



Statutory Document No. 19/03

## THE DATA PROTECTION ACT 2002

### THE DATA PROTECTION (SUBJECT ACCESS MODIFICATION) (HEALTH) ORDER 2003

*Approved by Tynwald*

18<sup>th</sup> February 2003

*Coming into operation*

1st April 2003

In exercise of the powers conferred on the Council of Ministers by section 26(1) of the Data Protection Act 2002<sup>1</sup>, and of all other enabling powers, and after consultation with the Isle of Man Data Protection Supervisor, the following Order is hereby made:—

#### **1. Citation, commencement and interpretation**

(1) This Order may be cited as the Data Protection (Subject Access Modification) (Health) Order 2003 and, subject to section 61(1) of the Act, shall come into operation on the 1st April 2003.

(2) In this Order —

"the Act" means the Data Protection Act 2002.

"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 Department of Health and Social Security and data to which this Order applies are processed in connection with the exercise of the functions conferred on him by or under its functions in relation to social security,

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<sup>1</sup> 2002 c.2

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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;

"request" means a request made under section 5;

"section 5" means section 5 of the Act.

## **2. Personal data to which Order applies**

(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 5 by an order made under section 35(1) of the Act.

## **3. Exemption from the subject information provisions**

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

(2) The personal data referred to in paragraph (1) are personal data processed by a court and consisting of information supplied in a report or other evidence given to the court in the course of proceedings to which the Summary Jurisdiction Rules 2002<sup>2</sup> apply where, in accordance with a provision of any of those Rules, the information may be withheld by the court in whole or in part from the data subject.

## **4. Exemptions from section 5**

(1) Personal data to which this Order applies are exempt from section 5 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 6(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 statutory provision 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 5 in any case to the extent to which the application of that section would disclose information —

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<sup>2</sup> SD 733/02

- (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 minor, and that person has parental responsibility for the 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.

#### **5. Modification of section 5 relating to data controllers who are not health professionals**

(1) Subject to paragraph (2) and article 7(3), section 5 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 4(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.

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

(1) Subject to paragraph (2), article 4(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 4(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 6 months before the relevant day (as defined by section 5(12) of the Act) and ending on that 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 5(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 4(1) does not apply with respect to all of the information which is the subject of the request.

**7. Further modifications of section 5**

(1) In relation to personal data to which this Order applies section 5 is modified as follows.

(2) In subsection (4), after paragraph (b) insert "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".

(3) After subsection (9) insert —

"(9A) If the High Court is satisfied, on the application of any person to whose physical or mental health or condition serious harm would be likely to be caused by compliance with a request under this section, that the data controller in question is about to comply with the request in contravention of that section or the provisions of the Data Protection (Subject Access Modification) (Health) Order 2003, the court may order him not to comply with the request."

MADE 30th January 2003

*Mary Williams*

Chief Secretary

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**EXPLANATORY NOTE**

*(This note is not part of the Order.)*

This Order makes special provision under the Data Protection Act 2002 for health records specified in article 2.

Where, under rules of court, information comprised in such records and included in a report to the court in certain proceedings relating to children may be withheld by the court, it is exempted from the provisions of the Act which confer rights on data subjects to gain access to data held about them (article 3). Such records are also exempted from those rights where their exercise would be likely to cause serious harm to the physical or mental health or condition of the data subject or another person (article 4). Before deciding whether this exemption applies, a data controller who is not a health professional is obliged by articles 4(2) and 5(1) to consult a specified health professional, except in certain cases (articles 5(1) and 6(1))

and (2)). A further exemption 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 4(3)).

The Order also modifies section 5 of the Act so that a data controller cannot refuse access on the grounds that the identity of a third party would be disclosed, unless serious harm to the third party's physical or mental health or condition is likely to be caused such that the exemption in article 4(1) applies (article 7).

