

**PART 9 ENTERPRISE ACT 2002**

A Guidance Note on  
Information Disclosure to  
consumers and Intellectual  
Property Rights Holders for  
civil proceedings

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## **PART 9 ENTERPRISE ACT 2002 – INFORMATION DISCLOSURE**

### **A Guidance Note on Information Disclosure to Consumers and Intellectual Property Rights Holders for civil proceedings**

#### **Introduction**

This document is a guide to the changes to Part 9 of the Enterprise Act 2002 (EA02)<sup>1</sup> to allow information to be disclosed for the purposes of civil proceedings. It is in two sections, the first section relates to disclosure under Part 9 generally and the second is specific to the new provisions.

It should be read in the context of Part 9 EA02 and in conjunction with section 241A<sup>2</sup> EA02 and SI 2007 No.2193<sup>3</sup> which sets out the legal definition of what information can be disclosed and for what purposes under this gateway. This document is designed to help officials, public authorities, consumers, business and intellectual property (IP) rights holders.

This is not statutory guidance or legal advice. You may consider it necessary to seek further advice from your legal representatives. It is for the Courts to interpret legislation and disclosure decisions should be made by public authorities on a case by case basis.

#### **Background**

Since Part 9 came into force in June 2003 public authorities such as Trading Standards Service have, in many cases, been unable to disclose information to consumers and IP rights holders for civil proceedings.

The Trading Standards Service highlighted the problem of being unable to release information to consumers who wished to pursue civil cases. In addition, IP rights holders were concerned they were unable to obtain information from public authorities that would help them take action against counterfeiters in civil courts.

On 6 April 2007 the new section 241A Enterprise Act 2002 which allows disclosure of information for civil proceedings, came into force. The order which set out what kinds of information can be disclosed and the purposes for which disclosure can be made came into force on 1 October 2007 (SI No. 2193).

From 1 October 2007 public authorities are able to disclose specified information prescribed by the order for certain purposes. This document guides you through the new provisions on disclosure for civil proceedings. It is

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<sup>1</sup> You can view the Enterprise Act 2002 at <http://www.opsi.gov.uk/acts/acts2002/20020040.htm>

<sup>2</sup> Section 241A was inserted by section 1281 of the Companies Act 2006. You can view the new section 241A at <http://www.opsi.gov.uk/acts/acts2006/20060046.htm>

<sup>3</sup> You can view the statutory instrument [http://www.opsi.gov.uk/si/si2007/uksi\\_20072193\\_en.pdf](http://www.opsi.gov.uk/si/si2007/uksi_20072193_en.pdf)

intended for use by public authorities holding specified information and consumers and IP rights holders.

It is important to stress that this guidance is also to help public authorities decide which information they must protect and not disclose.

## **SECTION 1**

### **General Disclosure Provisions**

#### **1. What is specified information?**

The whole of Part 9 deals with the protection and disclosure of specified information. Information is specified if it comes to a public authority<sup>4</sup> in relation to any function it has under or by virtue of;

- i. Part 1, 3, 4, 6, 7 or 8 the Enterprise Act 2002,
- ii. An Act listed in Schedule 14 (Annex A to this note)
- iii. Any secondary legislation specified by the Secretary of State (Annex B to this note)

Part 9 only applies to information gathered by a public authority under enactments or legislation listed above. The lists of legislation Annex A and B are up to date at 30 August 2007.

Information gathered under other legislation may be subject to Freedom of Information<sup>5</sup> and Data Protection Act 1998<sup>6</sup> (DPA98) provisions, which are not covered by this guidance note. DPA98 may also apply to Part 9 specified information.

**If the information is about someone who has died or a business that no longer exists: information can be disclosed. However, it may be subject to FOI and DPA98 provisions.**

#### **2. Why can't specified information be given to anyone who asks for it?**

There is a general restriction on the disclosure of specified information under Part 9. If the information is about a living person or a business that still exists it may not be disclosed without their consent unless there is a relevant gateway.

#### **3. Under what circumstances can specified information be disclosed under Part 9?**

##### **3.1 Disclosure to third parties**

Public authorities can disclose specified information about a person or business with their consent. However, public authorities are under no obligation to seek consent for disclosure when they are asked for information.

- Public authorities holding specified information may disclose it to fulfil any function they have under any Act.

Public authorities may disclose specified information:

<sup>4</sup> Public authority is construed in accordance with section 6 of the Human Rights Act 1998.

<sup>5</sup> Guidance on FOI is available at <http://www.foi.gov.uk/guidance/index.htm>

<sup>6</sup> Guidance on DPA 1998 is available at <http://www.ico.gov.uk/>

- to help anyone exercise a function they have under the Enterprise Act 2002 or the legislation listed in Annex C (EA02 Schedule 15 and subordinate legislation).
- in connection with the investigation of any criminal offence or criminal proceedings or to help decide whether to start or end criminal investigations or proceedings. In the case of criminal proceedings the public authority must be satisfied that the disclosure is proportionate to what is to be achieved by that disclosure.

However, if the information has already been legitimately disclosed to the public (in circumstances that do not breach Part 9 or DPA98 disclosure rules) and its disclosure does not break any other law governing disclosure, it can be disclosed. For example if information has already been legitimately published it can be disclosed freely.

Nothing in Part 9 allows disclosure of information which contravenes the Data Protection Act 1998, but there are exceptions in the DPA98 that may allow disclosure.

Part 9 does not prevent disclosure where public authorities have a power or duty to do so otherwise than under Part 9. However Part 9 specified information cannot be disclosed in response to requests for disclosure under the Freedom of Information Act 2000. Section 44 of that Act exempts information from the right of access where its disclosure is prohibited by or under another enactment (for example, Part 9 of the Enterprise Act 2002).<sup>7</sup>

Nothing in Part 9 stops disclosure to another person if it is required by a Community (European Union) obligation.

### 3.2 Disclosure to an overseas public authority

Public authorities can disclose specified information (with some exceptions) to an overseas public authority:

- for the investigation of any criminal offence or criminal proceedings, or to help decide whether to start or end criminal investigations or proceedings.
- for carrying out investigations and bringing civil proceedings to enforce certain specified legislation or equivalent legislation in the other country.

Part 8 EA02 designated enforcers (Annex D) cannot disclose specified information to an overseas public authority.

For details of the rules on disclosing specified information to an overseas public authority see s.243 EA02.<sup>8</sup>

<sup>7</sup> See Mr M J Dey v Information Commissioner and Office of Fair Trading  
[http://www.informationtribunal.gov.uk/Documents/decisions/mj\\_dey\\_v\\_infocomm\\_officefair\\_trading%20\\_16apr07.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/mj_dey_v_infocomm_officefair_trading%20_16apr07.pdf)

<sup>8</sup> [http://www.opsi.gov.uk/acts/acts2002/ukpga\\_20020040\\_en\\_21#pt9-pb2-l1g243](http://www.opsi.gov.uk/acts/acts2002/ukpga_20020040_en_21#pt9-pb2-l1g243)

#### **4. What happens if information is wrongfully disclosed?**

A person who wrongly discloses specified information commits an offence.

A person who uses specified information for a purpose not permitted by Part 9 commits an offence.

**Requests for information should be considered on a case by case basis. When considering whether to disclose information a public authority must have regard to s.244 of the Enterprise Act (Specified information: consideration relevant to disclosure).**

#### **5. What are the penalties for these offences?**

On summary conviction an offender can be sent to prison for up to three months and/or fined of up to £5,000.

On indictment an offender can go to prison for up to two years and/or be ordered to pay an unlimited fine.

## **SECTION 2**

**This section only relates to the new provisions under s.241A which allow information to be disclosed by public authorities for the purposes of civil proceedings.**

Section 241A EA02 enables public authorities in certain circumstances to disclose information where the information is to be used for civil proceedings or otherwise for the purposes of establishing, enforcing or defending legal rights. This will include prospective proceedings, taking legal advice in respect of proceedings and alternative ways of establishing, enforcing or defending legal rights such as Alternative Dispute Resolution schemes.

Information can be disclosed to consumers and IP rights holders and their authorised representatives seeking redress.

**Although the new disclosure gateway is discretionary, a public authority must exercise the discretion in good faith and for the purposes of the legislation, which is to help consumers and IP rights holders to obtain their legal rights. The Act and the Order lay down detailed criteria for making disclosure (in particular in section 244). Where the criteria are satisfied a public authority would be expected to disclose unless there was a legally proper reason to justify non-disclosure. Although the authority will need to satisfy itself that the grounds for the request are genuine it is not required to make a judgement about the likelihood of success for the consumer or IP rights holder.**

### **6. For what purposes can information be disclosed?**

A civil proceeding is any proceeding relating to or arising out of a legal right or obligation of a consumer. For example a consumer may wish to seek redress for a product that has injured them or find the location of a trader to serve court papers.

A civil proceeding is also any proceeding relating to or arising out of the infringement of an intellectual property right or relating to or arising out of passing off or the misuse of a trade secret. That includes any infringement of patent, copyright, and analogous or related right, database right, registered or unregistered design right, registered trade mark, topography right, supplementary protection certificate, plant variety right, protected designation of origin or a protected geographical indication. An IP rights holder may wish to obtain information to pursue civil action against a counterfeiter.

## 7. How do you define consumer?

A consumer is defined in the order as an individual who is acting outside his trade, business or profession, or is acting with a view to carrying on a business which has not yet begun trading.

## 8. Can all specified information be given to consumers and intellectual property rights holders for civil proceedings?

No. Competition information is excluded by the Act from disclosure as follows:

- Information that comes to a public authority in connection with an investigation under Part 4, 5 or 6 of the Fair Trading Act 1973 or section 11 of the Competition Act 1980.
- Competition information within the meaning of section 351 of the Financial Services and Markets Act 2000.
- Information that comes to a public authority in connection with an investigation under Part 3 or 4 or section 174 of the Enterprise Act 2002.
- Information that comes to a public authority in connection with an investigation under the Competition Act 1998.

**It is immaterial when the information came into the possession of the public authority.**

The statutory instrument excludes from possible disclosure information which comes to the OFT under the Enterprise Act 2002 section 5(1) (acquisition of information) in connection with their work under sections: 6 (provision of information to the public), 7 (provision of information and advice to Ministers), 8 (promoting good consumer practice), 11 (super complaints), 92 (duty of OFT to monitor orders and undertakings relating to market investigations), 162 (duty to monitor certain orders and undertakings) and Part 6 (cartel offence) and paragraphs 14 to 18 (monopoly references, enforcement undertakings and orders) of Schedule 24.

Market studies were introduced as a means of identifying and addressing all aspects of market failure. As well as looking at particular economic markets the studies may also relate to practices across a range of goods and services. These studies usually require a high level of co-operation from interested parties and the provision of considerable amounts of information. Information is received by the OFT under section 5(1).

This information is excluded from disclosure because we do not want the civil gateway to act as a disincentive to business to volunteer information to OFT on the basis that it may be disclosed. Without some reassurance that this information will be properly protected, the OFT might lose continued co-operation with its studies which would

significantly affect its ability to fulfil their functions. However, information that OFT hold by virtue of their enforcement powers under consumer protection legislation is not excluded.

The statutory instrument also excludes information;

- that comes to any regulator in connection with the exercise of its functions under section 11 (super-complaints to OFT) as applied by section 205 super-complaints to regulators other than OFT.
- which comes to Her Majesty's Revenue and Customs in connection with the exercise of their functions under the Customs & Excise Management Act 1979 and the Value Added Tax Act 1994.

### **9. What else do public authorities have to consider before disclosure?**

Requests for information to pursue civil redress should be considered on a case by case basis.

When considering whether to disclose information a public authority must have regard to s.244 of the Enterprise Act (Specified information: consideration relevant to disclosure).

- Public authorities must not disclose, as far as practicable, specified information, if it will be contrary to the public interest to do so.
- Public authorities must not, as far as practicable, disclose commercial information they think might significantly harm the legitimate interests of the business concerned.
- Public authorities must not, as far as practicable, disclose information about the private affairs of an individual if they think it might significantly harm the individual's interests.
- The public authority must consider the extent to which disclosure of information covered by the previous two points is necessary for the purpose the authority is allowed to make the disclosure.

A public authority will need to satisfy itself that the request for information to pursue civil redress is a genuine one and that the information is relevant to the case.

**Public authorities may want to consider advising information recipients when disclosing that;**

- **Part 9 specified information must not be used for any purpose other than that for which it was originally disclosed.**

- A person commits an offence if they wrongfully use specified information disclosed in a way not permitted by Part 9.

**SCHEDULE 14**  
**Specified Functions**  
(as at 30 August 2007)

Sections 238 and 243

Parts 1, 2, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973 (c 41).

Trade Descriptions Act 1968 (c 29).

Hallmarking Act 1973 (c 43).

Prices Act 1974 (c 24).

Consumer Credit Act 1974 (c 39).

Customs and Excise Management Act 1979 (c 12).

Estate Agents Act 1979 (c 38).

Competition Act 1980 (c 21).

Video Recordings Act 1984 (c 39).

Consumer Protection Act 1987 (c 43).

Consumer Protection (Northern Ireland) Order 1987 (SI 1987/2049 (NI 20)).

Copyright, Designs and Patents Act 1988 (c 48).

Property Misdescriptions Act 1991 (c 29).

Timeshare Act 1992 (c 35).

Clean Air Act 1993 (c 11).

Value Added Tax Act 1994 (c 23).

Trade Marks Act 1994 (c 26).]

Competition Act 1998 (c 41).

Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and

Markets Act 2000 (c 8).

An order made under section 95 of that Act.

Fireworks Act 2003.

Consumers, Estate Agents and Redress Act 2007

**Specified Subordinate Legislation**  
(as at 30 August 2007)

Section 238(1)(c)

Crystal Glass (Descriptions) Regulations 1973.

Textile Products (Indications of Fibre Content) Regulations 1986.

Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987.

Control of Misleading Advertisements Regulations 1988.

Paragraph 3 of Schedule 5 to the Simple Pressure Vessels (Safety) Regulations 1991.

Package Travel, Package Holidays and Package Tours Regulations 1992.

General Product Safety Regulations 2005.

Footwear (Indication of Composition) Labelling Regulations 1995.

Household Appliances (Noise Emission) Regulations 1990.

Electromagnetic Compatibility Regulations 2006.

Supply of Machinery (Safety) Regulations 1992.

Recreational Craft Regulations 1996 in so far as not revoked by the Recreational Craft Regulations 2004.

Lifts Regulations 1997.

Non-Road Mobile Machinery (Emission of Gaseous and Particulate Pollutants) Regulations 1999.

Pressure Equipment Regulations 1999.

Radio Equipment and Telecommunications Terminal Equipment Regulations 2000.

Personal Protective Equipment Regulations 2002.

Packaging (Essential Requirements) Regulations 2003.

Recreational Craft Regulations 2004

The Restrictions of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2006

**SCHEDULE 15**

**Enactments Conferring Functions**  
(as at 30 August 2007)

Section 241

Gun Barrel Proof Act 1868 (cap 113).

Gun Barrel Proof Act 1950 (cap 3).

Trade Descriptions Act 1968

Unsolicited Goods and Services Act 1971 (c 30)

Fair Trading Act 1973.

Hallmarking Act 1973 (c 43).

Prices Act 1974.

the relevant statutory provisions within the meaning of Part 1 of the Health and Safety at Work etc Act 1974 (c 37).

Consumer Credit Act 1974.

Unsolicited Goods and Services (Northern Ireland) Order 1976 (SI 1976/57 (NI 1)).

Gun Barrel Proof Act 1978 (c 9).

the relevant statutory provisions within the meaning of the Health and Safety at Work (Northern Ireland) Order 1978 (SI 1978/1039 (NI 9)).

Estate Agents Act 1979.

Competition Act 1980.

Weights and Measures (Northern Ireland) Order 1981 (SI 1981/231 (NI 10)).

National Audit Act 1983 (c 44).

Telecommunications Act 1984 (c 12).

Video Recordings Act 1984 (c 39).

Companies Act 1985 (c 6).

Weights and Measures Act 1985 (c 72).

Airports Act 1986 (c 31).

Gas Act 1986 (c 44).

Insolvency Act 1986 (c 45).

Company Directors Disqualification Act 1986 (c 46).

Financial Services Act 1986 (c 60).

Companies (Northern Ireland) Order 1986 (SI 1986/1032 (NI 6)).

Consumer Protection Act 1987 (c 43).

Consumer Protection (Northern Ireland) Order 1987 (SI 1987/2049 (NI 20)).

Banking Act 1987 (c 22).

Education Reform Act 1988 (c 40).

Copyright, Designs and Patents Act 1988 (c 48).

The Education (Unrecognised Degrees) (Northern Ireland) Order 1988 (SI 1988/1989 (NI 22)).

Water Act 1989 (c 15).

Electricity Act 1989 (c 29).

Companies Act 1989 (c 40).

Companies (Northern Ireland) Order 1989 (SI 1989/2404 (NI 18)).

Insolvency (Northern Ireland) Order 1989 (SI 1989/2405 (NI 19)).

Companies (Northern Ireland) Order 1990 (SI 1990/593 (NI 5)).

Companies No 2 (Northern Ireland) Order 1990 (SI 1990/1504 (NI 10)).

Courts and Legal Services Act 1990 (c 41).

Broadcasting Act 1990 (c 42).

Property Misdescriptions Act 1991 (c 29).

Water Industry Act 1991 (c 56).

Water Resources Act 1991 (c 57).

Statutory Water Companies Act 1991 (c 58).

Land Drainage Act 1991 (c 59).

Water Consolidation (Consequential Provisions) Act 1991 (c 60).

Timeshare Act 1992 (c 35).

Electricity (Northern Ireland) Order 1992 (SI 1992/231 (NI 1)).

Clean Air Act 1993 (c 11).

Railways Act 1993 (c 43).

Coal Industry Act 1994 (c 21).

Trade Marks Act 1994 (c 26).

Part IV of the Airports (Northern Ireland) Order 1994 (SI 1994/426 (NI 1)).

Gas Act 1995 (c 45).

Broadcasting Act 1996 (c 55).

Gas (Northern Ireland) Order 1996 (SI 1996/275 (NI 2)).

Competition Act 1998 (c 41).

Financial Services and Markets Act 2000 (c 8).

Government Resources and Accounts Act 2000 (c 20).

Postal Services Act 2000 (c 26).

Utilities Act 2000 (c 27).

Transport Act 2000 (c 38).

Company Directors Disqualification (Northern Ireland) Order 2002 (SI 2002/3150 (NI 4)).

Communications Act 2003.

Fireworks Act 2003.

Water Act 2003 (c 37).

Railways Act 2005 (c 14).

Gambling Act 2005 (c 19).

Water and Sewerage Services (Northern Ireland) Order 2006.

Consumers, Estate Agents and Redress Act 2007.

the Companies Acts (as defined in section 2 of the Companies Act 2006).

**Subordinate legislation**  
(as at 30 August 2007)

Section 241(3)(c)

Household Appliances (Noise Emission) Regulations 1990

Electromagnetic Compatibility Regulations 2006

Supply of Machinery (Safety) Regulations 1992

Recreational Craft Regulations 1996 insofar as not revoked by the  
Recreational Craft Regulations 2004

Lift Regulations 1997

Non-Road Mobile Machinery (Emission of Gaseous and Particulate  
Pollutants) Regulations 1999

Pressure Equipment Regulations 1999

Radio Equipment and Telecommunications Terminal Equipment Regulations  
2000

Personal Protective Equipment Regulations 2002

Packaging (Essential Requirements) Regulations 2003

Recreational Craft Regulations 2004

The Restriction of the use of Certain Hazardous Substances in Electrical and  
Electronic Equipment Regulations 2006

Consumer Protection (Cancellation of Contracts Concluded away from  
Business Premises) Regulations 1987

Consumer Protection (Distance Selling) Regulations 2000

Control of Misleading Advertisements Regulations 1988

Crystal Glass (Descriptions) Regulations 1973

Footwear (Indication of Composition) Labelling Regulations 1995

Insolvency Rules (Northern Ireland) 1991

Insolvency Rules 1986

Licensing of Air Carriers Regulations 1992

Measuring Containers Bottles (EEC Requirements) Regulations 1977

Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations (Northern Ireland) 1997

Textile Products (Indications of Fibre Content) Regulations 1986

Paragraph 3 of Schedule 5 to the Simple Pressure Vessels (Safety) Regulations 1991

Package Travel, Package Holidays and Package Tours Regulations 1992

Railway Regulations 1998

Unfair Terms in Consumer Contracts Regulations 1999

Open-Ended Investment Companies Regulations 2001

Transport (Scotland) Act 2001 (Conditions attached to PSV Operators's Licence and Competition Test for Exercise of Bus Functions) Order 2001

General Product Safety Regulations 2005

Part 2 and 3 of the Railways and other Guided Transport Systems (Safety) Regulations 2006

**Part 8 Designated Enforcers**  
(as at 30 August 2007)

Section 213(2)

The Civil Aviation Authority

The Director General of Electricity Supply for Northern Ireland

The Director General of Gas for Northern Ireland

The Office of Communications

The Water Services Regulation Authority

The Gas and Electricity Markets Authority

The Information Commissioner

The Office of Rail Regulation

Financial Services Authority

Consumers' Association