TEMPLATE FOR APPLYING FOI SECTION 40(2) OR EIR 12(3) 13(1)

DOF/2022-0409

The lawfulness, fairness and transparency test

Business areas are required to carry out a "lawfulness, fairness and transparency test" when considering the disclosure of third party personal data falling within the scope of a FOI or EIR request. **In most cases**, neither of the lawful basis outlined below will apply, however the business area must complete the test as evidence as having considered.

The steps are as follows:-

1. **Consider the Personal Data falling within the scope of the request**

   ICO guidance states that, personal data only includes information relating to natural persons who:

   - can be identified or who are identifiable, directly from the information in question; or
   - who can be indirectly identified from that information in combination with other information.

   The request asks how many disabled people have been employed by NIPS, when the applicant has disclosed they are classed as disabled under DDA, at the application stage.

   Brief description:

   The data held in relation to any disability declared in candidate's application forms, is classified as special category personal data. Health data can be about an individual's past, current or future health status. It not only covers specific details of medical conditions, tests or treatment, but includes any related data which reveals anything about the state of someone's health.

   Release of the information requested would necessitate review of individual employee records and consideration of sensitive data determining whether there was a disability declared. As Data Controller, The Department cannot not assume that the requester does not hold other information which could be used in conjunction with this to re-identify individuals.

   Article 9 lists the conditions for processing special category data:

   (a) Explicit consent

   (b) Employment, social security and social protection (if authorised by law)

   (c) Vital interests

   (d) Not-for-profit bodies

(e) Made public by the data subject

(f) Legal claims or judicial acts

(g) Reasons of substantial public interest (with a basis in law)

(h) Health or social care (with a basis in law)

(i) Public health (with a basis in law)

(j) Archiving, research and statistics (with a basis in law)

ICO guidance states:

"Due to its sensitivity, the conditions for processing special category data are very restrictive and generally concern specific, stated purposes. Consequently, only two are relevant to allow you to lawfully disclose under FOIA or the EIR. These are in Article 9(2) of the GDPR:

- *explicit consent; or*
- *the processing relates to personal data which has clearly been made public by the individual concerned.*

2. Lawfulness

Do either of the two lawful basis below which allow for the disclosure of personal data apply? **No**

☐ **Consent:** We do not have the explicit consent of the colleagues involved to share their special category information.

☐ **Legitimate interests:** Disclosure is not necessary for the Department's legitimate interests or the legitimate interests of a third party that overrides the data subject(s) rights and freedoms, particularly their right to privacy. The data subjects involved would have a reasonable expectation that this information would not be shared with the public at large.

Furthermore, the relevant Article 9 condition has not been met, therefore we cannot disclose this special category data, as disclosure would be unlawful and therefore contravene of principle (a)

The DoF Privacy notice states that we may process personal information for the purposes of detection and investigation of suspected or actual fraud, loss or crime, data matching under the National Fraud Initiative, staff monitoring and as required by other legislation. This request is based solely on the requester's private concerns as opposed to a pressing public interest that would necessitate transparency and disclosure of the information.

Consequently, if the HR team were to comply with the request, we would, in effect, be making an unrestricted disclosure of personal data to the general public on the strength of the requester's private interests. This could constitute a disproportionate and unwarranted level of interference with the individuals' rights and freedoms – particularly their right to privacy and family life under the Human Rights Act 1998.