



GUERNSEY STATUTORY INSTRUMENT

2002 NO. 15

**The Data Protection (Subject Access Modification) (Health)
Order, 2002**

<i>Made</i>	<i>9th July, 2002</i>
<i>Coming into operation</i>	<i>1st August, 2002</i>
<i>Laid before the States</i>	<i>2002</i>

THE STATES ADVISORY AND FINANCE COMMITTEE, in exercise of the powers conferred on it by sections 30(1) and (4) and 66(2) of the Data Protection (Bailiwick of Guernsey) Law, 2001^a and all other powers enabling it, and after consultation with the Data Protection Commissioner in accordance with section 66(3) of that Law, hereby makes the following Order -

Personal data to which Order applies.

1. (1) Subject to paragraph (2), this Order applies to personal data consisting of information as to the physical or mental health or condition of the data subject.

(2) This Order does not apply to any data which are exempted from section 7 by an order made under section 38(1) of the Law.

Exemption from the subject information provisions.

2. (1) Personal data falling within paragraph (2) and to which this Order applies are exempt from the subject information provisions.

^a Order in Council No. V of 2002.

(2) This paragraph applies to personal data processed by a court and consisting of information -

(a) supplied in a report or other evidence given to the court by or on behalf of -

(i) a probation officer;

(ii) a medical practitioner;

(iii) an educational establishment;

(iv) a Committee of the States; or

(v) any other person or body,

in the course of any proceedings relating to families or children; and

(b) which the court directs should be withheld from the data subject on the ground that -

(i) it appears to it impracticable to disclose the report having regard to his age and understanding; or

(ii) undesirable to do so having regard to potential serious harm which might thereby be suffered by him.

(3) For the purposes of this article, the expression “**proceedings**

relating to families or children” includes any court proceedings to which the Orders of the Royal Court set out in the Schedule to this Order apply.

Exemptions from section 7.

3. (1) Personal data to which this Order applies are exempt from section 7 in any case to the extent to which the application of that section would be likely to cause serious harm to the physical or mental health or condition of the data subject or any other person.

(2) Subject to article 5(1), a data controller who is not a health professional shall not withhold information constituting data to which this Order applies on the ground that the exemption in paragraph (1) applies with respect to the information unless the data controller has first consulted the person who appears to the data controller to be the appropriate health professional on the question whether or not the exemption in paragraph (1) applies with respect to the information.

(3) Where any person falling within paragraph (4) is enabled by or under any enactment or rule of law to make a request on behalf of a data subject and has made such a request, personal data to which this Order applies are exempt from section 7 in any case to the extent to which the application of that section would disclose 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) which the data subject has expressly indicated should

not be so disclosed,

provided that sub-paragraphs (a) and (b) shall not prevent disclosure where the data subject has expressly indicated that he no longer has the expectation referred to therein.

- (4) A person falls within this paragraph if -
- (a) the data subject is a child, and that person has parental responsibility for that data subject; or
 - (b) the data subject is incapable of managing his own affairs and that person has been appointed by a court to manage those affairs.

Modification of section 7 relating to data controllers who are not health professionals.

4. (1) Subject to paragraph (2) and article 5(3), section 7 of the Law is modified so that a data controller who is not a health professional shall not communicate information constituting data to which this Order applies in response to a request unless the data controller has first consulted the person who appears to the data controller to be the appropriate health professional on the question whether or not the exemption in article 3(1) applies with respect to the information.

(2) Paragraph (1) shall not apply to the extent that the request relates to information which the data controller is satisfied has previously been seen by the data subject or is already within the knowledge of the data subject.

Additional provision relating to data controllers who are not health professionals.

5. (1) Subject to paragraph (2), article 3(2) shall not apply in relation

to any request where the data controller has consulted the appropriate health professional prior to receiving the request and obtained in writing from that appropriate health professional an opinion that the exemption in article 5(1) applies with respect to all of the information which is the subject of the request.

(2) Paragraph (1) does not apply where the opinion either -

- (a) was obtained before the period beginning six months before the relevant day (as defined by section 7(11) of the Law) and ending on that relevant day, or
- (b) was obtained within that period and it is reasonable in all the circumstances to re-consult the appropriate health professional.

(3) Article 4(1) shall not apply in relation to any request where the data controller has consulted the appropriate health professional prior to receiving the request and obtained in writing from that appropriate health professional an opinion that the exemption in article 3(1) does not apply with respect to all of the information which is the subject of the request.

Further modifications of section 7.

6. In relation to data to which this Order applies -

- (a) section 7(4) of the Law shall have effect as if the full stop at the end of paragraph (b) were deleted and there were inserted immediately after the word "individual" -

“; 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 his capacity as a health professional.”;

(b) section 7(9) shall have effect as if -

(i) there were substituted -

“(9) If a court is satisfied on the application of -

(a) any person who has made a request under the foregoing provisions of this section, or

(b) any other person to whom serious harm to his physical or mental health or condition would be likely to be caused by compliance with any such request in contravention of those provisions,

that the data controller in question is about to comply with or has failed to comply with the request in contravention of those provisions, the court may order him not to comply or, as the case may be, to comply with the request.”;

and

(ii) the reference therein to a contravention of the foregoing provisions of that section included a reference to a contravention of the provisions contained in this Order.

Interpretation.

7. (1) In this Order, unless the context otherwise requires -

“the appropriate health professional” means -

- (a) the health professional who is currently or was most recently responsible for the clinical care of the data subject in connection with the matters to which the information which is the subject of the request relates; or
- (b) where there is more than one such health professional, the health professional who is the most suitable to advise on the matters to which the information which is the subject of the request relates; or
- (c) where -
 - (i) there is no health professional available falling within paragraph (a) or (b); or
 - (ii) the data controller is the States' Social Security Authority and data to which this Order applies are processed in connection with the exercise of the functions conferred on it by or under the Social Insurance (Guernsey) Law, 1978^b, the Health Service (Benefit) (Guernsey) Law, 1990^c or any other of its functions in relation to social

^b Ordres en Conseil Vol. XXVI, p. 292; Vol. XXVII, pp. 238, 307 and 392; Vol. XXIX, pp. 24, 148 and 422; No. V of 1990; No. XII of 1993; No. V of 1994; Nos. VI and XIII of 1995; No. I of 1998; No. VI of 1999; No. X of 2000; No. IX of 2001 and Recueil d'Ordonnances Tome XXVI, p. 177.

^c Ordres en Conseil Vol. XXXII, p. 192

or health protection,

a health professional who has the necessary experience and qualifications to advise on the matters to which the information which is the subject of the request relates;

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

“**an instrument**” means any order (including any Order of the Royal Court), regulations, rules or other subsidiary legislative instrument;

“**the Law**” means the Data Protection (Bailiwick of Guernsey) Law, 2001;

“**request**” means a request made under section 7; and

“**section 7**” means section 7 of the Law.

(2) The provisions of the Interpretation (Guernsey) Law, 1948^d apply to the interpretation of this Order -

(a) throughout the Bailiwick; and

(b) as they apply to the interpretation of an enactment.

(3) Unless the context otherwise requires, references in this Order to an enactment or instrument are references thereto as amended, re-enacted (with or without modification), extended or applied.

^d Ordres en Conseil Vol. XIII, p. 355.

(4) Unless the context otherwise requires -

(a) a reference in this Order to a numbered article is a reference to the article of this Order which is so numbered; and

(b) a reference in a provision of this Order to a numbered paragraph is a reference to the paragraph of that provision which is so numbered.

Citation.

8. This Order may be cited as the Data Protection (Subject Access Modification) (Health) Order, 2002.

Commencement.

9. This Order shall come into force on the 1st August, 2002.

Dated this 9th day of July, 2002.

A handwritten signature in black ink, appearing to read 'L. C. Morgan', is written over a horizontal dotted line. The signature is stylized and extends to the right of the line.

L. C. MORGAN

President of the States Advisory and Finance Committee

For and on behalf of the Committee.

SCHEDULE

RULES OF COURT - PROCEEDINGS WHICH RELATE TO FAMILIES OR CHILDREN

1. Adoption Rules, 1961^e
2. Adoption (Alderney) Rules^f
3. Court of Appeal (Guardianship Proceedings) (Appeals) Rules, 1979^g
4. Domestic Proceedings and Magistrate's Court Rules, 1989^h
5. Juvenile Court (Criminal Cases) Rules, 1990ⁱ
6. Matrimonial Causes Rules, 1952^j

^e O.R.C. Vol. I, pp. 180 and 222 and No. I of 1968.

^f O.R.C. No. I of 1974.

^g O.R.C. No. II of 1979.

^h O.R.C. No. IX of 1989 and No. I of 1993.

ⁱ O.R.C. No. III of 1990 and No. I of 1994.

^j O.R.C. Vol. I, p. 64; No. I of 1973; No. I of 1980; No. IV of 1983; No. I of 1986 and No. I of 2001.

EXPLANATORY NOTE.

(This note is not part of the Order)

This Order provides for the partial exemption from the provisions of the Data Protection (Bailiwick of Guernsey) Law 2001 ("the Law") which confer rights on data subjects to gain access to data held about them relating to the physical or mental health or condition of the data subject (article 1(1)). The Order does not apply to any data to which any order made under section 38(1) of the Law applies (article 1(2)).

An exemption from section 7 of the Law is conferred by article 3(1) only to the extent to which the supply to the data subject of particulars of the information constituting the data would be likely to cause serious harm to his or any other person's physical or mental health or condition. Before deciding whether this exemption applies (and, accordingly, whether to grant or withhold subject access) a data controller who is not a health professional is obliged by articles 3(2) and 4(1) to consult the health professional responsible for the clinical care of the data subject or, if there is more than one, the most suitable available health professional or, if there is none available or the data controller is the States' Board of Health, the States' Social Security Authority, a probation officer or other person in the course of any proceedings relating to families or children, a health professional who has the necessary experience and qualifications to advise on the matters to which the information which is requested relates (definition in article 7). This obligation to consult does not apply where the data subject has already seen or knows about the information which is the subject of the request (article 4(1)), nor in certain limited circumstances where consultation has been carried out prior to the request being made (article 5(1) and (2)).

A further exemption from section 7 of the Law is conferred in certain circumstances where a third party is making the request for access on behalf of the data subject and the data subject does not wish that information to be disclosed to that third party (article 3(3)).

In the case of court reports in certain proceedings, article 2 provides an exemption from section 7 of the Law and also a complete exemption from the first data protection principle to the extent to which it requires compliance with paragraph 2 of Part II of Schedule 1 to the Law (which confers obligations on data controllers to give certain information to data subjects relating to data held about them).

Article 6 modifies section 7 of the Law so that a data controller cannot refuse access on the grounds that the identity of a third party would be disclosed in cases where the

information is contained in a health record and the third party is a health professional who has compiled or contributed to that health record or has been involved in the care of the data subject in his capacity as a health professional, unless serious harm to that health professional's physical or mental health or condition is likely to be caused by giving access such that the exemption in article 3(1) applies.