

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 9: Information

Introduction

585. This Part creates a new gateway and sets out general restrictions and conditions for the disclosure of specified information held by public authorities. It reflects the Government strategy of widening and harmonising the gateways through which information can be disclosed in the UK and overseas and at the same time introduces appropriate safeguards in respect of permitted disclosure of information.
586. The Anti-Terrorism, Crime and Security Act 2001 introduced a new gateway (and amended numerous existing gateways) to allow the disclosure of certain information within the UK and to overseas authorities for the purpose of pursuing criminal investigations or proceedings. The provisions in this Part create a corresponding gateway for disclosure of information relating to consumer and competition matters for the purpose of criminal investigations and proceedings in the UK and overseas. However, they also create a gateway to allow certain information to be disclosed for facilitating the exercise of certain statutory functions in the UK, and for certain civil investigations and proceedings overseas. This wider gateway is necessary for the disclosure of information relating to consumer and competition matters as overseas enforcement of such legislation is often under a civil regime. The provisions relating to the consumer legislation specified in the Anti-Terrorism, Crime and Security Act 2001 will be repealed when Part 9 of this Act comes into force, and consumer legislation will then be covered by this Part.
587. Within the UK, the provisions in this Part will enable a public authority to disclose information to facilitate the exercise of its own statutory functions and certain statutory functions of other persons and for the purposes of any criminal investigations or proceedings.
588. With regards to overseas public authorities, the provisions are more limited. It will be possible to disclose information to any overseas authority for the purpose of any criminal investigations or proceedings. However, for the purpose of civil proceedings, information can only be disclosed to those public bodies involved in the enforcement of consumer or competition legislation. In addition, competition information obtained under the Financial Services and Markets Act 2000 and certain sensitive commercial information (for example, information connected to market and merger investigations) is expressly excluded from the overseas gateway. There are also various safeguards in this Part designed to prevent the misuse of any information disclosed overseas.
589. In order to provide a consistent regime, the gateways that exist in current legislation for the disclosure of information relating to consumer and competition matters will be harmonised. Therefore, the provisions in this Part will replace the existing information disclosure provisions in the legislation listed in section 247.

Restrictions on disclosure

Section 237: General restriction

590. This section sets out the general restriction on the disclosure of information by a public authority. The term ‘public authority’ is defined in section 238 by reference to the Human Rights Act 1998.
591. *Subsection (1)* states that the general restriction applies only to information classed as ‘specified information’ – as defined in section 238. Therefore, these provisions impose no restrictions on the disclosure of information that falls outside the definitions in section 238. The restriction applies in respect of specified information that relates to either the affairs of an individual or to those of any business of an undertaking.
592. *Subsection (2)* provides that the restriction will apply throughout the lifetime of any individual who is the subject of the information, or while any undertaking to which the information relates continues in existence. However, it also acts as a pointer to the exceptions to the general restriction that are set out in sections 239-243 inclusive.
593. *Subsection (3)* sets out a further exception to the general restriction: disclosure is permitted where the information concerned has already been placed in the public domain by any lawful means, including – but not restricted to – any of the exceptions to the general restriction set out in sections 239-243 inclusive.
594. *Subsection (4)* states that all of the provisions on disclosure of information are subject to the provisions of the Data Protection Act 1998.
595. *Subsection (5)* states that the Competition Appeal Tribunal is not subject to the disclosure provisions of this Part.
596. *Subsection (6)* confirms that the restrictions on disclosure, with the exception of section 244, are not intended to affect any power or duty to disclose information which exists outside Part 9 of the Act (i.e. whether arising under this Act or elsewhere).

Section 238: Information

597. This section defines the information to which the disclosure provisions will apply.
598. *Subsection (1)* defines ‘specified information’ as information that has been obtained by a ‘public authority’ (as defined in subsection (3)) in connection with the exercise by it of any function that it has under the following Parts of this Act - Part 1 (‘The Office of Fair Trading’), Part 3 (‘Mergers’), Part 4 (‘Market Investigations’), Part 6 (‘Cartel Offence’), Part 7 (‘Miscellaneous Competition Provisions’) and Part 8 (‘Enforcement of Certain Consumer Legislation’), under any of the enactments listed in Schedule 14 of this Act; or under any secondary legislation specified by the Secretary of State in an order. *Subsection (4)* provides that the term “enactment” will be taken to refer to both primary and secondary legislation, including Scottish and Northern Ireland legislation.
599. *Subsection (2)* has the effect of applying the new disclosure provisions to all “specified information” held by public authorities after the passing of this Act, as well as to information already held by a public authority at the time the Act was passed.
600. *Subsection (3)* requires the term ‘public authority’ to be construed in accordance with the terms of section 6 of the Human Rights Act 1998 – that is to include courts and tribunals (including the House of Lords in its judicial capacity), as well as any person exercising functions of a public nature, but excluding Parliament. (An ‘overseas public authority’ is separately defined in section 243 of this Act).
601. *Subsection (5) and (6)* empower the Secretary of State to amend the lists of legislation in Schedule 14, under which statutory functions arise. This will allow the lists to be updated to reflect subsequent changes to the legislative base. *Subsection (7)* provides

that statutory instruments made under subsection (4) will be subject to the negative Parliamentary procedure.

Permitted disclosure

Section 239: Consent

602. *Subsection (1)* provides that disclosure will be permitted where the authority wishing to disclose the information obtains the necessary consent(s) that are detailed in the following subsections.
603. *Subsection (2)* requires the consent to disclosure by the provider of the information, but applies only where the authority knows the identity of the person from whom it obtained the information. This recognises the possibility that it may not always be possible to identify the provider of particular pieces of information. Where the identity of the provider is known, the authority must satisfy itself that the provider was legally in possession of the information and that the provider consents to further disclosure before releasing the information.
604. *Subsections (3), (4) and (5)* require the consent by the subject of the information. Where the information concerns the affairs of an individual, that individual must consent to further disclosure by the authority. Where the information relates to the business of an undertaking, *subsection (5)* requires consent to be given by a senior representative of the undertaking: for example, the company secretary or other director; a partner; or, in the case of an unincorporated body, a person in a position of management or control.

Section 240: Community obligations

605. This section sets out the principle that disclosure may be made where it is necessary for the authority to disclose the information for the purpose of fulfilling any obligation under European Community law.

Section 241: Statutory functions

606. This section enables public authorities holding information to disclose specified information to persons exercising specified statutory functions.
607. *Subsection (1)* provides that a public authority that holds information to which the disclosure provisions in this Part apply may disclose that information for the purpose of facilitating the exercise by that public authority of any of its statutory functions.
608. *Subsection (2)* provides that if information is disclosed under subsection (1) in circumstances in which it is not put into the public domain (for example where it is not published in the press), such information must not be further disclosed by the recipient of the information without the agreement of the public authority that disclosed the information to it, and disclosure may only be for the purpose of facilitating the exercise by the public authority that made the original disclosure of its statutory functions.
609. *Subsection (3)* provides that specified information held by public authorities can be disclosed to any person for the purpose of facilitating the exercise of any function that that person has under this Act, any of the Acts specified in Schedule 15 or any secondary legislation specified by the Secretary of State by an order made for the purpose of this subsection.
610. *Subsection (4)* provides that information disclosed to a person exercising a function under one of the Acts or pieces of legislation specified in subsection (3) can only be used for a purpose relating to that function.
611. *Subsection (5)* provides that the term ‘enactment’ will be taken to refer to both primary and secondary legislation, including Scottish and Northern Ireland legislation.

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612. *Subsection (6)* empowers the Secretary of State to amend the lists of enactments in Schedule 15.
613. *Subsection (8)* provides that statutory instruments made under *subsection (6)* will be subject to the negative Parliamentary procedure.

Section 242: Criminal proceedings

614. This section permits disclosure for the purposes of criminal proceedings.
615. *Subsection (1)* permits a public authority to disclose specified information to any person for the purposes of investigating whether there have been breaches of UK criminal law; assisting in the bringing or conducting of UK criminal proceedings; or deciding whether to commence or terminate such investigations or proceedings. Disclosure is not required to be for the purposes of specified statutory functions – information may be disclosed for the purpose of the enforcement of any enactment by way of criminal proceedings.
616. *Subsection (2)* provides that information disclosed under this section can only be used for the purpose for which it is disclosed.
617. *Subsection (3)* provides that a public authority may only make a disclosure under section 242 if it is satisfied that the disclosure is proportionate to what is sought to be achieved by it.

Section 243: Overseas disclosures

618. This section specifies the circumstances under which information may be disclosed to overseas authorities.
619. *Subsections (1), (2) and (12)* permit a public authority to disclose specified information to any overseas public authority (as defined in *subsection (11)*) for the purpose of any criminal investigations or proceedings, or for civil investigations or proceedings that relate to competition or consumer matters. *Subsection (12)* specifically provides that disclosure may be made for the purposes of overseas civil proceedings under legislation that is equivalent to the domestic infringements and Community infringements set out in Part 8 of the Act.
620. *Subsection (3)* prevents the disclosure to any overseas authority of information that is held by any person or body that has been designated as an enforcer by the Secretary of State for the purposes of Part 8 of this Act under *subsection 213(4)*. It also prevents the disclosure to any overseas authority of any competition information obtained under the Financial Services and Markets Act 2000 and certain sensitive commercial information (for example, information connected to market and merger investigations).
621. *Subsection (4)* provides that the Secretary of State can prevent disclosure of information overseas if she thinks the proceedings or investigation for which the information has been requested would be more appropriately carried out by authorities in the UK or in another country. *Subsection (5)* requires the Secretary of State to take appropriate steps to bring any decision made by him under *subsection (4)* to the attention of persons likely to be affected by it.
622. *Subsection (6)* sets out the considerations that a public authority must take into account when deciding whether to disclose information overseas, namely whether the reason for the request is sufficiently serious to justify disclosure; the existence of appropriate protection against self-incrimination in criminal proceedings and for personal data in the requesting country; and the existence of any mutual assistance agreements covering the information concerned with the requesting country.
623. *Subsection (7)* states that protection against self-incrimination and of personal data will be appropriate if it corresponds to that provided in any part of the UK.

624. *Subsections (8) and (9)* give the Secretary of State the power, by order (subject to the negative resolution procedure) to modify, add to, or remove any of the considerations in *subsection (6)*.
625. *Subsection (10)* prevents information that is disclosed to overseas authorities from being further disclosed (without the permission of the UK authority from whom the information came). This prevents the overseas authority from using the information for any purpose other than the purpose for which it is disclosed by the UK public authority and from further disclosing it to other bodies or authorities. Should they wish to use it for a different purpose than that originally specified, a further request to the UK authority would have to be made.
626. It is accepted that *subsection (10)(a) and (b)* are essentially unenforceable as there are no sanctions that could be taken against an overseas authority that contravenes these conditions. However, it is envisaged that should an overseas authority breach these provisions it is unlikely that a UK authority would disclose any further information.
627. *Subsection (11)* defines an overseas public authority. For the purpose of this Part, an overseas public authority is any organisation involved in the conduct of criminal investigations or proceedings, and also those organisations involved in the conduct of any civil investigations or proceedings related to the enforcement of competition or consumer legislation. In reality, this will probably include police and security forces together with national competition authorities and organisations with powers linked to consumer legislation (these could be public or private bodies).

Section 244: Specified information: considerations relevant to disclosure

628. This section sets out further considerations to which public authorities must have regard before disclosing any specified information (whether under a power in Part 9 or elsewhere).
629. *Subsections (2) and (3)* provide that, before disclosing the relevant information, a public authority must consider whether disclosure would be contrary to the public interest, and whether disclosure would cause significant harm to the interests of the business or individual to which it relates.
630. *Subsection (4)* provides that, should the public authority consider that disclosure of particular information could significantly harm the interests of an individual or a business, then they must make a judgement as to the extent to which disclosure of that information is necessary.

Offences

Section 245: Offences

631. This section sets out the circumstances in which the disclosure of information, or the use of information disclosed, constitutes an offence, and also specifies the sanctions that will apply if such an offence is committed.
632. *Subsection (1)* explains that an offence is committed if specified information is disclosed in circumstances to which none of the relevant exceptions set out in this Part applies and whilst the individual who is the subject of the information is still alive or any undertaking to which the information relates continues to trade.
633. *Subsection (2)* specifies that an offence is also committed if information is disclosed overseas despite a direction from the Secretary of State that it should not be.
634. *Subsection (3)* extends the offence to include the use of information for a purpose not permitted under this Part.

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635. *Subsection (4)* specifies the maximum prison terms and fines for an offence under Part 9.

Schedule 14: Specified functions

636. This Schedule specifies the Acts under which any information obtained by a public authority in connection with the exercise of any statutory function will be 'specified information' for the purposes of this Part.

Schedule 15: Enactments conferring functions

637. This Schedule lists certain legislation under which statutory functions arise for the purpose of section 241. Information may only be passed to a public authority for the purpose of carrying out a statutory function that arises under the enactments listed in this Schedule.