to come down in favour of non disclosure if these parts of the exemption are to be applied. The details of the different parts of this exemption are explained in detail in this guidance.

1.4 **Information exempt under Part (1)- the personal data of the applicant**

If the information requested is the personal data of the person making the request (or has been made on that person's behalf by their representative or MP), it will be exempt under Part (1) of section 40. If one particular item of information is the personal data of both the data subject and another individual this will still be exempt under Part (1) of this exemption. An example would be a request for what someone has said about the applicant – that would be data 'relating to' both the applicant and the other person. This has to be contrasted with a request for information about the applicant and information about someone else where the 'third party' data are *not* also the personal data of the applicant. An example of this would be a request for a department's records about the applicant and the applicant's family. In those cases, only the personal data of the applicant falls within section 40(1); the other personal data has to be considered separately under section 40(2) and 40 (3).

Although information which falls within Part (1) here is exempt from the Act, it must instead be treated as a subject access request under the DPA , provided it meets the requirements set out in section 7(2) and (3) of the DPA. IDI Chapter 24 '**Disclosing Personal Information**' (sections 10 & 11) has detailed guidance for staff on handling subject access requests within IND.

Where units in IND receive requests for information which fall to be exempted under section 40 (1) these should be referred immediately to IND's Subject Access Bureau at the following address:

The Subject Access Bureau
12th Floor East Wing
Block B
Whitgift Centre
Croydon

There will be no need for units to provide a direct response to the applicant, as this will be done by the SAB who will ensure that all DPA requirements are met before processing the request.

1.5 **Information exempt under Parts (2) and (3): the personal data of a third party**

Part (2) of section 40 relates to information which constitutes the personal data of a third party (which is not at the same time the personal data of the applicant). In summary, the personal data of a third party will be exempt if its disclosure to a member of the public would:

- contravene any of the data protection principles (see Point 1.6);

- contravene section 10 of the DPA (see Point 1.7); or
- not be required to be disclosed in response to a subject access request due to the operation of one of the exemptions in Part IV of the DPA. (see Point 1.8)

In applying this part of section 40 no regard must be had here to the identity of the person who has requested the information (other than to ascertain that they are not the data subject) when assessing whether or not to disclose information. Staff must assess the applicability of this part of section 40 as if they were disclosing the information to 'a member of the public' and not to the specific applicant.

1.6 **Information whose disclosure would contravene any of the data protection principles.**

If the information requested constitutes the personal data of a third party (that is, a person other than the applicant) and its disclosure to a member of the public would contravene one or more of the data protection principles, the information will be exempt under the Act and the request must be refused. This part of section 40 is also an absolute exemption.

The data protection principles are statutory requirements to which IND must comply with in processing (e.g. handling and disclosing) personal information -see IDI Chapter 24 on '**Disclosing Personal Information**' for full details of these principles.

The data protection principles most likely to be relevant to the disclosure of information under the FOI Act are the first and second principles. They require information to be:

- processed "lawfully" and "fairly"; and not processed at all unless one of the conditions in Schedule 2 is met (relating to personal data) and in respect of sensitive personal data one of the conditions in Schedule 3.
- obtained only for 1 or more specified and lawful purposes and not processed in any matter incompatible with that/those purposes.

Further explanation of the data protection principles can be found at Chapter 24 (section 1) IDI on '**Disclosing Personal Information**'.

Exemptions from the data protection principles

In order to apply this part of section 40, careful regard must be had not only to the detailed requirements of the data protection principles but also to the exemptions from those principles which are contained in Part IV of the DPA (see part 1.7 below). If an exemption in Part IV of the DPA from the data protection principles applies then this part of the section 40 exemption cannot be used in refusing to provide information. Staff should however consider the remaining parts of section 40 and the other exemptions within the FOI Act prior to any disclosure of personal information.

If there is any doubt over whether an exemption from any of the data protection principles applies, advice should be sought from the IND Central FOI Team.

Responding to an applicant where data protection principles are breached

The exemption from the duty under section 40 (3) of the Act to disclose personal data where to do so would breach a data protection principle is an absolute exemption. There is no need to carry out a public interest balancing test to demonstrate why the information requested will not be communicated. A standard template letter for staff to adapt and send in these circumstances is attached at **Appendix A** entitled: ***'Standard template for use to an applicant when refusing to provide information under section 40(3).'***

Using a neither confirm nor deny response to the applicant

If, however, staff believe that even confirming or denying that information is held by IND would itself contravene any of the data protection principles then an exemption from the duty to confirm under the Act's information provisions can also be considered. The application of the duty to confirm or deny is, however, subject to the public interest balancing test: even if confirming or denying would breach any of the data protection principles. The exclusion from this duty can only be maintained if the public interest in its maintenance outweighs the public interest in confirming or denying whether the information is held. It should also be a completely separate assessment from the decision made as to whether or not to communicate the information itself to the applicant

In weighing up the public interest test, staff should take into account that the DPA enacts an EC Directive and ensures that the privacy of individuals is protected. The data protection principles are the principal mechanism for securing this protection and in most cases the public interest in preserving this will outweigh any public interest in disclosure.

Staff should always consult with the IND Central FOI Team if considering using a neither confirm or deny response to a request. If a decision to use a neither confirm nor deny response is taken staff should consult with the IND Central FOI Team for further advice on producing a response to the applicant.

1.7 Information whose disclosure would breach section 10 of the DPA

If IND has received a notice under section 10 of the DPA which requires it to cease or not to begin processing any of that person's personal data on the grounds that the processing would cause or be likely to cause substantial and unwarranted damage or distress to him or another, it is obliged to comply with that notice if it is valid.

If IND does not challenge the validity of that notice, the personal data (held on computer records, in relevant and structured filing systems) will be exempt from disclosure under the exemption here, providing the public interest balancing test justifies such non-disclosure.

Applying the exemption where section 10 of the DPA is breached

The public interest test applies to this part of the exemption under section 40 of the Act: if disclosure would breach section 10 of the DPA, it is necessary to ask whether,

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. The fact that IND has received notification that the disclosure of this information to a member of the public is likely to cause substantial and unwarranted damage or distress will attract considerable weight. A particularly strong public interest in favour of disclosure will usually be required if the public interest in maintaining this exemption is to be outweighed. Staff should contact the IND Central FOI team if seeking to use this part of the section 40 exemption.

Using a neither confirm nor deny response to the applicant

If, however, staff believe that even confirming or denying that information is held by IND would itself contravene a notice received under section 10 of the DPA they should consider neither confirming nor denying that the information requested is held. The public interest balancing test also applies to a neither confirm nor deny response: the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in complying with the duty. This should be a completely separate assessment from the decision made as to whether or not to state to the applicant that the information is held.

Staff should always consult the IND Central FOI Team if considering using a neither confirm nor deny response. If a decision to use a neither confirm nor deny response is taken staff should send a letter to the applicant along the lines of the standard letter template at **Appendix A**. This is entitled: ***'Standard template letter for use to an applicant where the duty to confirm has been exempted under section 40 (5) and a neither confirm nor deny response is engaged'***.

1.8 Information which would be exempt from the right of subject access created by the DPA by virtue of any of the provisions of Part IV

Part IV of the DPA sets out a number of exemptions to the right of access for individuals to their own personal data. If a request is received in IND and it is for personal data of a person other than the applicant, then that information will not be disclosable under the FOI Act if the subject of that data could not themselves access it under the DPA because of one of the DPA exemptions.

If the data subject would not be able to access the information by way of a subject access request, because of a DPA subject access exemption, the information will not be available to anyone else under the FOI Act right of access. This part of the exemption under section 40 thereby ensures that the right of access to information under the FOI Act does not jeopardise the interests protected by the DPA exemptions.

By way of example, paragraph 1 of Schedule 7 to the DPA provides an exemption from the subject access provisions for personal data which consist of *'a reference given or to be given in confidence by the data controller for the purposes of....the education, training or employment, or prospective education, training or employment, of the data subject'*.

If for example IND as the former employer of person X, gave a confidential reference to another body, who was considering whether or not to employ X, that person would not be entitled to access any of his personal data contained in that reference by way of a subject access request to IND. Therefore, if a third party requests from IND

access to personal data of person X which are contained in that reference, that information will be exempt under section 40 of the Act. That is because person X himself (the data subject) could not have obtained the personal data due to their being exempt from the DPA.

Applying the exemption to Information which would be exempt from the right of subject access created by the DPA by virtue of any of the provisions of Part IV

This part of the exemption under section 40 is subject to the public interest test: staff can only maintain the exemption here if, in all the circumstances of the case, the public interest in favour of maintaining this exemption outweighs the public interest in disclosure. It will be necessary when seeking to assess whether or not to withhold information requested here to have regard to the extent to which the exemption under the DPA in Part IV needs to be protected by maintaining it under section 40 of the FOI Act. Staff should consult the IND Central FOI team if considering applying this part of section 40 to a refusal to supply information.

Using a neither confirm nor deny response to the applicant

If the subject of personal data would not even be entitled to be informed by IND whether that data subject's data were being processed (because those data would be exempt from that right by virtue of an exemption in Part IV of the DPA) then that information will be exempt from the duty under the Act to confirm or deny. This exclusion of the duty to confirm is also subject to the public interest test.

Staff must always consult the IND Central FOI Team if considering a neither confirm nor deny response. If a decision to use a neither confirm nor deny response is taken staff should send a letter to the applicant along the lines of the standard letter template at **Appendix A**. This is entitled: '**Standard template letter for use to an applicant where the duty to confirm has been exempted under section 40 (5) and a neither confirm nor deny response is engaged**'.

1.9 Relationship with other exemptions

Information which constitutes personal data may also be exempt from disclosure by virtue of another exemption. The definition of 'personal data' is very wide and could include the fact that a particular person is the author of a document or the fact that a person attended a particular meeting. Almost any information which can be requested under the FOI Act may include personal data and it may be that exemptions other than section 40 more readily apply in light of the subject matter or source of the information. For example, if IND holds information which reveals that a particular person works for the Security Service, that information will constitute the personal data of that person and may be exempt under parts 2 and 3 of section 40. However, the information is also information relating to a security body within the meaning of the exemption under section 23 of the act. In such a case the exemption under section 23 applies more simply to exempt this information than section 40.

Aside from exemptions which are based on the particular subject matter or source of information and which might apply to exempt personal information from the FOI Act,

the following exemptions may be of significance in the context of personal information:

- Section 21 which protects information which is readily available to the applicant otherwise than under the FOI Act (see Section 6 of this IDI Chapter for further details)
- Section 30 which exempts information which is held, amongst other things, with a view to deciding whether to bring criminal proceedings (see Section 9 of this IDI Chapter for further details)
- Section 31 which protects information whose disclosure would be likely to prejudice, amongst other things, the apprehension or prosecution of offenders or the assessment or collection of any tax or duty. (see Section 9 of this IDI Chapter for further details).
- Section 38 which protects information whose disclosure could endanger physical and mental health. See the DCA website for further details at <http://www.dca.gov.uk/foi/guidance/exguide/sec38/index.htm>.
- Section 41 which protects information obtained by a public authority from another person and whose disclosure to the public, otherwise than under the FOI Act, would constitute an actionable breach of confidence. See part 2 below for further information
- Section 44 which exempts information whose disclosure is prohibited by or under an enactment or whose disclosure is incompatible with any Community obligation. See Section 13 of this IDI Chapter for further details.

2. INFORMATION PROVIDED IN CONFIDENCE

2.1 Background

Section 41 of the Freedom of Information Act establishes an absolute exemption from the rights of access to information under the Act if the information requested was provided to a public authority **in confidence**. This is established through reference in section 41 to the common law action for '*breach of confidence*'. According to this action, if a person who holds information is under a duty to keep that information confidential (a 'duty of confidence'), there will be a breach of confidence if that person makes an unauthorised disclosure of the information. This concept recognises that unauthorised disclosure of confidential information may cause substantial harm. The law protects these interests by requiring the information to be kept confidential: if information is disclosed in breach of a duty of confidence, the courts may award damages (or another remedy) to the person whose interests were protected by the duty.

The crucial feature of this exemption is that it can only be applied if a breach of confidence would be '*actionable*' i.e. if a person could bring an action and be successful against another person for breach of confidence. The courts have also recognised that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence.

If IND receives a request for information which has been obtained from another person and holds the information subject to a duty of confidence, that information can be withheld under section 41 if providing it to the public would constitute an actionable breach of that confidence. Each of the elements involved in applying this exemption are examined further below. The application of this exemption will be complex and necessitate the involvement of the IND Central FOI Team and legal advice at the outset.

Where IND Directorates have consulted with the IND Central FOI Team, and are seeking to apply this exemption, it must be authorised at Grade 7/Assistant Director level or above, and the IND Central FOI Team must also approve its use.

IND Directorates can contact the IND Central FOI Team either by phone or email.

2.2 **Key considerations for staff when seeking to apply this exemption**

There are three important considerations which staff must bear in mind when considering the application of this exemption :

- Whether or not IND will hold information subject to a duty of confidence depends largely on the circumstances in which it was obtained and whether there was an express agreement to keep it confidential. The Lord Chancellor's Code of Practice issued under section 45 of the Act, provides good practice advice for public authorities on the circumstances in which they should agree to hold information in confidence. The Code can be found at the following website: <http://www.foi.gov.uk/codepafunc.htm>
- Special considerations apply if information to which this exemption may apply is personal information relating to an individual in their private capacity. Further, specific guidance in relation to private, personal information can be found at **Appendix B**.
- If this exemption is incorrectly applied and information is wrongly disclosed, IND and the Department may (in some circumstances) be exposed to a common law action for breach of confidence. However, if information is wrongly withheld the Department may face sanctions under the Act.

2.3 **Scope of the exemption**

If requested information which is held by IND is to fall within the terms of this exemption, then three questions must always be asked by staff. If the answer to any of the questions is 'no', then the information requested will not be protected by this exemption:

- Was the information obtained by IND from any other person?
- Is the information held subject to a duty of confidence?
- Would the disclosure of this information to the public, otherwise than under the Act, constitute an actionable breach of confidence? This will include consideration of whether there would be a defence to an action for breach of confidence.

Each of these questions is examined in turn at Points 2.4-2.6.

2.4 Was the information obtained by IND from any other person?

This exemption only protects information which was obtained by a public authority from any other person (including another public authority). The origin of the information could be a natural person, in other words an individual, or a group of individuals or an organisation.

Whilst this exemption may apply where a duty of confidence is owed by IND to another public authority, it will not apply where the public authority in question is another Government Department. Section 81 (2) of the Act provides that Government Departments cannot claim that the disclosure of any information obtained from another Government Department would constitute a breach of confidence. This is because the disclosure would not be actionable by any other Government Department.

For example, IND could not claim that information which it holds from the Department for Work and Pensions is exempt under section 41 because its disclosure would breach a duty of confidence which it owes to the Department for Work and Pensions.

However, the information which IND holds from another Government Department may be subject to this exemption aside from the issue of whether its disclosure may be actionable by another Government Department. IND may, for example, hold information from another Government department which if disclosed would result in an individual's personal information being disclosed and the individual could take action against IND and the other Government Department concerned for its disclosure. Alternatively, the information could be subject to another exemption and could fall to be exempted, for example, under Section 40 if it is personal information.

This exemption also usually requires the information in question to have been obtained from outside IND and the wider Home Office. Information generated within IND or the wider Home Office will not usually be covered unless a breach of duty of confidence occurred where IND or the wider Home Office owes confidence to an employee in their private capacity.

A further consideration for staff is that IND does not have to have obtained the information with the active involvement of another person for a duty of confidence to occur. By way of example, if staff took a photograph which includes confidential information about the subject of the photograph (for example, if it shows where that person is receiving medical treatment), the exemption here may apply even though the subject of the photograph did not provide the information in an active sense or even know that the photograph had been taken.

2.5 Is the information held subject to a duty of confidence?

IND will routinely hold information which has been obtained from other public bodies, private organisations and individuals to which obligations of confidence are likely to attach. For example: frank exchanges of views with other public authorities; information which is commercially sensitive; and the personal, private information of individuals.

Information will only be held subject to a duty of confidence if it has the **necessary quality of confidence**. This means that it must be information which is:

- worthy of protection- someone must have an interest in the information being kept confidential. For example, even if a commercial contract states that everything in the contract is 'confidential', any useless or trivial information cannot be confidential and no duty of confidence will arise in relation to that information.
- inaccessible- in the sense of not being in the public domain or a matter of public knowledge. Whether information is in the public domain is a question of degree; it will depend on the circumstances and the extent of public knowledge at the time when disclosure is requested. Information relating to an act which is done in a public place may still be private information and, equally, an activity is not necessarily private simply because it is not done in public.

The courts will recognise that a person holds information subject to a duty of confidence in two types of situations:

- 1) where that person expressly agrees or undertakes to keep information confidential: there is an **express duty of confidence**; or
- 2) where the nature of the information or the circumstances in which the information is obtained imply that the person should keep the information confidential: there is an **implied duty of confidence**.

Express duty of confidence

Where IND expressly agrees to keep information confidential, a duty of confidence is likely to arise provided that the information has the necessary quality of confidence. For example, where IND may sign a contract which contains a confidentiality clause or agrees in correspondence that, if information is provided, it will be kept confidential.

Whilst it will usually be a question of fact whether IND has agreed to or undertaken a duty of confidence, there are important policy considerations involved in the question of whether it is appropriate to agree to a duty of confidence. In light of the public interest in open government and freedom of information, staff in IND must consider carefully whether it is appropriate to agree to keep information which it receives, confidential.

Paragraph 31 of The Lord Chancellor's Code of Practice deals with the circumstances in which a public authority should accept information in confidence:

This code has considerable force: it is one of the duties of the Information Commissioner to promote its observance and there is a legitimate expectation that IND, as a constituent part of the Home Office will adhere to it. It is also likely that a court would take its provisions into account when determining whether the Department has complied with the Act.

When considering whether to agree to hold information subject to a duty of confidentiality, the following factors may be relevant for staff:

- The nature of the interest which is to be protected and whether it is necessary to hold the information in confidence in order to protect that interest;

- Whether it is possible to agree to a limited duty of confidentiality, for example by clearly stating the circumstances in which IND would disclose information;
- Whether the information will only be provided on the condition that it is kept confidential and, if so, how important the information is in relation to IND's functions;
- The nature of the person from whom the information is obtained and whether that person is also a public authority to whom the Act and the Code of Practice applies (where the person supplying the information is also a public authority, departments must be particularly cautious in agreeing to keep the information confidential).

If it is necessary and justifiable for IND to agree to keep the information confidential, then practical steps should also be taken by IND Directorates to respect the confidential nature of the information. Staff should ensure that the circulation of confidential information is controlled and that the confidential status of that information is regularly reviewed.

Implied duty of confidence

Even though IND may have no pre-existing relationship with the person to whom the duty is owed, or may not have agreed to keep the information confidential, an implied duty of confidence may still arise in certain circumstances. Here, the law may step in to **imply** a duty of confidence- IND may be obliged, by virtue of the very nature of the information, to keep it confidential. Whether or not the information concerned shall be held subject to a duty of confidence is a question of degree which depends on the circumstances at the time that its disclosure is requested.

The circumstances in which information was obtained may impose an implied duty of confidence in relation to information which is not obviously of a confidential nature. For example, where IND can legally oblige people to provide information for certain purposes (statutory compulsion), a duty of confidentiality will often arise in relation to that information and IND may be prohibited from disclosing the information in other contexts.

Another factor which may be relevant to ascertaining whether or not information which is held may be subject to an implied duty of confidence could be if there is a well known practice on the part of IND to protecting similar information against disclosure, and the supplier of the information could reasonably have expected this to continue. For example, IND would not usually disclose the details of an individual's asylum application to third parties and most applicants will reasonably express this to continue.

2.6 Would the disclosure of this information to the public constitute an actionable breach of confidence?

For a disclosure to breach a duty of confidence it must be unauthorised. Unauthorised disclosure could take place where disclosure runs contrary to the express wishes of the person to whom the duty is owed or where a public authority does not have the consent of the person concerned. If a person has expressly consented to disclosure, the exemption here will not apply as its disclosure would not be a breach of confidence actionable by that person.

2.7 Public interest considerations

The courts have recognised that disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential. When applying this exemption staff must, therefore, consider internally whether the public interest in disclosure of the confidential information concerned means that it would not constitute an actionable breach of confidence to disclose that information to the public. Staff should note however, that this public interest test should not be demonstrated in a response to the applicant if it is decided to withhold information under this exemption. Instead, the public interest test considerations set out here only needs to be recorded internally to assess whether this absolute exemption applies.

The following principles must be applied when conducting this balancing test:

- Where a duty of confidence exists, there is a general public interest in favour of keeping that confidence;
- There is no general public interest in the disclosure of confidential information in breach of a duty of confidence. If the public interest in keeping the confidence is to be outweighed it will be necessary to identify a specific interest in favour of disclosure;
- There is a public interest in ensuring public scrutiny of the activities of public authorities. If disclosure would enhance this scrutiny then this will be a factor in the balancing exercise. However, where the interests of a private person are protected by a duty of confidence (whether an individual or an organisation), the general interest in public scrutiny of information held by a public authority is unlikely in itself to override the public interest in keeping the confidence;
- The Act itself has no influence on the weight which it attaches to the public interest in the disclosure of information for the purposes of this exemption.
- When considering the balance of interests, public authorities must have regard to the interests of the person to whom the duty of confidence is owed; the public authority's own interests in non-disclosure are not relevant to the application of this exemption.
- No regard may be had to the identity of the person who is requesting the information nor to the purpose to which they will put the information. The question is whether disclosure "to the public" would be a breach of confidence (and not whether disclosure to the particular person requesting the information would be a breach). A request for information from a journalist or pressure group must be treated in the same way as a request from a person who, for example, is conducting historical research.

If this exemption is wrongly applied and information is withheld, the Department may face sanctions under the Act for not complying with the duty to provide information. However, if the information is wrongly disclosed, IND may, in some circumstances, face an action for breach of confidence. In balancing the relevant public interests here, the question to be asked is what conclusion would a court come to if the information were disclosed to the public and an action for breach of confidence was brought? That is to say:

- if a court would conclude that the public interest in disclosure to the public outweighed the public interest in keeping the confidence then the information will not be exempt under section 41- unless an other exemption applies, the information must be disclosed;
- if a court would conclude that the public interest in disclosure did not outweigh the public interest in keeping the confidence, the information will be exempt and the request should be refused on the basis of section 41.

As explained above, when considering the public interest balancing test, no regard may be had to the motive for the request for information nor to the effect which disclosure to that particular requester would have. However, regard *must* be had to the effect which disclosure to the public would have. Examples of cases where there may be a public interest in the disclosure of confidential information include:

- Information revealing misconduct/mismanagement of public funds;
- Information which shows that a particular public contract is bad value for money;
- Where the information would correct untrue statements or misleading acts on the part of public authorities or high profile individuals;
- Where a substantial length of time has passed since the information was obtained and the harm which would have been caused by disclosure at the time the information was obtained has depleted.

Examples of cases where the public interest is unlikely to favour the disclosure of information may include:

- Where disclosure would engender some risk to public or personal safety;
- Where disclosure would be damaging to effective public administration;
- Where there are contractual obligations in favour of maintaining confidence (in such cases legal advice is likely to be essential);
- Where the duty of confidentiality arises out of a professional relationship;
- Where disclosure would affect the continued supply of important information (for example, information provided by whistleblowers)

These examples are for illustrative purposes only. Decisions on which way the delicate balance of arguments may rest will vary on a case by case basis and will, in most cases, require advice from the IND Central FOI Team and further legal advice.

If the only interests to be protected by the non-disclosure of the requested

information are the interests of another public authority (rather than a third party) then the key consideration is: would the public authority to which the duty is owed by IND be able to refuse a request for that information? If it would be able to refuse because an exemption would apply, the information will be exempt under section 41. If it would not be able to refuse, section 41 will not apply.

2.8 Consultation with third parties

In order to ascertain whether information supplied in confidence can be disclosed in response to a request or is exempt under section 41, it may be necessary to consult with the information provider, affected third parties and in some cases other relevant Government Departments, depending on the nature of the information.

Consultation with the person to whom the duty of confidence is owed will not, however, release IND from its overriding obligations under the Act. If a person does not respond to consultation or refuses consent to disclosure, this will not be a determinative factor and it will still be necessary to consider whether the exemption under section 41 applies. If a consultation would be disproportionate, staff will need to consider what is the most reasonable cause of action for it to take in light of the requirements of the Act and the individual circumstances of the request.

2.9 Responding to an applicant

In all cases where the decision is taken to withhold information under either of the Act's information access provisions, it is important for staff to ensure that they document clearly the reasons for the refusal to disclose which will stand up to scrutiny by the Information Commissioner and, ultimately, the courts. It is essential that reasons for decisions are properly recorded and that there is an audit trail to demonstrate how those decisions were reached. In particular, this must show why the public interest in favour of keeping the confidence was not outweighed by any countervailing public interest in disclosure.

If staff consider that it is appropriate to confirm whether or not IND holds the information requested, but refuse to communicate that information on the grounds of the exemption under section 41, then the response to the applicant should state the exemption itself and it applies to the information requested. A standard template letter at **Appendix A** is attached for IND Directories to adapt for their own use in these circumstances. This is entitled: '**Standard letter template for use when applying an exemption under section 41 where information is provided in confidence and the duty to communicate has been exempted**'

Using a neither confirm nor deny response to the applicant

Staff may, however, decide that in some instances confirming or denying whether the information is held in IND would, in itself, represent an actionable breach of confidence.

When ascertaining whether confirmation or denial would constitute an actionable breach of confidence, staff should apply the same considerations as to the disclosure of the information itself:

a) is the fact that the public authority does or does not hold the information itself

information which is held subject to a duty of confidence? And

b) would confirmation or denial constitute an actionable breach of that duty of confidence?

This assessment must, however, be a separate decision aside from whether or not to communicate the information requested.

A standard template for IND Directorates to adapt when using a NCND response to an applicant in such circumstances can be found at **Appendix A**. This is entitled: ***'Standard template letter for use to an applicant where the duty to confirm has been exempted under section 41 (2) and a neither confirm nor deny response is engaged'***.

2.10 Duration of the exemption

The exemption here does not cease to apply after a specified period. However, the passage of time may mean that the information is no longer sufficiently sensitive to be considered 'confidential' or that the public interest in keeping the confidence has been substantially weakened. If staff receive a request for information which was obtained on a confidential basis a long time ago, it should be considered carefully whether the disclosure of that information would still constitute an actionable breach of confidence.

2.11 Relationship with other exemptions

When considering whether a request for information should be refused on the basis of section 41 it is also important to consider whether the information may also be protected from disclosure by virtue of another exemption. Where another exemption may also apply it will be necessary to consult the detailed guidance on that section.

- **Section 40:** If confidential information is personal information, the personal information exemption may apply (see Point 1 on personal information).
- **Section 43:** Where information is confidential because it is commercially sensitive, the commercial interests exemption should be considered. See Section 13 of this IDI Chapter for further details)
- **Section 27(3):** If information of a confidential nature has been obtained from a State other than the United Kingdom or from an international organisation or international court, section 23 should be considered as a person outside the UK jurisdiction is unlikely to be able to bring an action for breach of confidence for the purposes of section 41. See Section 8 of this IDI Chapter for further details
- **Section 30(2)(b):** if information has been obtained from confidential sources, the application of section 30(2)(b) should also be considered. See Section 9 of this Chapter for further details.

3. APPENDIX A

STANDARD LETTER TEMPLATES

STANDARD TEMPLATE FOR USE TO AN APPLICANT WHEN REFUSING TO PROVIDE INFORMATION UNDER SECTION 40(3).

[Insert details of relevant Directorate address here]

Our Ref:
Your Ref:
Date:

Dear **[insert name of applicant]**.

I am writing in reply to your letter dated **[insert date]** in which you requested **[insert details of information requested]**.

It is the general policy of IND not to disclose, to a third party, personal information about another person. This is because IND has obligations under the Data Protection Act and in law generally to protect this information. Your request for personal information has been considered in line with IND's obligations under the Freedom of Information Act. However, it has been concluded that the information you have requested is exempt under Section 40(3) of that Act. Section 40(3) of the Freedom of Information Act states that this disclosure would breach the Data Protection principles and therefore we cannot supply the information you have requested.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]
[Insert full name of IND staff member dealing with request]
[Insert IND Directorate]

STANDARD LETTER TEMPLATE FOR USE WHEN APPLYING AN EXEMPTION UNDER SECTION 41 WHERE INFORMATION IS PROVIDED IN CONFIDENCE AND THE DUTY TO COMMUNICATE HAS BEEN EXEMPTED

Our Ref:

Your Ref:
Date

Dear **[enter applicant name]**,

Thank you for your *letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]** . This falls to be dealt with under the Freedom of Information Act 2000.

I can confirm that this information is held by *IND/IND Directorate* **[delete and or insert relevant Directorate name as appropriate]**

I have decided, however, not to communicate this information to you pursuant to the exemption under section 41(1) of the Freedom of Information Act 2000. This allows us to exempt information if it is provided in confidence. We have a duty of confidence to the information you have requested and its disclosure to you would lead to an actionable breach of confidence. **[IND Directorates to explain why the information requested must be treated in confidence as far as possible without disclosing any of the confidential information which may be covered by the exemption]**

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]
[Insert full name of IND staff member dealing with request]
[Insert IND Directorate]

STANDARD TEMPLATE LETTER FOR USE TO AN APPLICANT WHERE THE DUTY TO CONFIRM HAS BEEN EXEMPTED UNDER SECTION 41 (2) AND A NEITHER CONFIRM NOR DENY RESPONSE IS ENGAGED.

[Insert details of relevant Directorate address here]

Our Ref:

Your Ref:

Date

Dear **[insert name of applicant]**,

Thank you for *your letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]**. This falls to be dealt with under the Freedom of Information Act 2000.

I have considered your request carefully and have decided that we are not obliged to inform you whether the IND holds the information of the description specified in your request.

We are not obliged to inform you whether or not the requested information is held pursuant to section 41 (2) of the Freedom of Information Act 2000 which exempts information which relates to information provided in confidence.

[IND Directorate to insert explanation for using the exemption under section 43 to the extent this is possible without disclosing exempt information.]

[IND Directorate give reasons for the public interest balancing test concluding that the public interest in the maintenance of the exemption outweighs the public interest in disclosing – to the extent this is possible without disclosing exempt information.]

You should not infer from this response that the information you request is or is not held.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]

[Insert full name of IND staff member dealing with request]

[Insert IND Directorate]

4. APPENDIX B

Personal information

Private information relating to individuals, such as details of an individual's physical or mental health, is likely to attract greater protection than commercial information or information relating to the functions of public authorities. Private, personal information is more likely to be 'confidential' information by its very nature and to be held subject to expectations of privacy, particularly where disclosure would affect the private and family lives of individuals, as protected by Article 8 of the ECHR.

Although personal information enjoys particularly stringent protection under the law of breach of confidence, the public interest in keeping the confidence may in some circumstances be outweighed by countervailing public interests in disclosure. For example, disclosure may be in the interests of freedom of expression (as protected by Article 10 of the ECHR) or in the interests of protecting the rights and freedoms of others. There is a public interest in ensuring scrutiny of the activities of public authorities and the FOI regime enhances the weight to be attached to this interest. However, if information is private, personal information of the type whose disclosure would engage Article 8 (as opposed, for example, to information relating to an individual in an 'official' capacity, for example if that person is a public office holder), it is unlikely that the public interest in open government will outweigh the public interest in keeping the confidence.

Even if there is a legitimate aim which is pursued by disclosure, the effect of the disclosure on the Article 8 rights of the person affected must be proportionate to the legitimate aim. For example, in the case of *Peck v UK* CCTV footage picked up the applicant walking down a road with a knife in his hand. The applicant had tried to commit suicide. The CCTV operating notified the police who were able to stop him. The CCTV footage was subsequently broadcast, without concealing the identity of the applicant, to demonstrate how its use could assist the police in averting dangerous situations. This interfered with the applicant's Article 8 right to respect for his private and family life. Although the broadcast pursued the legitimate aim of promoting the use of CCTV to prevent and detect crime, the authority could have masked the identity of the applicant or sought his consent. There were not sufficient reasons to disclose the information without taking these steps and the interference with the applicant's Article 8 rights was therefore not proportionate to the legitimate aim.