

Law Enforcement Requests made under Section 41(b) of the Data Protection Act 2018

Disclaimer: This document is not, and does not purport to constitute, legal advice.

1. Purpose

The purpose of this document is to assist staff of Dublin City University in the event that they receive a request from a Law Enforcement Entity for personal data which the University holds.

A Law Enforcement Entity may include An Garda Síochána, Revenue and Customs, Military Police. The requested personal data may relate to any individual, such as DCU students, DCU staff, visitors to DCU, members of the public.

It is crucial to remember that, simply because a member of a law enforcement entity makes a request to DCU, this does not mean that they are entitled to the requested information.
(See below, however, section 2.3 in relation to court orders and section 3.5 in relation to children.)

2. Context

2.1 Legal Framework

The General Data Protection Regulation (GDPR)¹ restricts how personal data may be processed by a Data Controller. In particular, personal data may not be used for a purpose incompatible with the purpose for which the data was initially collected.

This obligation is qualified by Section 41(b) of the Data Protection Act 2018². This provides that a Data Controller operating in Ireland may decide to disclose personal data to certain third parties, to the extent that this is “necessary and proportionate for the purposes of preventing, detecting, investigating or prosecuting criminal offences.”

2.2 Legal Basis for Requests

When a Data Controller receives a law enforcement request, that Data Controller must comply with GDPR; meanwhile, the Law Enforcement Entity which made the request must for their part comply with relevant EU legislation (the Law Enforcement Directive).³

In practice, this means that simply because a member of a Law Enforcement Entity, such as An Garda Síochána, asks DCU for some identifiable information about an individual **does not mean that they are entitled to it.**

Where a request is made by a Law Enforcement Entity for personal data held by the University, there is no obligation to provide the requested personal data. The Data Protection Act 2018 does not place any obligation on the University to disclose personal data to An Garda Síochána or other law enforcement entities. The Act merely allows for the disclosure to be made, in accordance with the provisions of Section 41(b).

Indeed, under GDPR and the Data Protection Act 2018, DCU may be under an obligation **not** to disclose the personal data. Conversely, if in response to a request from a Law Enforcement Entity, the personal data is released in full or in part, DCU then assumes full legal responsibility as Data Controller for the release, and towards any affected Data Subjects.⁴

2.3 Important Note: Court Orders

This document does not apply in respect of valid Court Orders. Where a valid Court Order exists and is provided to an appropriate member of DCU staff then, once **an executed⁵ copy of that valid Court Order has been provided to the University, DCU is always obliged to provide the information specified in that Court Order.** (See also section 3.3, below.)

3. Requests from Law Enforcement Entities: Standard Operating Procedure

3.1 Format of Requests

If any such requests are received, they must:

- Be made in writing to DCU; and
- Cite the relevant statutory provision (e.g. Section 41(b) of the Data Protection Act 2018).

Requests from a Law Enforcement Entity made verbally, whether in person or by phone, should not be facilitated. If a verbal request is received, the requester shall be informed by DCU staff that the request must be made in writing to the appropriate member of University staff. This may be by email or by post.

The “appropriate member of University staff” shall be the Head of School or Head of Unit, as applicable, and shall be in the relevant School or Unit which holds the requested personal data.

3.3 Deciding whether or not to release the personal data⁶

Having received a valid request in writing from law enforcement, such as from An Garda Síochána, the University or staff member might feel under pressure to comply with the request. It is important to resist any such feelings of pressure, and instead make practical considerations, including:

- Is the request valid?
- Are there legal grounds for disclosing the personal data?
- Will the disclosure involve transferring personal data outside of the EEA?
- Is disclosing the personal data necessary and proportionate for the requester's purposes?⁷

Again, there is no obligation to comply with a request for disclosure of personal data under Section 41(b) of the Data Protection Act 2018.

- **If you are in any doubt, please contact the Data Protection Unit: data.protection@dcu.ie**

If the University does choose to comply with the request in full or in part under Section 41(b), it bears the risk as Data Controller. Thus, the decision maker must be satisfied that disclosing the personal data is **necessary and proportionate** for the purpose of **preventing, detecting, investigating or prosecuting criminal offences** (see also section 3.4, below).

Consequently, this places a burden on the University as Data Controller to justify the processing (i.e. the release of the personal data to the law enforcement entity), and to keep appropriate records to demonstrate GDPR compliance. The University will also have other GDPR obligations, including: Transparency to data subjects; Data Minimisation; facilitating Data Subject Rights; and ensuring appropriate data Security.

The following quote is instructive:

If information concerning individuals or video footage is important for a criminal investigation, the Gardaí can and often will get a District Court order or even a search warrant. And if this is served on you, there will be a legal obligation to provide the specific information, and you will have protection as a result. Depending on the circumstances, this may be preferable to complying voluntarily with a request for disclosure under Section 41(b), and taking on the risk and potential liability of getting it wrong.

And if you choose not to comply with a request for disclosure under Section 41(b) of the Data Protection Act 2018, which you are entitled to do in the absence of any other legal obligation or mandatory reporting requirement. Bear in mind that the communication received may likely contain sensitive or confidential information that should not be retained unless there is a specific reason to do so.⁸

3.4 Necessity and Proportionality

The Data Protection Act 2018 expressly states that that the processing of personal data in this way (i.e. collating the personal data and disclosing it to the law enforcement entity) must be "necessary and proportionate," and must be for specified purpose(s) as set out under Section 41(b) (i.e. a new purpose for processing).

It will be for the decision-maker to assess and determine what is necessary and what is proportionate in the circumstances, and this will relate to the purpose(s) for the request. Therefore, it is also recommended that the decision-maker engage with the requester to ascertain the reason(s) for their request.⁹

When assessing necessity and proportionality:

Section 41 of the [Data Protection Act 2018] is of central importance to Irish organisations who receive a law enforcement request. To rely on section 41 of the Act, the recipient [i.e. DCU] must be satisfied that disclosure of the requested personal data – which would involve processing for a purpose other than the purpose for which that data was collected – is necessary and proportionate for the purposes of: (i) preventing a threat to national security, defence or public security; (ii) preventing, detecting, investigating or prosecuting criminal offences; or (iii) the purposes set out in section 47 of the Act (which deals with legal advice and legal proceedings).

In this regard, the recipient should consider if the disclosure would align with the reasonable expectations of data subjects (based on indications made in the [University's] Privacy Policy or otherwise), whether the data that is requested seems excessive or disproportionate, and whether the data that is requested seems objectively necessary for the requester's stated purposes.¹⁰

In compliance with the mandatory principle of Accountability under GDPR, the decision-maker must ensure that a detailed record of actions taken on foot of any such request is made, including the assessment of necessity and proportionality, prior to reaching a final decision on whether or not to release the requested personal data.

Once the assessment of necessity and proportionality is complete, it remains for the decision-maker to determine whether the information should be released to the Law Enforcement Entity.

3.5 Important Note: Children and Vulnerable Persons

Please note that additional legal obligations apply in respect of children, such as safeguarding, child protection, and the following:

You should also always bear in mind that the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 makes it an offence to withhold information from Gardaí in relation to specified offences against a child or vulnerable person.¹¹

Therefore, the approach outlined in the preceding sections may need to be modified to ensure compliance with such statutory obligations.

End.

Appendix: Key Elements from the Legislative Framework

GDPR

[Article 23](#) of the General Data Protection Regulation states:

Restrictions

1. *Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:*

- (a) national security;*
- (b) defence;*
- (c) public security;*
- (d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;*
- (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security;*
- (f) the protection of judicial independence and judicial proceedings;*
- (g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;*
- (h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);*
- (i) the protection of the data subject or the rights and freedoms of others;*
- (j) the enforcement of civil law claims.*

2. *In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:*

- (a) the purposes of the processing or categories of processing;*
- (b) the categories of personal data;*
- (c) the scope of the restrictions introduced;*
- (d) the safeguards to prevent abuse or unlawful access or transfer;*
- (e) the specification of the controller or categories of controllers;*

(f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;

(g) the risks to the rights and freedoms of data subjects; and

(h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

Data Protection Act 2018

[Section 41\(b\)](#) of the Data Protection Act 2018 states:

Processing for purpose other than purpose for which data collected


41. Without prejudice to the processing of personal data for a purpose other than the purpose for which the data has been collected which is lawful under the Data Protection Regulation, the processing of personal data and special categories of personal data for a purpose other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for the purposes—

[...]

(b) of preventing, detecting, investigating or prosecuting criminal offences

[...].

Document Version Control

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Endnotes

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02016R0679-20160504&from=EN> (Accessed 16 September 2022).

² Data Protection Act 2018, Section 41(b): “Without prejudice to the processing of personal data for a purpose other than the purpose for which the data has been collected which is lawful under the Data Protection Regulation, the processing of personal data and special categories of personal data for a purpose other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for the purposes [...] of preventing, detecting, investigating or prosecuting criminal offences [...].” Available online:

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⁴ Logue, F. 2019. Garda Requests under Section 41(b) of the Data Protection Act 2018. FP Logue Solicitors, 4 October 2019. Available online: <https://www.fplogue.com/garda-requests-for-disclosure-of-personal-data/> (Accessed 11 November 2021).

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⁶ Logue, F. 2019. *Op. cit.*

⁷ Corbet, R. and Stafford, C. 2020. *Op. cit.*

⁸ Logue, F. 2019. *Op. cit.*

⁹ Medisec. 2020. Garda Request for Medical Records. Medisec Factsheet, May 2020. Available online:

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¹⁰ Corbet and Stafford. 2020. *Op. cit.*

¹¹ Medisec. 2020. *Op. cit.*