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**Title:** Freedom of information and data protection: reconciling conflicting objectives  
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## **Freedom of information and data protection: reconciling conflicting objectives**

Zealotry has no place in public affairs. Reconciling conflicting, but equally worthy, objectives to achieve a result that enhances the public good is what public administration is mainly about. Both data protection and freedom of information have their passionate advocates. Either side might argue that, at the rubbing point, their own favourite should prevail. It is, indeed, sometimes said, that in a particular FOI regime privacy trumps transparency or vice versa.

Headline writers might, indeed, portray data protection and FOI as being irremediably opposed: data protection prevents personal information from ever being disclosed; while, if personal information is held officially, FOI requires it always to be made available on request. That is a story which might sell newspapers, but inaccurate.

For many European countries, data protection rules are set by international instruments to which the countries concerned subscribe. At the heart of that legal regime is the European Convention on Human Rights, Article 8 of which creates the right to private life and gives data protection its human rights pedigree. Membership of the European Union brings with it the requirement to give effect to that community's body of rules, known as the *acquis*, which includes the 1995 Data Protection Directive (95/46/EC) The 25 member states of the EU, and others besides, have also chosen to be bound by the broadly similar, but less prescriptive, rules in the Council of Europe's 1981 Convention on Data Protection (Convention 108) – an instrument which, although drawn up in Europe, deliberately refrains from calling itself a "European" Convention in the, I believe sadly still unfulfilled, hope that others outside that continent will formally adhere to it. Then, more widely, and slightly earlier still, there are the OECD's 1980 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

It is a common feature of the three data protection specific instruments that they do not prohibit the disclosure of personal data. They do, though, set rules, known as the data protection principles, which must be respected in handling personal data, including, crucially for FOI regimes, making disclosures. If the disclosures can be made without breaching the data protection principles, there is nothing to stop them being disclosed in response to an FOI request. (There is a small wrinkle in the case of the Data Protection Directive, which, in limited circumstances, gives individuals

the right to prevent disclosures and other forms of processing of their personal data even though they are fully compliant with the data protection principles.)

There are fewer international constraints on the FOI side. I am not aware that the right of access to official information at large is enshrined in any binding international instrument, although some see the right to freedom of expression in Article 10 of the European Convention on Human Rights as playing a part in its genesis, albeit not in the direct line of parentage, but acting perhaps rather as a god-parent. Such binding instruments as exist are of limited extent. The 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (a United Nations instrument ) and the 2003 EC Directive on Public Access to Environmental Information (2003/4/EC ) create, as the latter's name makes clear, a right of access to officially held environmental information. Broader in scope, in that it applies to the generality of official documents , but non-binding, is the 2002 Council of Europe Recommendation on access to official documents (Recommendation R(2002)2). Crucially, all three instruments recognise the need for a happy union between FOI regimes and data protection regimes, by including the protection of privacy or personal data among the legitimate interests for which exemptions may be provided.

Within the flexible framework established by the international data protection and FOI instruments, all that is needed is an FOI law to create the right to official information - and a clever draftsman, for although it is easy to state the principle, making it work in practice, especially with a pre-existing data protection law as intricately structured as the UK's, can require drafting skills of the highest order.

In making the match, it is necessary to distinguish two separate categories of request for personal information: those which seek the requester's own personal information (known in the data protection jargon as a "subject access request"); and those which seek the personal information of other people . Different rules are required for each category.

For the former, perhaps the simplest approach, and that adopted in the UK Freedom of Information Act 2000, is to exempt such requests entirely from the FOI regime, and require them to be dealt with under the data protection rules. This is consistent with the Council of Europe Recommendation which says, in Article II 2, that the rules it sets do not affect the right of [subject] access or the limitations to [subject] access provided for in the Data Protection Convention.

The second category is the more difficult, since it requires a set of rules for the disclosure of third parties' personal data to be established that ensure that the disclosures are consistent with the data protection principles. The

difficulty arises from the fact that the principles are themselves, deliberately, expressed in very general terms. They achieve their effect by their interpretation in the light of the prevailing circumstances. The UK approach has been to preserve this effect for FOI disclosures by simply reading the data protection principles in the Data Protection Act 1998 into the Freedom of Information Act 2000. Thus the judgement whether or not a disclosure of third party personal information can properly be made in accordance with the principles will have to be made on a case by case basis having regard to all the relevant facts. That is precisely what the public authority would have to do even without the FOI legislation. The difference is that without the FOI legislation the authority had the discretion to refuse disclosure. Now, subject to other exemptions, it must disclose if the data protection principles do not prevent disclosure.

There are many other detailed points in the provisions of the Freedom of Information Act 2000 that deal with the disclosure of third party personal data. But the essence of the arrangements is that there is a duty to disclose if the data protection principles permit disclosure. It would be wrong to portray this as data protection getting the better of FOI or vice versa.

## References

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Directive 2003/4 of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

European Convention on Human Rights, Council of Europe, 1950

Freedom of Information Act 2000 (c. 36), London, HMSO

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