



Section 33 of the Data Protection Act – a practical note for researchers

Section 33 of the Data Protection Act 1998 (DPA) provides an exception to those engaged in historical or other research, and in the preparation of certain statistics, to some of the eight data protection principles contained in the DPA.

Research, history and statistics

1. In this section – ‘research purposes’ includes statistical or historical purposes; ‘the relevant conditions’, in relation to any processing of personal data, means the conditions
 - a. that the data are not processed to support measures or decisions with respect to particular individuals, and
 - b. that the data are not processed in such a way that substantial damage or substantial distress is, or is likely to be, caused to any data subject.
2. For the purposes of the second data protection principle, the further processing of personal data only for research purposes in compliance with the relevant conditions is not to be regarded as incompatible with the purposes for which they were obtained.
3. Personal data which are processed only for research purposes in compliance with the relevant conditions may, notwithstanding the fifth data protection principle, be kept indefinitely.
4. Personal data which are processed only for research purposes are exempt from section 7 if
 - a. they are processed in compliance with the relevant conditions, and
 - b. the results of the research or any resulting statistics are not made available in a form which identifies data subjects or any of them.
5. For the purposes of subsections 2 to 4 personal data are not to be treated as processed otherwise than for research purposes merely because the data are disclosed
 - a. to any person, for research purposes only,
 - b. to the data subject or a person acting on his behalf,
 - c. at the request, or with the consent, of the data subject or a person acting on his behalf, or
 - d. in circumstances in which the person making the disclosure has reasonable grounds for believing that the disclosure falls within paragraph a, b or c.

The exemption is, however, quite narrow and only affects the three data protection principles relating to

- ▶ the purpose for which data were obtained (the second data protection principle)
- ▶ the duration for which they can be kept (the fifth data protection principle)
- ▶ and the data subject’s access provisions (relating to a data subject’s right of access under s.7 DPA)

Section 33 **does not** give a blanket exemption from all the data protection principles which apply to personal data provided and/or used for research purposes. Researchers wishing to use personal data should be aware that most of the data protection principles will still apply (notably the requirement to keep data secure).

The exemption relates to personal data which are processed (or further processed) 'only for research purposes' (undefined, but includes statistical or historical purposes). To qualify for the research exemption, the research must be able to comply with the 'relevant conditions' that:

- a. the personal data are not processed to support measures or decisions with respect to particular individuals
and that
- b. the data are not processed in such a way that substantial damage or substantial distress is, or is likely to be, caused to any data subject.

Section 33(2) provides that the further processing of personal data only for research purposes will not breach the second data protection principles (i.e. personal data must not be processed in a manner which is incompatible with the purpose for which the data were obtained) if the processing complies with the 'relevant conditions'. Provided that the 'relevant conditions' have been complied with, personal data may be further processed for research purposes:

1. even if the data were originally obtained for a different purpose (therefore exempt from the second data protection principle)
and
2. the personal data may be kept indefinitely for the specific research purposes for which they are being used (therefore exempt from the fifth data protection principle)
and
3. the personal data will be exempt from the data subject's rights of access where 'the results of the research or any resulting statistics are not made available in a form which identifies data subjects or any of them' (section 33(4)).

Administrative Data Research Network view

Our view is that data gathered for non-research purposes could be used for research as long as there is no breach of the remaining DPA requirements that:

- ▶ personal data are fairly and lawfully processed (this still requires at least one of the conditions set out in Schedule 2 DPA to be met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 DPA is additionally met)
- ▶ personal data are adequate, relevant and not excessive (to the purpose of processing)
- ▶ personal data are accurate and up to date
- ▶ personal data are processed in accordance with the data subject's rights under the DPA (save that the 'research exemption' provides exemption from the data subject access provisions)
- ▶ personal data are kept securely, and
- ▶ personal data are not transferred to countries without adequate data protection

Our view is also that the 'research exemption' is limited in its scope, but that it does reduce or limit the effect of the second, fifth and sixth data protection principles that must be adhered to during the processing of personal data, as discussed above.

The DPA no longer applies where personal data have been successfully anonymised (so that they cease to be 'personal data' for the purposes of the DPA), and the anonymised information can be used for research without consideration of the section 33 exemption. [Guidance on the concept of personal information](#)

Fair and lawful

The first data protection principle requires that personal data are processed fairly and lawfully. This data protection principle still needs to be adhered to, even if the 'research exemption' applies. The conditions that are relevant for the processing of any personal data are contained in Schedule 2 DPA. Where the data used for research are sensitive, an additional reason to process them is required (as set out in Schedule 3 DPA).

In order to process **non-sensitive** personal data, at least one of the conditions set out in Schedule 2 must be met, thus providing a legitimising reason to process personal data, which must be fairly and lawfully processed:

- ▶ consent of the data subject
- ▶ contractual necessity
- ▶ non-contractual legal obligation of the data controller
- ▶ vital interests of the data subject
- ▶ functions of a public nature
- ▶ legitimate interests of the data controller

Where a researcher is seeking to use **sensitive** personal data, a valid Schedule 3 DPA legitimising condition will also have to be met. Data controllers are forbidden from processing sensitive personal data unless one or more of the additional 20 conditions for processing sensitive personal data are met. These conditions are contained in Schedule 3 of the DPA as well as in secondary legislation (and they include the requirement to obtain the explicit consent of the data subject). Those involved in research containing sensitive personal data are advised to consult the relevant condition(s) to be relied upon, and to seek further legal advice where necessary.

The Administrative Data Research Network considered the specific question of whether a data subject was always required to give consent to the processing of their data. Although the data subject's consent to processing is not always required, one of the other conditions relevant for the purposes of the fair and lawful processing of personal data will still be required where consent is absent. Where consent of the data subject has not been requested, or where consent has not been given by the data subject, the other condition that is relied on must be valid; otherwise consent will be required to process the personal data lawfully.

For example, where non-anonymised personal data are to be processed, and where there is no consent of the data subject to the processing of non-sensitive data, researchers may be able to rely on one of the other conditions for processing personal data contained in Schedule 2 DPA, provided that the condition is valid in the circumstances. Those conditions include the 'legitimate interests of the data controller':

'6.(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

If the requirements of this condition are clearly satisfied, reliance on this condition would satisfy the first data protection principle that the processing of personal data is fair and lawful, and thereby eliminate the need for a researcher to seek the data subject's consent to the processing. There is no definition of 'legitimate interests' in the DPA, which makes the condition somewhat uncertain, but where the interests of the data controller and those of the data subject are perceived to be equal, the interests of the data subject are likely to be the most important. However, if another Schedule 2 condition (other than the consent of the data subject) cannot be satisfied, consent may be the only condition that can be relied upon – and the consent of the data subject will therefore be required.

The Network's view is that researchers using non-sensitive administrative data may not need the consent of the data subject to process personal data, but only where another valid legitimising condition relevant to the fair and lawful processing of personal data may be relied upon. In those circumstances, researchers can, and are likely to rely primarily on the legitimising condition that the 'processing is necessary for the purposes of legitimate interests pursued by the data controller'. Any research involving sensitive personal data will require an additional Schedule 3 condition to be met, which will be much more exacting. If the Schedule 3 condition that is to be relied upon is consent, then it must be 'explicit consent'.

The Network wants all research using administrative data to be safe, and has provided these and other good practice guidelines to make that happen.

Please note that any advice provided by the Administrative Data Research Network is for information only and not legal advice. If you are unsure about any aspect of administrative data research, please consult your legal department or the relevant data holding organisation.