

REDACTION POLICY FOR CONSULTATION RESPONSES

1.1 There are several obligations of which we should be aware when handling consultation responses. These are engaged if an FOI request is received requesting the disclosure of consultation responses, and also when publishing consultation responses (or an analysis / compilation of responses). This memo considers our FOI, data protection, confidentiality, copyright and defamation obligations. A policy for handling consultation responses, and in particular the redaction of responses, is then set out. The appendices contain a practical guide to redaction, and a redaction checklist which can be used for each project.

FOI

1.2 As a public authority, the Law Commission is obliged to comply with the duties created by the Freedom of Information Act 2000 (FOIA). Consequently, the Law Commission is required to supply information we hold (including consultation responses) to anyone that requests it,¹ unless an exemption applies.

1.3 The main exemptions likely to be encountered when considering disclosure of consultation responses are:²

- (1) Personal data of third parties (ie not the person requesting the information) if disclosure would breach any of the eight data protection principles in the Data Protection Act 1998 (DPA)³ (section 40(2) FOIA - this is an absolute exemption so the public interest test does not need to be applied);
- (2) Information provided to us in confidence, if disclosure would be an actionable breach of confidence (section 41 FOIA - this is an absolute exemption so the public interest test does not need to be applied); and
- (3) Information intended for future publication (section 22 FOIA - this is a qualified exemption, so the public interest test should be considered when deciding whether this exemption applies).

1.4 The first two of these exemptions allow us to withhold information when responding to an FOI request in order to comply with other obligations we are under. The content of

¹ Freedom of Information Act 2000 s 1.

² The other exemptions are: information already reasonably accessible (s 21); research information (s 22A); information relating to security bodies and national security (ss 23 and 24); prejudice to defence or the effectiveness of the armed forces (section 26); prejudice to international relations or relations between the UK government, the Scottish Executive, the Welsh Assembly and the Northern Ireland Executive (ss 27 and 28); prejudice to the economy or the financial interests of the UK, Scottish, Welsh or Northern Irish administrations (s 29); prejudice to investigations or law enforcement (ss 30 and 31); court records (s 32); prejudice to audit functions (s 33); parliamentary privilege (s 34); government policy (s 35); prejudice to the effective conduct of public affairs (s 36); communications with the royal family and the granting of honours (s 37); endangering health and safety (s 38); environmental information (s 39); personal information of the requester (s 40(1)); legal professional privilege (s 42); trade secrets and prejudice to commercial interests (s 43); statutory prohibitions on disclosure (s 44).

³ See paragraphs 1.5 to 1.12 below.

these obligations (and accordingly, what falls within the FOI exemptions) are discussed below.

Data Protection (the DPA and GDPR)

1.5 The DPA sets out eight data protection principles with which we must comply.⁴ These principles apply when we are publishing consultation responses, but also when we are responding to an FOI request (hence the section 40(2) FIOA exemption). The main data protection principle which will apply to handling consultation responses is:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.⁵

1.6 “Personal data” is defined by the DPA as data which relate to a living individual who can be identified from that data alone, or from that data and other information which is or is likely to be in the possession of the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.⁶

1.7 The Schedule 2 conditions which are relevant to us are consent or legitimate interest.

1.8 The DPA is due to be replaced by the GDPR on 25 May 2018.

1.9 Under the GDPR, we will be under an obligation to process any personal data fairly, lawfully, *and in a transparent manner*.⁷ “Personal data” is defined by the GDPR as any information relating to an identified or identifiable natural person, where an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.⁸

⁴ Data Protection Act 1998, sch 1.

⁵ Data Protection Act 1998, sch 1 para 1.

⁶ Data Protection Act 1998, s 1.

A distinction is also made for “sensitive personal data”, which is defined as personal data consisting of information as to (a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of a similar nature, (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992), (e) his physical or mental health or condition, (f) his sexual life, (g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings. Special care needs to be taken with sensitive personal data, and stricter conditions apply to its disclosure than apply to other personal data. A similar category of sensitive data exists under the GDPR, called “special category data”, which is also subject to stricter rules on processing.

⁷ GDPR Art 5 para 1(a).

⁸ GDPR Art 4 para 1.

- 1.10 There are conditions parallel to those in the DPA which must be met in order for data processing to be legal. These include consent and necessity for the performance of a task carried out in the public interest. The “legitimate interest” condition in the GDPR does not apply to public authorities.
- 1.11 There seem to be two main differences between the definitions of “personal data”:⁹
- (1) The GDPR definition refers to a “natural person” as opposed to a “living individual”. This makes the GDPR definition slightly broader, as it would seem to also include a deceased natural person.
 - (2) The GDPR names specific examples, in a non-exhaustive list, of information which may allow a natural person to be identified. The DPA instead refers to “other information which is or is likely to be in the possession of the data controller”. This does not necessarily make the GDPR definition broader, but perhaps gives greater clarity as to what amounts to personal data.
- 1.12 The differences between the two seem to make little substantive difference to the content of the obligation, save for the explicit requirement in the GDPR to process information in a transparent way.

Confidentiality¹⁰

- 1.13 Sometimes consultation responses may contain confidential material. If this is the case, publishing such information (or disclosing it in response to an FOI request) could make us liable for a breach of confidence.
- 1.14 When assessing whether information is confidential, the following framework can be used.¹¹
- (1) The information must have the necessary quality of confidence:
Information will meet this criterion if it is more than trivial, someone has a genuine interest in it remaining confidential and it is not otherwise accessible. Trivial information which relates to a personal matter should be treated as more than trivial if the confider (or the person who the information is about) obviously attaches some importance to it.
 - (2) It must have been imparted in circumstances importing an obligation of confidence; and
There are two possibilities here: either the confider has attached explicit conditions to the use or disclosure of the information; or conditions on use are not explicit but are obvious from the circumstances.

⁹ There is a third difference in wording between the DPA and GDPR. The DPA definition specifically covers “expressions of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”. This is not explicitly referred to in the GDPR. It seems likely that this would fall within the phrase “any information relating to an individual”. Consequently, this is not a substantive difference between the DPA and GDPR.

¹⁰ See <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf> for more information.

¹¹ Set out by Megarry J in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415.

- (3) There must have been an unauthorised use of the information to the detriment of the confider.

In commercial cases, the detriment will usually be detriment to the confider's commercial interests. The impact of Article 8 ECHR is that information about an individual's private and personal life will be protected, even if disclosure would not result in any tangible loss to the confider.

- 1.15 Information which satisfies these criteria should not be published, and will be exempt from disclosure under section 41 FOIA. Requests for confidentiality must be dealt with on an individual basis. A mere request to keep a statement confidential, where the above criteria are not satisfied, is not enough to prevent us from having to disclose the information in response to an FOI request.

Copyright

- 1.16 Consultees are informed on the "How we consult" page included in Law Commission consultation documents that:

We may publish or disclose information you provide us in response to this consultation, including personal information.

Consequently, although consultees may be considered to have copyright in their consultation responses, they can effectively be considered to have granted us a license to publish their responses. We therefore do not breach copyright when we publish a compilation / analysis of responses.

- 1.17 In some instances, consultees (in particular, academics) may submit articles with their consultation responses. Although these articles will be protected by copyright, disclosure will not amount to a breach of copyright, where that disclosure is authorised by the FOIA.¹² This means that we should not publish articles as part of a compilation or analysis of responses, without first checking that doing so will not breach copyright. However, when responding to an FOI request, articles should be disclosed unless they fall within an exemption.
- 1.18 There are two exemptions which may apply to such articles. Firstly, if the article is as yet unpublished, but is intended to be published in the future (by the Law Commission or by any other person),¹³ it will fall under the section 22 FOIA exemption for information intended for future publication. Secondly, if the article is freely available elsewhere (this does not necessarily include availability on subscription databases such as Westlaw) then the article will fall within the section 21 exemption for information which is reasonably accessible by other means.
- 1.19 If either of these exemptions applies, then the article does not need to be disclosed in response to an FOI request. Otherwise, the article should be disclosed.

¹² Copyright, Designs and Patents Act 1988 s 50.

¹³ FOIA s 22(1)(a).

Defamation

- 1.20 Liability for defamation arises when a statement is published which has an adverse effect on a person's reputation.¹⁴ Sometimes consultation responses may contain potentially defamatory material. Therefore, when we are publishing consultation responses (or an analysis of responses) we must not publish any potentially defamatory material contained within the responses.
- 1.21 The position is more complicated when considering whether we must disclose potentially defamatory information in response to an FOI request.
- 1.22 Publication for the purposes of defamation is defined as the disclosure of defamatory material to one or more third parties.¹⁵ Consequently, disclosing defamatory information in response to an FOI request would constitute publication. Therefore, we potentially face liability either way: we could be liable for defamation if we do disclose the response, or liable for failing to comply with our FOI obligations if we do not.
- 1.23 There are two ways in which liability can be avoided:

- (1) **A defence to defamation.** Section 79 FOIA provides that any defamatory matter that is disclosed in response to an FOI request, which is contained in information that was originally supplied to a public authority by a third person (for instance, consultation responses), shall be "privileged" unless the publication is shown to have been made with malice. Where privilege is conferred, there will be no cause of action for defamation.¹⁶ Consequently, we will have a defence to liability for defamation where we have to disclose potentially defamatory comments as part of consultation responses in response to an FOI request.

However, having to disclose all potentially defamatory statements is problematic, as it poses a risk to crucial aspects of the Law Commission's work. Firstly, it is important that we are able to establish and maintain good relationships with a variety of stakeholders. If defamatory material contained in consultation responses relates to another stakeholder, having to disclose this material may place important stakeholder relationships at risk. Secondly, it is important that we are able to encourage as many people as possible to respond to our consultations as fully as possible. Having to disclose defamatory material contained in responses may result in fewer people being willing to respond openly, although it is recognised that consultees should be discouraged from making defamatory remarks in the first place.

It is preferable to rely on an FOIA exemption where one applies to the defamatory material.

- (2) **Exemption to disclosure under the FOIA.** Section 44 FOIA provides that information will be exempt from disclosure where disclosure is prohibited by or under any enactment. Although the Defamation Act 2013 provides for defences to defamation, and spells out some of the necessary conditions, liability for

¹⁴ See further K Oliphant, *The Law of Tort* (2014 3rd ed) at paras 25.8 to 25.9.

¹⁵ See further K Oliphant, *The Law of Tort* (2014 3rd ed) at para 25.10.

¹⁶ See further K Oliphant, *The Law of Tort* (2014 3rd ed) at para 26.46.

defamation itself is established under the common law. This would therefore seem to fall outside the section 44 exemption.

Alternatively, it could be argued that defamatory statements about an individual amount to personal data, and are therefore exempt from disclosure under section 40(2) FOIA. Defamatory comments in consultation responses will usually take the form of opinions and where the comments are about a living individual, this will expressly fall under the definition of personal data given in the DPA. It is unclear whether this will also be caught by the definition of personal data in the GDPR, but it is arguable that it would be covered by the phrase “any information” relating to a natural person. This would potentially allow us to redact potentially defamatory material which takes the form of an opinion about an individual. The decision has been taken that this amounts to sufficient grounds not to disclose, at the first instance, any potentially defamatory information about an individual (living or deceased).

It does not, however, cover defamatory material which does not constitute an opinion, or relates to corporate bodies or public authorities. The definition of “opinion” should be drawn broadly, given that the Law Commission will usually have no measure by which to judge whether something is true. Additionally, the definition of “defamatory information about an individual” should be drawn relatively broadly, given the breadth of the definition of personal data in the GDPR. For example, a defamatory statement about Joe Bloggs would clearly be covered, but as would a statement about “the Residential Leasehold team” or “the directors of our commonhold association” or “the directors of Big Developer Ltd”, as these are all specific groups of individuals, who could be identified using information in the public domain. Therefore, only defamatory statements about, for example, “HM Land Registry” or “Generic Producers & Co” do not need to be redacted.

- 1.24 In conclusion, it can be considered that defamatory statements which relate to an individual / group of individuals, or an easily identifiable individual / group of individuals fall within the section 40(2) FOIA exemption, and should not be disclosed in the first instance. Defamatory statements which relate to a general corporate body or public authority will have to be disclosed, but the Law Commission will have a defence to liability for defamation under the privilege imparted by section 79 FOIA.

Handling consultation responses

- 1.25 Each of the obligations discussed above must be reflected in how we handle consultation responses.
- 1.26 Often an obligation (or FOIA exemption) may apply to some of the information contained in a document, but not all of it. For example, a consultation response is likely to contain both exempt information (such as the consultee’s contact details) as well as non-exempt information (such as the body of their response to a question). Redaction allows us to remove the exempt information and then publish or disclose the rest of the document.
- 1.27 It is good practice to create redacted copies of consultation responses as we receive them, even if there is no current intention of publishing them in their full form. This will make the process easier and quicker should an FOI request be received in future. The

rest of this policy gives more detail on what should be redacted in order to comply with the various obligations discussed above.

Consent for publishing personal data in consultation responses

1.28 As discussed above,¹⁷ personal data must be processed fairly and lawfully, and with consent. The “How we consult” page included in Law Commission consultation documents informs consultees that:

We may publish or disclose information you provide us in response to this call for evidence, including personal information. [...] The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

1.29 When consultees submit a response, the email reply should contain the following statement:

We may attribute comments and will include a list of all respondents' names in any final report that we publish.

1.30 Therefore, when consultees submit a response, they can be considered to have consented to us publishing their personal data. However, any processing of this personal data must still be fair.

Information which should not be redacted

1.31 The following information can be published, and should not be redacted for FOI purposes.

- (1) **The names of consultees and their role / job description.** Consultees have consented to their names being published in a list of consultees, and to have their comments attributed to them. Their job descriptions can be an important marker of a consultee’s experience and consequently the weight that should be attached to their comments. For these reasons, publishing the names and job descriptions of consultees can be considered fair.
- (2) **Potentially defamatory material relating to a corporate body or public authority.** This should not be published proactively as part of a compilation / analysis of responses, since the section 79 FOIA defence does not apply. However, in responding to an FOI request, it should not be redacted as it does not amount to personal information, and so should be disclosed.

¹⁷ See paragraphs 1.5 to 1.7 above.

Information which should be redacted

1.32 The following information cannot be published, and should be redacted for FOI purposes.

- (1) **Names of persons other than the consultee responding**, as there is no consent. This includes the names and job descriptions of persons who have sent in responses on behalf of another (be that their employer or an organisation that they are a member of). These individuals are not themselves consultees, and so consent to publish their names has not been given

Names of businesses are not information relating to a “living individual” or a “natural person”, and therefore should not be redacted. This includes where an individual responds in a personal capacity, or on behalf of an organisation other than their employer, but uses their employer’s house styled documents to submit the response.

- (2) **Handwritten signatures**. Signatures amount to personal information, and disclosure or publication may increase the risk of fraud. Consequently, publishing handwritten signatures would be unfair, and so they should be redacted.
- (3) **Email addresses (both personal and professional)**. Although there may be considered to be consent through the general disclaimer, disclosure of email addresses could lead to consultees and other individuals receiving significant unwanted correspondence from third parties. It would therefore be unfair to publish or disclose email addresses of consultees or third parties. Consequently, email addresses should be redacted.

However, generic company email addresses (such as info@xyz.com) are not specifically linked to individuals, and therefore probably do not constitute personal data. They do not, therefore, need to be redacted.

- (4) **Phone numbers**. For similar reasons to email addresses, publishing or disclosing phone numbers of consultees or third parties would be unfair. Therefore, all references to direct dial numbers or mobile phone numbers should be redacted.

Generic company phone numbers (where it is clear that they are not direct dial numbers) should not be redacted.

- (5) **Law Commission staff details**. It is generally understood that civil servants (excluding Senior Civil Servants) are entitled to have their names and professional contact details removed prior to publication.¹⁸ This may be relevant, for example, where a consultee has addressed his or her response to an employee of the Law Commission by name.

¹⁸ This seems to be because, although it may be deemed fair to disclose this information, it would very rarely be necessary for the purposes of a legitimate interest in the context of consultation responses. See https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

- (a) This means that references to members of the team, other than Commissioners and the named contact in a CP, should be redacted.
 - (b) Commissioners' names do not need to be redacted in light of the fact that they are the Commissioner for the project. However, their email addresses and direct dials should be redacted given the potential risk of a significant volume of unwanted calls and emails.
 - (c) The name and email address given as contact details in a CP do not need to be redacted. This is because they have already been published. Direct dial numbers, however, should be redacted. This is because, whilst email addresses will become inactive once the individual has left the Commission, the phone number will instead be assigned to another person. This is particularly relevant for the contact details of RAs.
- (6) **Home addresses.** All residential addresses should be redacted for similar reasons to email addresses and phone numbers. In addition, home addresses may also constitute "location data", as specified by the GDPR, which would allow an individual to be located. This makes publication or disclosure unfair. This also applies to details other than a full address which would allow a specific property to be identified.

However, where descriptions are sufficiently vague that a specific property cannot be easily identified from the consultation response, the descriptions do not need to be redacted. Generic commercial addresses also do not need to be redacted.

- (7) **Discussion of criminal offences.** Any responses that discuss the commission of a criminal offence or allege the commission of a criminal offence by an individual fall within the category of "sensitive person data" under the DPA. The GDPR also includes a prohibition on processing personal data relating to criminal convictions and offences other than where specifically authorised by the Member State. Such information must be redacted. It may be sufficient to redact the name of the individual, or it may be necessary to redact more of the substance of the discussion, if it would allow the individual to be identified.
- (8) **Other information which allows an individual to be identified.** This also constitutes personal information, so should be redacted, for example correspondence references, identification numbers or specific client numbers e.g. Leaseholder Advisory Service claim number.
- (9) **Confidential information.** Where information satisfies the requirements for confidentiality set out above, disclosure or publication would amount to an actionable breach of confidence. Such information must therefore be redacted.
- (10) **Potentially defamatory material relating to an individual or a group of individuals.** This should be redacted in the first instance. The term "individual" should be considered in its broadest sense, to recognise the broad definition of personal data in the GDPR. This should include any individual or group of individuals who could be identified from information available elsewhere in the public domain. For example, a defamatory statement about Joe Bloggs would

obviously be covered, but so would a statement about “the Law Commission Residential Leasehold team” or “the directors of our commonhold association” or “the directors of Big Developer Ltd”, as these are all specific groups of individuals, who could potentially be identified using information in the public domain. Therefore, only defamatory statements about “HM Land Registry” or “Generic Producer & Co” should not be redacted.

Appendix 1: Guide to redaction

- 1.1 This appendix only covers the basics of how to carry out redaction, for the file formats most commonly used for consultation responses. The National Archives redaction toolkit provides detailed and helpful guidance on how to redact a variety of documents, including excel spreadsheets.¹⁹

Word Document

- 1.2 A word document needs to be converted to a PDF before it can be redacted.
- (1) Open the word document.
 - (2) Click “File” > “Export” > “Create PDF/XPS”
 - (3) Save the PDF somewhere sensible.
 - (4) Follow the steps below for redacting a PDF.

Emails

- 1.3 An email needs to be converted to a PDF before it can be redacted.
- (1) Open the email.
 - (2) Click “File” > “Print”. Select “Microsoft Print to PDF” from the drop-down list of printers, then click “Print”.
 - (3) Save the PDF somewhere sensible.
 - (4) Follow the steps below for redacting a PDF.

PDFs

- 1.4 Adobe Pro has an in-built redaction tool, as well as an “examine document” function, which allow sensitive data to be removed properly from a document.
- (1) Open the response using Adobe Pro.
 - (2) Click “Advanced” > “Redaction” > “Mark for redaction”.
 - (3) Highlight any text you wish to redact, or draw a box over any pictures (or part of a picture, for example if the PDF is a scanned document) that you wish to redact. A red outline should then appear around this, which becomes a black box when you hover your mouse over it.
 - (4) When you have selected all the text to redact, click “Advanced” > “Redaction” > “Apply Redactions”. Click “OK” on the pop-up box.

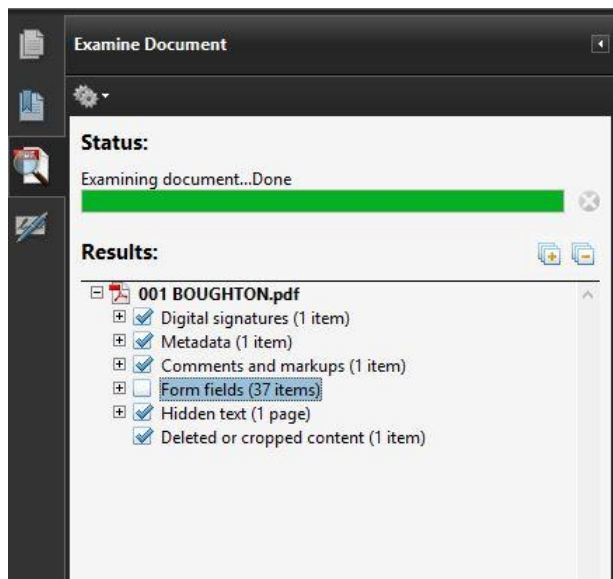
¹⁹ http://www.nationalarchives.gov.uk/documents/information-management/redaction_toolkit.pdf

- (5) A box should then appear asking if you would like to examine your document for additional document information. Click “Yes”. (If this box does not appear, click “Document” > “Examine Document”.)
- (6) On the panel that then appears, click “Remove”.
- (7) Click “File” > “Save”, and enter the name you want for your redacted version.

PDF Forms

1.5 Information input into form fields on PDF forms cannot be redacted using the Adobe redaction tool. Instead, follow these steps:

- (1) Open the response using Adobe Pro.
- (2) Delete any information you wish to redact, and replace it with “[REDACTED]”, so that it is clear where information has been removed.
- (3) Click “Document” > “Examine Document”.
- (4) In the panel that appears, make sure you **UNTICK** “Form Fields”.



- (5) Click “Remove”.
- (6) Click “File” > “Save”, and enter the name you want for your redacted version.
- (7) Check whether there is the option to “File” > “Save a copy”. If so, click on this, click “Save a copy” in the box that pops up, and give this a slightly different name to the redacted version you saved in step (6).
- (8) Delete the version saved in step (6), keeping only the copy made in step (7).

Appendix 2: Redaction checklist

Project Name: {Type project name here}	Progress
Create a “redacted responses” folder for the project	
<i>Work through the following list for each response, and save a redacted copy into the “redacted responses” folder (do not overwrite the original file).</i>	
Do NOT redact the following information:	
The names of consultees (and their role / job description). <i>Note: some consultees may be organisations. The name of the organisation should not be redacted.</i>	
Potentially defamatory material relating to a corporate body or public authority	
Redact the following information:	
Names of persons other than the consultee responding. <i>Note: This includes the names and job descriptions of persons who have sent in responses on behalf of another (be that their employer or an organisation that they are a member of).</i>	
Handwritten signatures	
Individuals’ email addresses (both personal and professional)	
Phone numbers (direct dial and mobile numbers)	
Law Commission staff details (other than the name of the Commissioner for the project, and the named contact published in the relevant CP)	
Home addresses	
Discussion of criminal offences	
Other information which allows an individual to be identified	
Confidential information	
Potentially defamatory material relating to an individual or a group of individuals	
Redaction completed: all consultation responses received for this project have been redacted, and redacted versions saved into the “redacted responses” folder.	