



Data Protection Act 1998

A Guide for Records Managers and Archivists



Standards for the management of Government records

In association with the Office of the Data Protection Commissioner



Records Management

Data Protection Act 1998

**A Guide for Records Managers
and Archivists**

Data Protection Act 1998 - A Guide for Records Managers and Archivists

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<http://www.pro.gov.uk/>

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Foreword

Records managers and archivists play a valuable role in ensuring that historical records are effectively managed and preserved for present and future generations. While I recognise the importance of retaining and making available such records, it is important to ensure that proper protection is given to individuals' rights to privacy with respect to the processing of their personal information. That is why I am pleased that the collaboration of the PRO with my Office has led to the production of this Guide.

It is a timely overview of the implications of the Data Protection Act 1998 which came into force on 1 March 2000, and which replaces the 1984 Act. The Data Protection Act 1984 had limited implications for records managers and archivists, applying as it did only to computerised information. However, the 1998 Act applies to structured paper records and will therefore have a significant impact on the use of personal data for records management and archival purposes.

Although following the advice in the Guide cannot, of itself, give a guarantee of total compliance with the Act, it does provide a framework of the issues which need to be addressed by records managers and archivists. It will assist those who process data for historical and archival purposes in being better prepared to meet the requirements of the Data Protection Act 1998. I commend it to you.

Looking to the future I am pleased that the PRO have expressed the intention to develop the Guide, in the light of practical experience of applying it. As records managers and archivists use the Guide, offer their comments and raise new questions, the responses can be used to enrich the guidance. I hope you will play your part in that process so that the resulting Guide will promote the following of good practice in a way which is helpful to you.

Elizabeth France
Data Protection Commissioner



1 Introduction

Records managers and archivists who have been managing or accessioning electronic records will be familiar with the provisions of the Data Protection Act 1984. This is referred to below as the 1984 Act. It imposed a duty on those holding personal data to comply with eight Data Protection Principles, to register with the Data Protection Registrar, and to allow people to access and, if necessary, to correct data that relates to them. The new Data Protection Act (cited here simply as the Act) is based on the EC Directive 95/46/EC. Many of the principles underlying the 1984 Act remain, but there are some significant developments, not the least of which is the extension of the data protection regime to manual records.

A copy of the Act is necessary for the full understanding of this Guide. It may be seen at <http://www.hmsso.gov.uk/acts/acts1998/19980029.htm>, or obtained from The Stationery Office Ltd on 020-7873 9090, or at the Stationery Office Bookshop.

1.1 Warning

The advice set out below is prepared in anticipation of the March 2000 commencement date. Seventeen statutory instruments will have been enacted. One of these will be a Commencement Order, expected to bring the Act into force. The Data Protection Registrar (to be called the Data Protection Commissioner) has issued guidance on the Act which should be consulted in conjunction with this Guide to achieve a more comprehensive appreciation of the provisions of the legislation. There are a number of aspects, e.g. enforcement, which have not been addressed in this Guide but which are, to a greater or lesser extent, considered in the Registrar's publications. These publications are available from the Office of the Data Protection Registrar, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. The website is at: <http://www.dataprotection.gov.uk/>

1.2 General

These notes emphasise those parts of the legislation that have changed, and concentrate on those provisions that may affect records managers and archivists. There are many other changes that will only affect those

working in particular specialised archives; these are such areas as the police, schools and health bodies. The rights of individuals are not dealt with in great detail and again the Registrar's publications should be consulted. Those parts of the text in *italics* are direct quotations from the Act.

1.3 Legislative Framework

The kernel of the Act is s4(4). This provides that *it shall be the duty of the data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller*. These principles are set out in Schedule 1 of the Act. They are broadly similar to those of the 1984 Act and are considered in detail in 3 below.

Generally, people responsible for personal data, (i.e. data controllers) are obliged to register a notification with the Data Protection Commissioner giving details of themselves, the data, the purposes for which the data are processed and various other details (s16). Although s17(2) exempts those holding only manual data from the requirement to notify, this does not exempt them from compliance with the rest of the Act unless they can rely on another permanent or transitional exemption in any particular case.

Part II of the Act gives individuals (not necessarily data subjects) a number of rights. Among these is the right to be told which data about them are held and processed, why they are held, where they came from and where they may be sent. Where data are inaccurate, a right to rectification may arise, see 3.4 below. Exemptions are dealt with in 4 below.

2 Definitions and Concepts

2.1 Data and Personal Data

There are new definitions in the Act for *data* and *personal data* s1(1):

'data' means information which:

- a) *is being processed by means of equipment operating automatically in response to instructions given for that purpose,*
- b) *is recorded with the intention that it should be processed by means of such equipment,*
- c) *is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or*
- d) *does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68 ...*

'personal data' means data which relate to a living individual who can be identified:

- a) *from those data, or*
- b) *from those data and other information which is in the possession of, or is likely to come into 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.

Archivists are sometimes required by law to keep records closed for the lifetime of an individual, and data protection legislation applies only to the data relating to living individuals. If it is not possible to ascertain whether an individual named in a record is still alive, a lifetime of 100 years is regarded as a safe maximum. In Scotland the practice has been to use 75 years.

The definition of data represents a significant extension to paper records: data now include information that is recorded as part of a *relevant filing system* or is intended to be included in such a system. A *relevant filing system* covers manual systems in which there is *any set of information relating to individuals, which is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible* s1(1). What this actually means in

practice remains to be seen. Initially it had been thought that personnel files which were not internally structured would not be caught. The current view is that data will be covered by the Act where there is a set of information relating to individuals which is structured in such a way that the relevant data will be generally accessible to the data controller in connection with day to day operations. What would certainly not be caught by this provision would be incidental references to individuals in files in systems structured by reference to topics not relating to individuals. These might be minutes of meetings, policy papers, or planning files, in all of which individuals might be mentioned in passing. An alphabetical index by name of individual, whether a card index containing information about a person, or as addendum to a collection of other papers giving a page reference for the information relating to that person, would fall within the definition, and would bring the indexed files within the system.

Before the current Act, the 1984 Act established subject access rights to data processed by equipment operating automatically. There was no right of access under that Act to manual data. A right of access to certain classes of manual data, principally records of the data subject's health or education, was provided by other legislation. These data are referred to as *accessible records* in the current Act and are defined in s68. The definition of *data* now includes *accessible records* (s1(1)(d)). Thus accessible records are data to which the terms of the Act apply even if they do not fulfil the general requirement for automated data or for manual data, in the latter case by forming part of a *relevant filing system*. The transitional exemptions from the right of subject access and the right to rectify for manual data do not apply to *accessible records*, thus preserving existing access rights, see 4.1.1.

2.2 Processing, s1(1)

This has a very wide meaning. It covers obtaining, recording or holding the information, or carrying out the following operations in relation to it :

- organisation, adaptation or alteration
- retrieval, consultation or use
- disclosure by transmission etc., or
- alignment, combination, blocking erasure or destruction

2.3 Data Controller, s1(1)

This is the person, (or persons), who determine the purpose for which and manner in which any personal data are, or are to be, processed.

2.4 Sensitive Personal Data, s2

This is personal data consisting of any information on the data subject's

- racial or ethnic origin
- political opinions
- religious, or other, beliefs
- trade union membership
- health, physical or mental
- sex life
- offences, committed or allegedly committed, or
- details of proceedings for offences

There are new restrictions on the processing of sensitive personal data. These are stricter than the requirements for processing other data. Transitional provisions may limit the impact of these new restrictions (see 4 below).

2.5 Special Purposes, s3

The *special purposes* are defined as those of journalism, artistic purposes and literary purposes. Research, historical and statistical purposes, although treated differently by the Act (see 2.8), do not fall within the definition of *special purposes*. Section 32 provides data controllers who are processing for the special purposes with various exemptions, where compliance is incompatible with the special purpose. However, the data controller must reasonably believe that publication would be in the public interest, having particular regard to the public interest in freedom of expression.

2.6 Data Subject Rights, Part II s7 to s14

The rights of data subjects have been expanded. In addition to the right to be informed whether, and what data are being processed, the data subject is entitled to be given :

- the purposes for which the data are being processed (s7(1)(b)(ii))
- the recipients to whom the data may be disclosed (s7(1)(b)(iii)) and
- in some cases the source of the data (s7(1)(c)(ii))

A copy of the personal data of the data subject must be given to him or her in an intelligible form and, unless this would involve disproportionate

effort, in a permanent form (s8(2)(a)). Records managers should remember here that for manual records the Act applies only if information relating to a particular individual is readily accessible (see definition in 2.1 above). There are provisions relating to the situation that arises if the data controller cannot comply with the request without disclosing information relating to another individual. Records managers and archivists processing personal data for statistical or research purposes may be concerned by data subject access requests which involve providing the data subject with information relating to another individual from which this third party may be identified. Ideally the consent of the third party should be obtained but if this is not possible (and any argument before the Commissioner to that effect will be more convincing if consent has at least been sought) the third party data may be disclosed if it is reasonable in all the circumstances to do so (s7(4)(b)). Guidance will be available from the Commissioner on the factors to consider.

The Act also contains provisions enabling individuals to prevent processing likely to cause damage or distress; other rights include the right to seek compensation for damage caused as a result of contravention and the right to seek rectification of inaccurate data.

2.7 Research Purposes, s33

The term *research purposes* in the Act includes statistical or historical purposes. This is an important section for records managers and archivists as it clarifies the conditions with which the data controller of archived data should comply to be in a position to claim exemption from various requirements of the Act. There are also transitional exemptions from compliance with parts of the Act, some indefinite, which apply to processing for historical research purposes, see 4.3 below.

The second data protection principle requires that personal data shall only be obtained for one or more specified and lawful purposes and shall not be further processed in a manner which is incompatible with such purpose(s). The fifth data protection principle requires that personal data shall not be kept for longer than is necessary for such purpose(s). Section 33 provides that processing of personal data only for research purposes in compliance with the *relevant conditions* will be

deemed compatible with the purposes for which the data were collected. The *relevant conditions* are :

- that the data are not processed to support decisions about individuals being made on the basis of the processing and
- that substantial damage or substantial distress is not likely to be caused to any data subject by the processing of the data

Personal data may be selected for permanent preservation and stored, if these two conditions apply, with the proviso that the other data protection principles are complied with. The exemption from compliance with data protection principles two and five is not lost if the data are disclosed to third parties for research purposes, or to the data subject. If the results of any research or any resulting statistics become anonymised and the *relevant conditions* apply, the data become exempt from data subject access rights, provided the data are processed only for research purposes. Manual data are data falling within the scope of the Act, and hence subject to data subject access rights, only if the information relating to the particular individual is readily accessible. Of course in every case the Act only applies if the data subject is still alive.

The processing of personal data by an archive institution would not be in breach of data protection principle two where there was a statutory obligation on the body that collected the data to transfer it to the archive, or a definite expectation of the collecting body that it would maintain an archive, as the archival purpose would be compatible with the purpose of collection. The data could be kept as long as it was of archival interest without offending the fifth principle. However, further processing for a non-archival purpose such as making decisions about individuals would not be compatible with the archival purpose and would be in breach of the second data protection principle.

Allowing access to, and publication of, personal data in archives comes within the definition of processing within the Act. As such it must comply with the data protection principles. The data controller of the archived data would be in a position to make a judgement and impose such conditions on the processing of the data as they merited to bring the processing within the law.

3 The Principles

There are eight principles with which data controllers must comply. These are found in Part I of schedule 1 to the Act. Part II of that schedule provides detailed interpretation of some of the principles.

3.1 The First Data Protection Principle: Fair and Lawful Processing

This specifies that processing must be fair and lawful; this is expanded upon in paragraphs 1 to 4 of schedule 1 part II.

- The person from whom the data are obtained must not have been deceived or misled as to the purpose for which the data were obtained
- The data subject, if the data have been obtained from him, must be told the name of the data controller and the purpose of the processing, and any further information necessary to enable processing to be fair
- Where the data are not obtained from the data subject, he should be given this information unless this would involve disproportionate effort. An Order specifies the conditions which must be satisfied to rely on this ground and the Commissioner's guidance must also be considered

The first data protection principle further specifies that data shall not be processed unless one of the conditions in schedule 2 is met. If the data are sensitive at least one of the conditions from schedule 3 must also be met. Compliance with the conditions is necessary, but not always sufficient. The processing in question, e.g. disclosure, must be generally fair and lawful. To be lawful it must not give rise to a cause of action e.g. for breach of confidence or for libel and must not be in breach of any statutory prohibitions on disclosure. (This is in contrast with subject access which overrides statutory prohibitions on disclosure.) To be fair, processing may, in certain circumstances, require records managers to obtain the data subject's consent or, in the case of sensitive data, explicit consent.

Schedule 2 Conditions – any data

- **Public records.** All archivists and record managers dealing with public records will be exercising their statutory functions under the public records legislation and so they would benefit by paragraph 5(b) which relates to processing for the *exercise of functions [...] conferred by an enactment.*
- **Public sector records which are not public records.** Where the records are not public records, it is possible that processing by public sector bodies would be covered by paragraph 3(b) of schedule 2 which relates to processing of data in *compliance with any legal obligation* (other than a contract) or paragraph 3(c), processing for the *exercise of any functions of [...] a government department.*
- **Private sector records.** Some private sector bodies, such as charities or academic archives, might be able to rely on paragraph 5(d) which relates to processing for *functions of a public nature exercised in the public interest.* This would apply particularly where the archive is open to the public or a section of the public for research purposes. There is also, in paragraph 6(1), a basis for processing where *necessary for the purposes of the legitimate interests of 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.* This may be relied upon by public or private companies with legitimate business interests and private family archives. There is a permissive power in sub paragraph (2) for the Secretary of State to specify circumstances in which this condition is, or is not, to be taken to be satisfied, but there is no requirement for any such order before the paragraph can be invoked.

Schedule 3 Conditions – sensitive data

- **Public records.** The conditions for lawful processing of sensitive data are more restrictive. Schedule 3 paragraph 7(1)(b) covers processing for the exercise of any functions conferred on any person by or under an enactment and may be sufficient to allow processing of public records.

- **Public sector records which are not public records.** Some non-statutory government functions are covered by 7(1)(c) relating to processing *for the exercise of any function of [...] a government department.*
- **Private sector records.** There appears not to be a provision within the schedule relating to processing of sensitive data by archivists not in the public sector. Non-profit making membership organisations that exist for political, philosophical, religious or trade-union purposes may, subject to safeguards, process sensitive data in connection with their members. This provision relates only to those who **are** members and does not appear to cover the processing of such information on discontinuance of membership, and would certainly not cover the archiving of lists of former members. However, paragraph 10 of schedule 3 allows the Secretary of State to specify, by Order, other circumstances in which sensitive data may be processed. A statutory instrument has been made specifying the following circumstances:

The processing –

- a) is in the substantial public interest;*
- b) is necessary for research purposes (which expression shall have the same meaning as in section 33 of the Act); and*
- c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and*
- d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.*

In relation to this condition, as for all the schedule 2 and 3 conditions, it should be emphasised again that this is a first hurdle; it is a necessary not sufficient condition for processing of all personal data by archives institutions to be fair and lawful.

3.2 The Second Data Protection Principle: Processing for a Specified and Lawful Purpose

This requires data to be obtained for one or more specified and lawful purposes, and not to be further processed in any manner incompatible with that purpose. It incorporates the previous second and third principles. We have noted above that where processing is only for

research purposes, further processing is not incompatible with the purpose for which the data were specified as having been obtained, if the relevant conditions are complied with s33.

3.3 The Third Data Protection Principle: Data not to be Excessive

This requires data to be adequate and not excessive for their purpose. The basic principle is also to be found in the 1984 Act but its meaning has now altered because of the changes to the definition of processing. Data should not have been collected or retained unless they were necessary for the purpose for which they were to be used. It is difficult to think of circumstances in which an archive could be considered to have excessive data for its purposes.

3.4 The Fourth Data Protection Principle: Accuracy of Data

This requires the data to be accurate and to be kept up to date. Clearly there is a potential issue here for records managers and archivists, since it is important to preserve a contemporary record and not necessarily an accurate one. If appropriate precautions are taken, this principle is not to be regarded as contravened (schedule 1 part II para 7). The precautions required are as follows:

- where data have been obtained from the data subject or from a third party and, if having regard to the purpose for which the data were obtained and have been further processed, the data controller has taken reasonable steps to ensure their accuracy (perhaps by being careful about what is transmitted to him/her or by cross checking it in some way), and
- if the data subject has told the data controller that the data are in his/her view inaccurate, a note is made and placed with the data

3.5 The Fifth Data Protection Principle: Data not to be kept longer than necessary

This principle is also subject to the s33 research exemption. Archivists may not therefore be in breach of this principle if they are processing for research purposes, in compliance with the *relevant conditions*.

3.6 The Sixth Data Protection Principle: Data Subject Rights

This principle is concerned with the rights of data subjects, which are found in Part II of the Act. These have been referred to in 2.6 above.

3.7 The Seventh Data Protection Principle: Security

Data must be protected against unauthorised or unlawful processing or loss, destruction or damage. The level of security must be appropriate to the nature of the data and the harm which could result from misuse. Where data are processed on behalf of a data controller by a data processor, further safeguards are imposed including the requirement for written contractual terms.

3.8 The Eighth Data Protection Principle: Transfer outside the European Economic Area.

Data may not be exported outside the European Economic Area unless to a country or area where the rights of data subjects can be adequately protected. The adequacy of the protection is considered in relation to a number of criteria including the nature of the data and the purpose for which the data are to be processed. A judgement will need to be made in each case. This restriction does not apply to *a transfer of part of the personal data on a public register where any conditions subject to which the register is open to inspection are complied with by any person to whom the data are disclosed after transfer* (schedule 4 para 7). The countries which make up the EEA are those within the European Union, together with Norway, Iceland and Liechtenstein.

4 Transitional Provisions

Transitional relief is dealt with in schedule 8. The transitional reliefs from immediate compliance with certain provisions of the Act apply to data which were subject to processing which was *already under way* immediately before 24 October 1998. This is called *eligible data*. The term *already under way* is of crucial importance as processing of data in relation to which processing was not *already under way* before 24 October 1998 must comply with the new Act immediately upon its coming into force. There are two timed periods of relief: that ending on

23 October 2001, and that thereafter to 23 October 2007. Different provisions apply to different types of data in these different periods. These are summarised below.

4.1 Exemptions to October 2001

4.1.1 Manual Data

With the exception of

- accessible records, (ie those which were previously subject to data subject access under other legislation, relating to health, education, social work and housing) and
- the records of credit reference agencies,

eligible manual data are exempt from all the data protection principles and Part II (data subject rights) and Part III (notification requirements), so actually the Act has no substantive effect. The records of credit reference agencies and accessible records are subject to some provisions of the Act. These can be found in paragraphs 3 and 4 of Schedule 8.

4.1.2 Automated Data

Payroll and accounts, mailing lists and membership lists, where the data subject has recorded no objection, enjoy the same exemptions as do manual data. Eligible automated data are only to be regarded as being processed if they are processed by reference to the data subject.

Schedule 8 para 13 gives the complex list of those provisions in the Act from which eligible automated data are exempt; basically these are the features that are requirements of the new Act, but were not of the old. The data are exempt from the first data protection principle to the extent to which it requires compliance with schedules 2 and 3, thus the requirements to satisfy grounds for the processing of eligible sensitive data do not apply.

4.2 Exemptions to October 2007

4.2.1 Non-historical Processing

Paragraph 14 makes a distinction between eligible manual data held immediately before 24 October 1998, and other eligible manual data. Eligible manual data held immediately before 24 October 1998 and

accessible records are exempt, until 2007, from the first data protection principle with the exception of the duty to inform the data subject of the purpose of collection and the identity of the controller (schedule 1 part II paragraph 2). This duty is to be carried out *so far as is practicable* and may not be reasonably practicable for most archivists although each case will need to be considered on its own facts. Eligible manual data held immediately before 24 October 1998 and accessible records are also exempt from data protection principles 2, 3, 4 and 5.

This leaves the data, with effect from 24 October 2001, subject to compliance with

- paragraph 2 of Part II of schedule 1 which relates to giving the data subject certain information
- Data Protection Principle 6 which relates to the data subject rights
- Data Protection Principle 7 imposing standards of security
- Data Protection Principle 8 which provides limitations on the transfer of personal data outside the EEA
- Part II of the Act (Individuals' Rights) including a modified right of rectification
- Part III of the Act (Notification)

This set of provisions appears again in the Act, in 4.3.1 and 4.3.2 below and are cited as the 'limited provisions'. It is important to note that in relation to the first data protection principle the obligation to provide information to the data subject still subsists, it being a requirement of fair processing established under the 1984 Act.

4.3 Historical Processing : Permanent Exemption

If the exemptions set out below are to apply, historical processing must be only for historical research purposes in compliance with the *relevant conditions* as defined in section 33 (see 2.8 above).

4.3.1 Historical Manual Processing

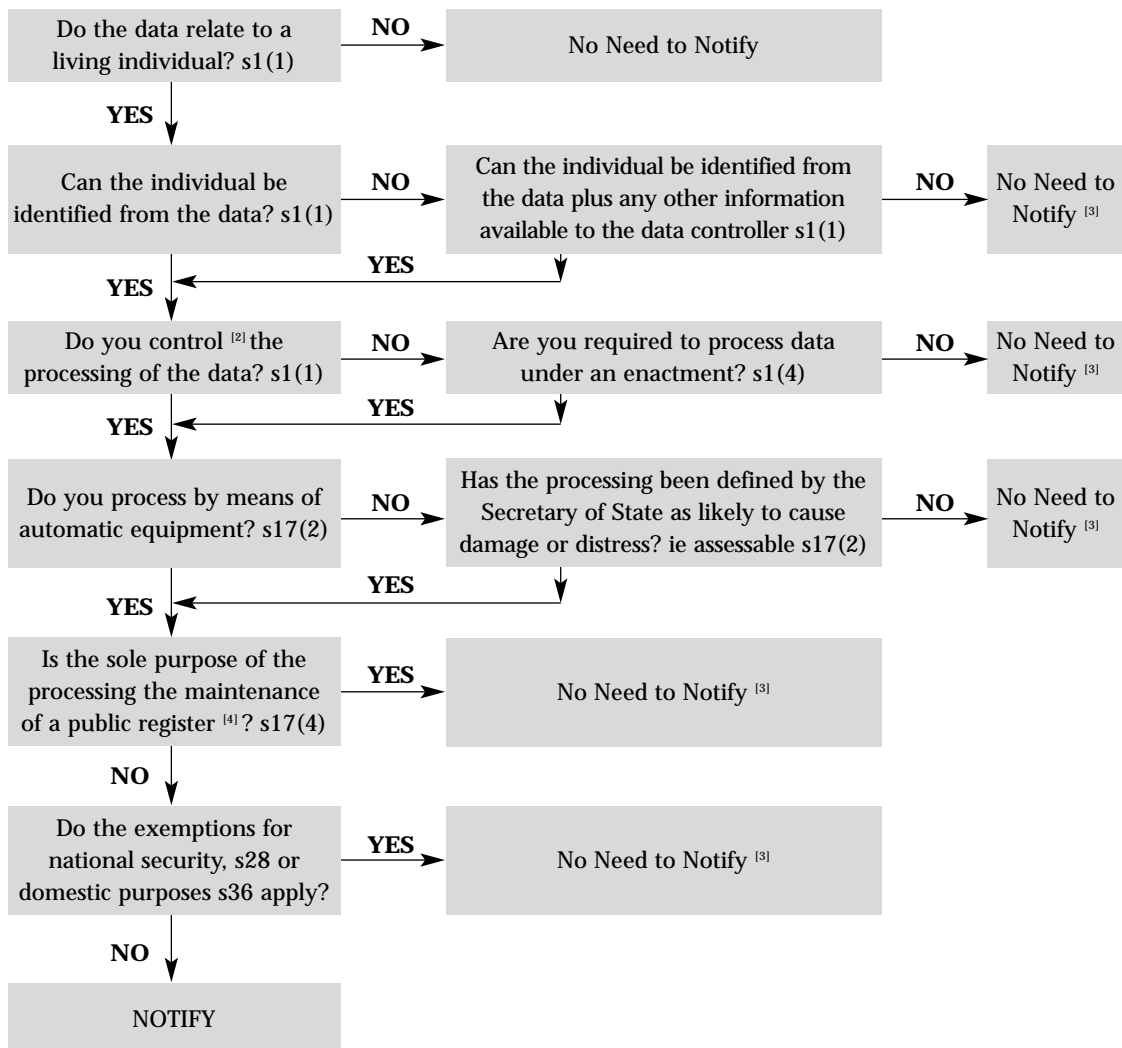
This is subject to the 'limited provisions' set out above in 4.2.1, except the modified right to rectification, which does not apply.

4.3.2 Historical Automated Processing

If the data are processed by reference to the data subject, the only exemption is from that part of the first data protection principle which requires compliance with the conditions in schedules 2 and 3. Whereas if the data are processed otherwise than by reference to the data subject they are subject to the 'limited provisions' set out in 4.2.1, other than the modified right to rectification.

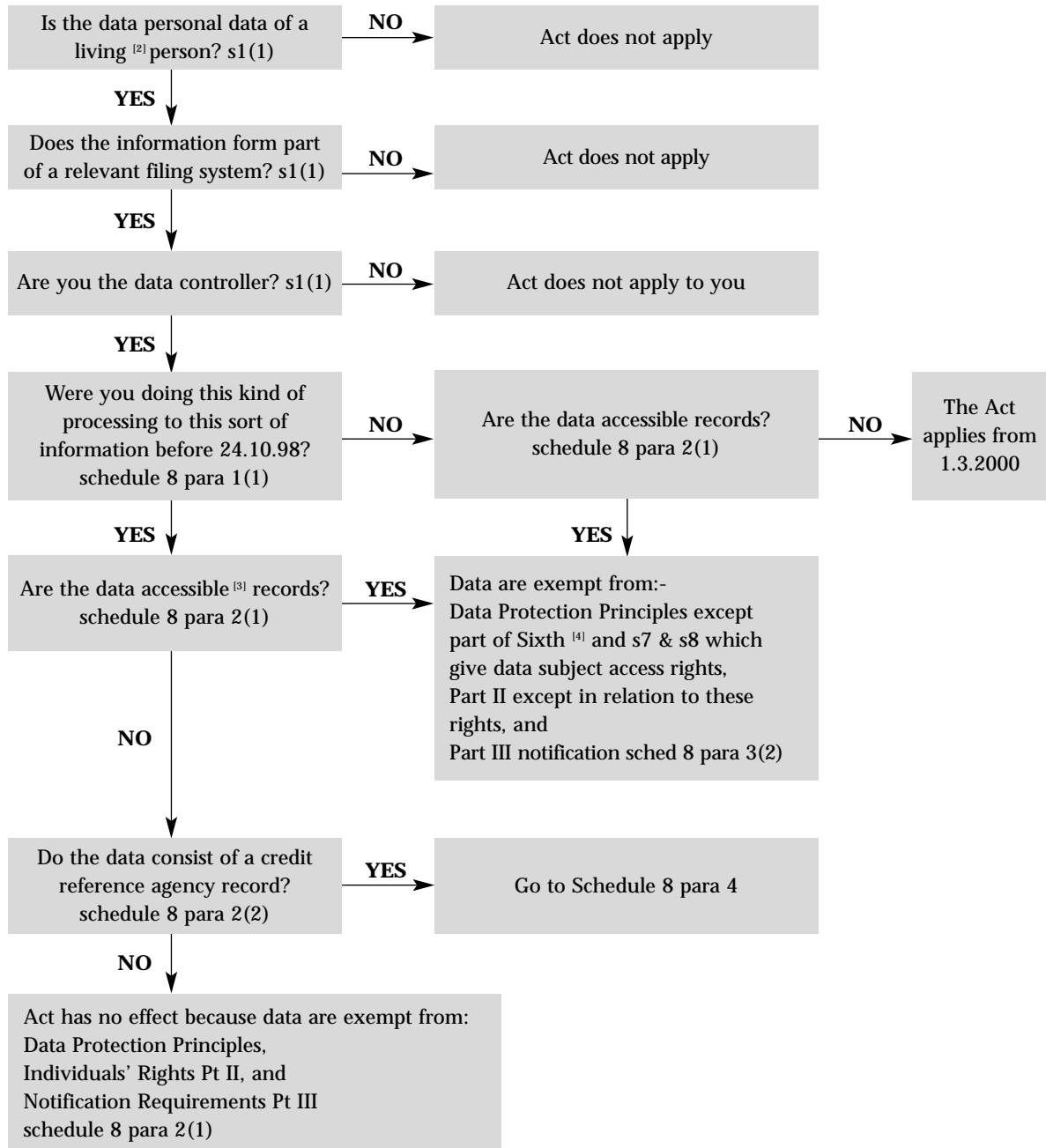
5 Decision Trees

5.1 Am I Required ^[1] to Notify under the 1998 Act? (but note that you may notify voluntarily, s18)



- 1 There are transitional exemptions from notification for eligible manual data in schedule 8, but s17(2) provides data controllers who only process such data (except where the processing is “assessable processing”) with an exemption from the prohibition against processing without notification.
- 2 You control processing if you determine, alone or jointly, the purposes for which, and the manner in which, the data are or are to be processed.
- 3 Notwithstanding the exemption from notification there remains an obligation to provide relevant particulars, if requested to do so under s24, unless notified.
- 4 Section 34 also exempts controllers from many provisions of the Act where they are obliged under an enactment to make data public.

5.2 Exemptions for Manual Data ^[1] to 23.10.01



1 Manual data are defined at (c) and (d) at paragraph 2.1 of the text.

2 Living, for discussion see 2.1.

3 Accessible record as defined at s68.

4 Those parts of the 6th Principle that apply are subject access and modified right of correction (s12A which can be found in schedule 13 of the Act).

6 Other PRO Publications and Further Information

- 6.1** The Public Record Office is currently working on a series of records management standards which aim to promote good practice in the management of public records throughout all stages of their life cycle. Four standards have been published so far:
- RMS 1.1 File Creation
 - RMS 2.1 Tracking Records
 - RMS 3.1 Storage of Semi-Current Records
 - RMS 5.1 Disposal Scheduling
- Other standards are planned for succeeding years, covering subjects such as documentation of records work and business recovery plans.
- 6.2** A second series of booklets currently in production gives guidance on the retention of records common to most Government departments. Buildings records, personnel records, accounting records, and health and safety records have been covered so far and more are planned for 2000.
- 6.3** Guidance on acquisition and appraisal are the subjects of a third series of publications. The first two booklets in this series cover *Planning of Records Appraisal* and the *PRO Acquisition Policy*.
- 6.4** In the area of electronic records a major publication, *The Management, Appraisal and Preservation of Electronic Records*, was issued in March 1999. This is in two volumes covering principles and procedures. More booklets will follow in this series.
- 6.5** A fifth series, covering Information Policy (of which this is one), is planned for 2000.

6.6 Further information on these and other aspects of the management of public records can be obtained from:

Records Management Department
Public Record Office

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Richmond

Surrey

TW9 4DU

tel: 020 8876 3444

fax: 020 8392 5283

e-mail: records-management@pro.gov.uk

The Public Record Office is responsible for guiding, supervising and co-ordinating the selection, safekeeping and transfer of public records created by Government departments and agencies.

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