

STATES OF JERSEY



DRAFT DATA PROTECTION (SUBJECT ACCESS MODIFICATION – HEALTH) (JERSEY) REGULATIONS 200-

**Lodged au Greffe on 11th October 2005
by the Finance and Economics Committee**

STATES GREFFE



Jersey

DRAFT DATA PROTECTION (SUBJECT ACCESS MODIFICATION – HEALTH) (JERSEY) REGULATIONS 200-

REPORT

Data controllers who process health records may benefit from certain exemptions to subject access requests where disclosure of personal data would be likely to cause harm to the data subject.

Any resource implications of these Regulations are already provided for within the resources of the Finance and Economics Committee.

Explanatory Note

These Regulations provide for the partial exemption of personal data about health from the operation of the subject information provisions of the Data Protection (Jersey) Law 2005 – provisions that confer rights on data subjects to be informed about personal data held about them.

The subject information provisions are Article 7 of the Law and one aspect of the first data protection principle. They require disclosure of certain key information about data to the person who is the subject of the data.

Regulation 1 is an interpretation provision. It includes a definition of “appropriate health professional” as a health worker who, under *Regulation 2*, is chosen according to criteria of relevance to particular health data.

Regulation 3 exempts from the operation of the proposed Regulations personal data already exempt under Regulations made under Article 38(1) of the Law (Regulations that preserve the operation of pre-existing legal restrictions on disclosure).

Regulation 4 exempts from the subject information provisions health data that come before the courts. Those data include evidence in proceedings concerning families or children, for example proceedings concerning adoption, matrimonial matters and guardianship. The data are exempt if a court so orders on the basis of the data subject’s level of understanding or because disclosure could seriously harm the data subject.

Regulation 5 exempts health data from disclosure under Article 7 of the Law if serious harm to a person’s physical or mental health or condition is likely to be caused by the disclosure.

Regulation 6 exempts health data from disclosure under Article 7 of the Law to someone who has the role of parent or guardian (or the like) in relation to a child, or in relation to a person unable to manage his or her own affairs. The exemption applies if the child or person would not have expected the data to be disclosed to the parent or guardian.

Regulation 7 modifies Article 7 of the Law in relation to health data, partly to cut down an existing exemption. A data controller will not be able to refuse access on the grounds that information about a third party would also be disclosed if in fact the third party is a health professional who had a hand in creating the data or in the care of the data subject.

However, further modifications in that Regulation introduce the possibility of a court’s ordering a data controller not to comply with a request for information if serious harm to a person’s physical or mental health or condition is likely to be caused by giving the information.

The Regulation also makes modifications that effectively require a health professional’s opinion before the exemption in Regulation 5 is relied on for a refusal or indeed before information is given, if in either case the personal data in question consist of information as to the physical or mental health or condition of the data subject.

Regulation 8 makes a future amendment to the text of Regulation 2 as a consequence of the move to Ministerial government.

Regulation 9 sets out the name of the Regulations and states when they come into force.

These Regulations contribute to the implementation of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.



Jersey

DRAFT DATA PROTECTION (SUBJECT ACCESS MODIFICATION – HEALTH) (JERSEY) REGULATIONS 200-

Arrangement

Regulation

<u>1</u>	<u>Interpretation</u>
<u>2</u>	<u>Appropriate health care professional</u>
<u>3</u>	<u>Personal data to which Regulations do not apply</u>
<u>4</u>	<u>Data processed by court exempt from subject information provisions</u>
<u>5</u>	<u>Data exempt from Article 7 where harm likely</u>
<u>6</u>	<u>Exemption from Article 7 where person looks after data subject</u>
<u>7</u>	<u>Modifications of Article 7</u>
<u>8</u>	<u>Amendment consequential on move to Ministerial government</u>
<u>9</u>	<u>Citation and commencement</u>



Jersey

DRAFT DATA PROTECTION (SUBJECT ACCESS MODIFICATION – HEALTH) (JERSEY) REGULATIONS 200-

Made

[date to be inserted]

Coming into force

[date to be inserted]

THE STATES, in pursuance of Articles 30(1) and 67 of the Data Protection (Jersey) Law 2005, ^[1] have made the following Regulations –

1 Interpretation

In these Regulations –

“appropriate health professional” means the health professional chosen in accordance with Regulation 2;

“care” includes examination, investigation, diagnosis and treatment;

“Law” means the Data Protection (Jersey) Law 2005.

2 Appropriate health care professional

- (1) For the purposes of these Regulations, the appropriate health professional shall, in relation to a request in respect of information comprised in personal data to which these Regulations apply, be chosen in accordance with this Article.
- (2) If the data controller is the Employment and Social Security Committee and the personal data are processed in connection with the exercise of the functions conferred on it under the Health Insurance (Jersey) Law 1967^[2] or the Social Security (Jersey) Law 1974^[3] (or any other functions that it has in respect of health insurance or social security) the appropriate health professional shall be a health professional who appears to the data controller to have the necessary experience and qualifications to advise on the matters to which the information relates.
- (3) In other cases, the appropriate health professional shall be the health professional who appears to the data controller to be currently or to have been most recently responsible for the clinical care of the data subject in connection with the matters to which the information relates.
- (4) If, in the application of paragraph (3), more than one health professional would be chosen, the appropriate health professional shall be, of those that would be so chosen, the one who appears to the data controller to be the most suitable to advise on the matters to which the information relates.
- (5) If, in the application of paragraph (3), no health professional would be chosen, the appropriate health professional shall be a health professional who appears to the data controller to have the necessary experience and qualifications to advise on the matters to which the information relates.

3 Personal data to which Regulations do not apply

These Regulations do not apply to personal data exempted from Article 7 of the Law by Regulations under Article 38(1) of the Law.

4 Data processed by court exempt from subject information provisions

- (1) Subject to Regulation 3, personal data are exempt from the subject information provisions if the data are processed by a court and consist of information as to the physical or mental health or condition of the data subject, being information that –
 - (a) is supplied in a report or other evidence given to the court in the course of proceedings relating to families or children; and
 - (b) the court directs should be withheld from the data subject on the ground that it appears –
 - (i) to be impracticable to disclose the report or other evidence having regard to the data subject’s age and understanding; or
 - (ii) to be undesirable to disclose the report or other evidence having regard to the serious harm that might thereby be suffered by the data subject.
- (2) For the purposes of this Article, “proceedings relating to families or children” includes proceedings relating to adoption, matrimonial matters or guardianship.

5 Data exempt from Article 7 where harm likely

Subject to Regulation 3, personal data that consist of information as to the physical or mental health or condition of the data subject are exempt from Article 7 of the Law in any case to the extent to which the application of that Article would be likely to cause serious harm to the physical or mental health or condition of the data subject or any other person.

6 Exemption from Article 7 where person looks after data subject

- (1) Subject to Regulation 3, in a case where a defined person is enabled by or under any enactment or rule of law to make a request under Article 7 of the Law on behalf of a data subject and has made such a request, personal data that consist of information as to the physical or mental health or condition of the data subject are exempt from Article 7 of the Law to the extent to which the application of that Article would result in the disclosure of information –
 - (a) provided by the data subject in the expectation that it would not be disclosed to the person making the request;
 - (b) obtained as a result of any examination or investigation to which the data subject consented in the expectation that the information would not be so disclosed; or
 - (c) that the data subject has expressly indicated should not be so disclosed.
- (2) Paragraph (1)(a) or (b) does not apply to the extent that the data subject has expressly indicated that he or she no longer has the expectation referred to in that sub-paragraph.
- (3) For the purposes of this Regulation, a defined person is a person who –
 - (a) has parental responsibility for a child who is the data subject; or
 - (b) has been appointed by a court to manage the affairs of a person who is the data subject and incapable of managing his or her own affairs.

7 Modifications of Article 7

Subject to Regulation 3, in relation to personal data that consist of information as to the physical or mental health or condition of the data subject –

- (a) Article 7(7) of the Law shall have effect as if the following word and sub-paragraph were inserted at

the end of that paragraph –

“; or

(c) the information is contained in a health record and the other individual is a health professional who has compiled or contributed to the health record or has been involved in the care of the data subject in the health professional’s capacity as a health professional.”;

(b) Article 7 of the Law shall have effect as if for paragraph (12) of that Article there were substituted the following paragraphs –

“(12) If a court is satisfied on the application of –

(a) a person who has made a request under this Article; or

(b) a person who would be likely to suffer serious harm to his or her physical or mental health or condition because of compliance with a request under this Article, being compliance that by virtue of an exemption is not required under this Article,

that the relevant data controller has failed to comply with or is about to comply with the request, being failure in contravention of this Article or compliance that by virtue of an exemption is not required under this Article, the court may order the data controller to comply or, as the case may be, not to comply with the request.

(13) A data controller who is not a health professional shall not, on the ground of the exemption prescribed by Regulation 5 of the Regulations refuse a request under this Article for information unless –

(a) after receiving the request, the data controller consults the appropriate health professional on the question whether the exemption applies and obtains in writing from the health professional an opinion that the exemption applies to the information; or

(b) the following conditions are satisfied –

(i) the data controller consulted a health professional before receiving the request,

(ii) the health professional was the health professional who would, if the data controller had carried out the consultation under sub-paragraph (a), have been the appropriate health professional,

(iii) the data controller obtained in writing from the health professional an opinion that the exemption applied to all of the information.

(14) The conditions referred to in paragraph (13)(b) are taken not to be satisfied if–

(a) the opinion was obtained before the start of the period of 6 months that ends on the day referred to in paragraph (11)(a) in respect of the request; or

(b) the opinion was obtained within that period but it is reasonable in all the circumstances to consult the appropriate health professional again.

(15) A data controller who is not a health professional shall not supply information in response to a request under this Article unless the data controller has first consulted the appropriate health professional on the question whether the exemption set out in Regulation 5 of the Regulations applies with respect to the information.

(16) Paragraph (15) does not operate in relation to a request to the extent that the request relates to information that the data controller is satisfied has previously been supplied to the data subject or is already within the knowledge of the data subject.

(17) Paragraph (15) does not operate in relation to a request if the following conditions are satisfied –

(a) the data controller consulted a health professional before receiving the request;

- (b) the health professional was the health professional who would, if the data controller had carried out the consultation under paragraph (15), have been the appropriate health professional;
 - (c) the data controller obtained in writing from the health professional an opinion that the exemption set out in Regulation 5 of the Regulations did not apply with respect to the information that is the subject of the request.
- (18) A reference in paragraph (12) to an exemption includes an exemption set out in the Regulations.
- (19) In this Article –
- ‘appropriate health professional’ means the health professional chosen in accordance with Regulation 2 of the Regulations;
 - ‘Regulations’ means the Data Protection (Subject Access Modification – Health) (Jersey) Regulations 200-.”.

8 Amendment consequential on move to Ministerial government

In Regulation 2(2) for the words “Employment and Social Security Committee” there shall be substituted the words “Minister for Employment and Social Security”.

9 Citation and commencement

- (1) These Regulations may be cited as the Data Protection (Subject Access Modification – Health) (Jersey) Regulations 200- and shall, except as provided in paragraph (2), come into force on 1st December 2005.
 - (2) Regulation 8 shall come into force on the same day as Article 42(3) of the States of Jersey Law 2005.
- [4]

[1] L.2/2005.

[2] Chapter 26.500.

[3] Chapter 26.900.

[4] L.8/2005.