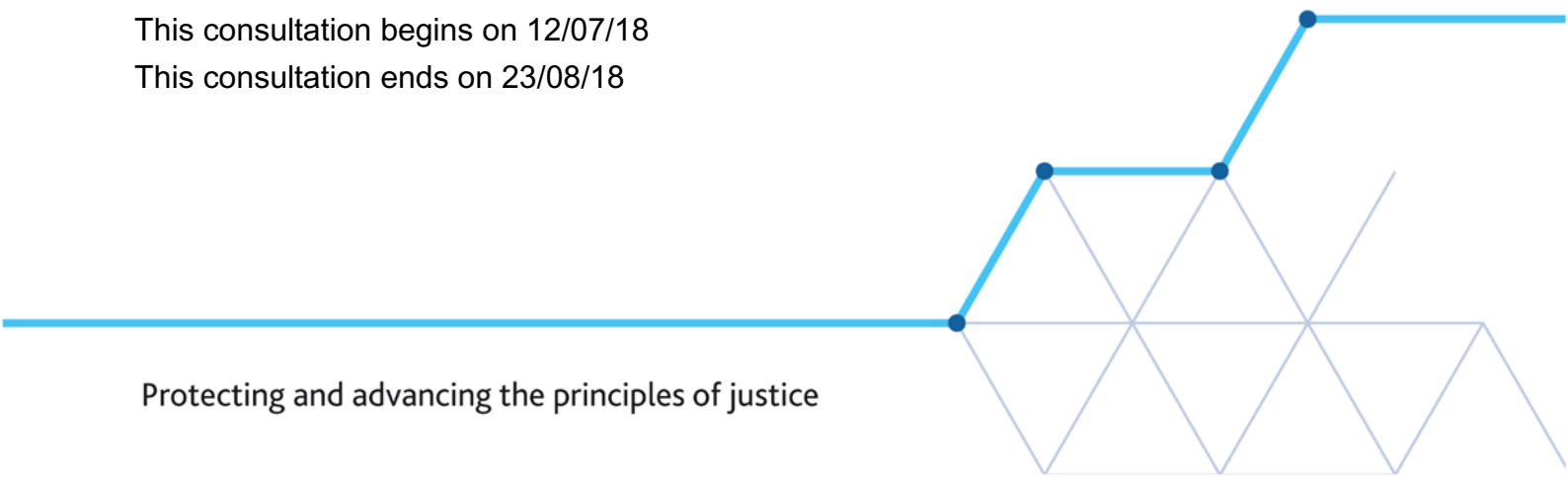
Ministry of Justice

Part 39 Civil Procedure Rules: proposed changes

Open justice

This consultation begins on 12/07/18
This consultation ends on 23/08/18



Protecting and advancing the principles of justice

Ministry
of Justice

Part 39 Civil Procedure Rules: proposed changes
Open justice

A consultation produced by the Ministry of Justice. It is also available at https://consult.justice.gov.uk/

About this consultation

To:	The consultation is aimed at court users in England and Wales.
Duration:	From 12/07/18 to 23/08/18
Enquiries (including requests for the paper in an alternative format) to:	Civil Justice and Law Policy Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Email: David.Hamilton5@justice.gov.uk
How to respond:	Please send your response by 23/08/18 to: Civil Justice and Law Policy Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Email: Part39condoc@justice.gov.uk
Additional ways to feed in your views:	N/A
Response paper:	A response to this consultation exercise is due to be published within three months of the consultation closing at: https://consult.justice.gov.uk/

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Foreword

The justice system in England and Wales is internationally recognised as one of the finest in the world; our strong and independent judiciary, world-class legal profession and our legal system are the basis of a modern society and strong economy.

Our ambitious programme of court reform, being undertaken by HM Courts and Tribunals Service, aims to bring new technology and modern ways of working to our justice system. These technological changes, alongside wider changes in society, mean that our court procedures need to be reviewed and kept up-to-date.

Our legal system is founded on the principle of open justice. The Government is fully committed to this principle. The public's right to know, to see the law as made in parliament and decided in courts, is fundamental. Sir Ernest Ryder, Senior President of Tribunals, in a speech on Securing Open Justice said "*Open justice is central to our justice systems. It is more than that. It is, through our courts and justice systems, of fundamental importance to democratic government"*.[1]

However, there are times when the public does not or cannot have an unlimited right to know. Individual rights need to be protected as well. Recent court cases indicate that there is confusion on this issue and that the rules need to be amended to address this.

The Civil Procedure Rules (CPR) govern civil court processes. Part 39, a general provision relating to court hearings, states in relation to open justice that the rule is that a hearing is to be in public.

The proposed changes to rule 39.2 in this consultation are designed to address this perceived imbalance and to propose further reforms:

- A restatement of the definition of a hearing, designed to build on and reinforce earlier work on improving physical access to hearings;
- A new rule to reemphasise the position that no party may communicate with the court on substantive issues without the other side being copied in;
- Proposals to supplement the provision of transcripts so that in certain cases a judge may direct that parties share their notes with the other side and that in some cases these shared notes may stand in place of a transcript; and
- A mechanism whereby those that are not party to an action (the particulars of which are held to be private) are able to be aware of and make representations.

[1] https://www.judiciary.gov.uk/announcements/speech-by-sir-ernest-ryder-senior-president-of-tribunals-securing-open-justice/

Modernising procedures and realigning aspects of the CPR with recent court decisions will ensure the Court processes will remain up-to-date.

Lucy Frazer QC MP

Parliamentary Under-Secretary of State for Justice

Executive summary

The proposed changes in this consultation paper are from the Civil Procedure Rule Committee (CPRC) but the consultation is being undertaken by the Ministry of Justice (MoJ).

MoJ is seeking views on changes to Part 39 of the Civil Procedure Rules (CPR) '*Miscellaneous provisions relating to hearings'.* This Part provides general direction on the conduct of hearings. The proposed changes in this consultation have been drawn up to clarify open justice requirements in relation to hearings in private and reporting restrictions. In addition, the proposed amendments widen the definition of a 'hearing' explicitly to take into account technological developments, introduce new rules for parties communicating with the court, and supplement the provision of transcripts.

Open justice is a fundamental principle of English and Welsh Law. All hearings, should be in public. Lord Diplock in *Attorney General vs Leveller Magazine Limited* [1979]440 at 449H-450D states the principle:

> *"As a general rule the English system of administering justice does require that it be done in public: Scott v Scott [1913] AC. 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."*

Lord Diplock also noted the tension between the public's right to know and the need to do justice:

> *"However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice".*[2]

[2] Per Flaux,J in *Graiseley Properties vs Barclays et al* [2013] EWHC 67 (Comm) at para 17

The balance between the public's right to know on the one hand and the need for secrecy *to do justice* is reflected in the wording of rule 39.2 CPR. But rule 39.2 has been subject to criticism. Specifically rule 39.2 reads:

> *A hearing, or any part of it, may be in private if publicity would defeat the object of the hearing; it involves matters relating to national security; it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality; a private hearing is necessary to protect the interests of any child or protected party; it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or the court considers this to be necessary, in the interests of justice.*
>
> *The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.*

In May 2011, the then Master of the Rolls, Lord Neuberger, commissioned a report into 'super injunctions', heavily anonymised injunctions often dealing with the private lives of prominent individuals. This report made several observations on open justice and rule 39.2. First, it reaffirmed the principle of *open justice* as fundamental. It then noted that departure can only be to secure the proper administration of justice. Any application to depart from the principle of open justice must be supported by clear evidence and carefully scrutinised by the court[3]. Rule 39.2 was not drafted in those terms and, therefore, the Master of the Rolls invited the CPRC to review and revise rule 39.2.

In *AMM vs HXW*[4] Mr Justice Tugendhat confirmed that when a judge is being asked to consider a request to depart from the principles of open justice, the test is one of necessity and not discretion, and that when the subject matter is particularly acute (in this case blackmail) the test to be satisfied is "whether there is sufficient general public interest in publishing a report of the proceedings which identifies [x] to justify any resulting curtailment of his right and his families' right to respect for their private and family life". The CPRC argues that this is indeed the correct interpretation and has drafted the proposed amendments to rule 39 accordingly.

Clarity on this issue is not just important for the parties to the case, but goes much wider, as the following two cases illustrate.

The 2000 case of *Storer vs British Gas PLC*[5] is authority for the proposition that when a tribunal was sitting in private without the jurisdiction to do so, the decision taken by the tribunal as unlawful.

In the Divisional Court case of *R (on the application of O'Connor)*[6] Lord Justice Fulford and Mr Justice Leggatt held that the principles of open justice are such that where members of the public are unlawfully excluded from the proceedings, the exclusion means that any decisions taken under those conditions would also be invalid.

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3 Report of the Committee on Super Injunctions: Super injunctions, Anonymised injunctions and open justice.
4 [2010] EWCH 2457 QB
5 [2000] 2 ALL ER 440
6 [2016] EWHC 2792 (Admin)

More recently the issue has been explored in terms of the disclosure of individuals' finances in respect of applications for Judicial Review and other challenges which come under the Aarhus Convention claim provisions. The question is whether the information disclosed warrants a departure from the stated general principles of open justice. In the September 2017 judgment handed down by the High Court in *RSPB and others v Secretary of State for Justice*,[7] the court concluded that the Aarhus Convention claim environmental costs protection regime (ECPR) should be amended, so that the default position is that any hearing of an application to vary costs caps in an Aarhus Convention claim is to be held in private. The current regime reflects the principle that the default position should be a public hearing. In order to remedy this situation, the Court made a specific recommendation in respect of the Practice Direction which accompanies Part 39. This change, which would require a minor amendment to the relevant Practice Direction, is not being taken forward separately at this time, and instead is being considered by the CPRC as part of this review.

Further improvements in terms of open justice in this consultation include a new rule to redefine hearings to expressly include those made by telephone and video or other simultaneous two-way communication. This broad definition is in recognition that hearings are not always in a formal courtroom setting but may take place by other means. Hearings in chambers are still hearings and are subject to the same rules.

There is also a proposal for a new process for cases that are subject to either it being in private or restrictions on reporting the parties' names to be placed on a central website.

The principle of open justice is further reinforced by an additional reform requiring that when parties communicate with the court, they must ensure that the other side is copied in.

Finally, there is a new provision designed to assist in overcoming some of the delay that parties (primarily unrepresented ones) have in obtaining transcripts. Instead of a verbatim (word for word) transcript the rule will allow the judge to request that a represented party share a note of the proceedings.

These changes to Part 39 will serve to provide more clarity and certainty to important provisions in the CPR.

[7] *RSPB and others v Secretary of State for Justice [2017] EWHC 2309 (Admin)*

Introduction

This paper sets out for consultation changes to Part 39 of the CPR '*Miscellaneous provisions for hearings'*. It reaffirms the government's commitment to open justice, on hearings being in public whilst also broadening the definition of a hearing. Other changes include a mechanism to make people aware of reporting restrictions, new rules on parties communicating with the court, as well as a solution to difficulties that parties have when requesting transcripts. The consultation is aimed at court users in England and Wales.

A Welsh language copy is available at https://www.gov.uk/government/consultations/part-39-civil-procedure-rules-consultation-on-proposed-changes

The proposals

This consultation details proposed changes by the CPRC, undertaken by MoJ.

Each proposal is accompanied by draft amendments to the relevant rule, or a new rule, indicating how the proposal might be given effect. We welcome your comments.

Amendments to CPR Part 39

An updated definition of "hearing" makes it clear that a "hearing" includes not only traditional hearings in a courtroom, but also those in chambers and hearings conducted by video link or telephone.

39.1 Interpretation

~~In this Part, reference to a hearing includes a reference to the trial~~.

(1) In this Part, a "hearing" means any proceeding before a judge (including a master or district judge) other than a determination on papers and where there is no oral pronouncement of the determination; and includes a proceeding conducted in whole or part by video link, telephone or other means of instantaneous two-way electronic communication.

(2) This Part does not apply to arbitration claims. (Rule 62.2(1) defines an arbitration claim).

Question 1: Is this new definition of a 'hearing' sufficiently clear to capture all possible arrangements used by courts to accommodate hearings?

Rule 39.2 (below) sets out the position that hearings are to be held in public unless one of the exceptions applies. There is also a provision to correct the widely held but mistaken belief that the parties may agree between themselves to hold a hearing in private without further consideration of the question by the court.

The new paragraph (2) in rule 39.2 is proposed in order to reinforce the requirements of section 12 of the Human Rights Act (freedom of expression).

39.2 General rule—hearing to be in public

(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court is satisfied of one or more of the matters in paragraph (4) below.

(2) In deciding whether to hold a hearing in private the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.

Question 2: Are 39.2 (1) and (2) clear that hearings are to be in public, and that it is the court that decides the issue?

The proposed new paragraph (3) of rule 39.2 below replaces the idea that the court does not have to make any special arrangements for accommodating members of the public

who wish to observe proceedings, with the idea that reasonable steps should be taken by the court to ensure that hearings are open to the public and those wishing to attend (except, of course, in those exceptional cases where the hearing is in private).

(2) ~~*The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public*~~

(3) The court shall take reasonable steps to ensure that all hearings are of an open and public character save when a hearing is held in private.

Question 3: Is this rule sufficiently clear in setting out the court's obligation to members of the public?

Question 4: Is the understanding of 'reasonable' sufficiently clear or should the rule be more prescriptive?

The proposed amended paragraph (4) of Rule 39.2 provides a test for holding a hearing in private and provides that the court must hold the hearing in private if that test is met. The test is twofold – first, that one of the listed scenarios applies, and second, that the court must be satisfied that it is necessary to hold the hearing, or part of it, in private to secure the proper administration of justice. The court is to hold the hearing in private only to the extent necessary to secure that.

A similar approach is taken in the amended paragraph (5) concerning restrictions on disclosure of the identity of a party or witness.

~~(3)~~ (4) A hearing, or any part of it, ~~may~~ must be held in private if and to the extent that the court is satisfied that it is necessary to do so to secure the proper administration of justice and that—

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or

(g) the court for any other reason considers this to be necessary, in the interests of justice.

~~(4)~~ (5) The court ~~may~~ must order that the identity of any party or witness ~~must~~ shall not be disclosed if it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.

The court must sit in private if, but only if, that is necessary to secure the proper administration of justice and one or more of (a)-(g) applies. The situations in (a)-(g) are well recognised categories where it may be unjust to sit in public.

Question 5: Is it necessary to further define what is meant by the term *"secure the proper administration of justice"*?

Question 6: Apart from applications for judicial review under the Aarhus provisions *(see-The Royal Society for the Protection of Birds vs the Secretary of State for Justice*[8]*)*, are there any other reasons why a hearing should be held in private and what are they?

Where the court has decided to hear cases in private and where the identities of the parties are anonymised there is currently no procedural mechanism for determining open justice issues. Media organisations and other potential opponents of anonymity orders and decisions to hear cases in private are not necessarily notified of such orders being made and may not have the opportunity to make representations which may infringe their rights to be heard on the issues. The process below in the proposed new paragraph (6) of rule 39.2 places a duty on the court to make the order public by following a simple procedure resulting in an electronic copy of the order being made available on a website thus allowing a party to challenge the order by making an application to the court. This proposal adopts a similar approach to that set out in *Practice Direction (Committal for Contempt: Open Court) [2015] 1 WLR 2195 (Lord Thomas LCJ).*

> *(6) Unless and to the extent that the court otherwise directs, where the court acts under paragraph (4) or (5), a copy of the court's order shall be made available via the "CopyDirect" Service and to the Judicial Office at judicialwebupdates@judiciary.gsi.gov.uk for publication on the website of the Judiciary of England and Wales. Any person who is not a party to the proceedings may apply to set aside the order.*

Question 7: Do you think this provision is sufficient to allow interested parties of the order the opportunity to make representations?

Question 8: Is it right that a judge may direct that the court's order should: a) not be placed on the website, b) or not until service on the other party, or c) not without redactions to protect anonymity etc?

Question 9: Are there any concerns with placing these orders on the Internet?

New Rules

A new rule is proposed to deal with the concern over parties communicating with the court (often by email) without copying in the other side. It is a fundamental rule of the administration of justice that none of the parties may communicate with the court without simultaneously alerting the other parties to that fact. The concern is particularly acute where a represented party communicates with the court, without notifying the unrepresented opposing party. A new rule is proposed to remedy this.

[8] [2017]EWHC 320- (Admin)

39.8—Communications with the court (New provision)

(1) Any communication between a party to proceedings and the court must be disclosed to, and if in writing (whether in paper or electronic format), copied to, the other party or parties or their representatives.

(2) Paragraph (1) above applies to any communication in which any representation is made to the court on a matter of substance or procedure but does not apply to communications that are purely routine, uncontentious and administrative.

(3) A party is not required under paragraph (1) above to disclose or copy a communication if there is (or are) a compelling reason (or reasons) for not doing so; provided the reason or reasons is (or are) clearly stated in the communication.

(4) A written communication required under paragraph (1) above to be copied to the other party or parties or their representatives, must state on its face that it is being copied to that person or those persons, stating their identity and capacity.

(5) Unless the court otherwise directs, a written communication to the court which does not comply with paragraph (4) above will be returned to the sender without being considered by the court.

(6) In addition to the return of written communications under paragraph (5) above, where a party fails to comply with paragraph (1) above the court may, subject to hearing the parties, impose sanctions or exercise its other case management powers under Part 3.

Question 10: Are these provisions sufficiently robust to stop the trend of one side making substantive representations to the court without copying in the other side?

Question 11: Are there any other measures that should be introduced to ensure that parties routinely copy in the other side when communicating with the court?

Question 12: Is a statement confirming a party has copied in the other side sufficient?

The second new provision within the existing rule deals with recording and transcription of proceedings. The new paragraph (6) is necessary to assist the increasing number of unrepresented parties appearing before the courts. It is intended to encourage the court and the parties to cooperate in providing an informal record of the proceedings while awaiting the approved transcript.

In particular, unrepresented parties may find it useful to have an informal note of hearings, for example in order to seek further legal advice, decide whether to appeal or consider the outcome of the case.

39.9—Recording and transcription of proceedings (New provision)

(1) At any hearing, whether in the High Court or the County Court, the proceedings will be tape recorded or digitally recorded unless the judge directs otherwise.

(2) No party or member of the public may use unofficial recording equipment in any court or judge's room without the permission of the court. To do so without permission constitutes a contempt of court.

(3) Any party or person may require a transcript or transcripts of the recording of any hearing to be supplied to him, upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript.

(4) Where the person requiring the transcript or transcripts is not a party to the proceedings and the hearing or any part of it was held in private under rule 39.2, paragraph (3) above does not apply unless the court so orders.

(5) Paragraph 6(2) of Practice Direction 52C (Appeals to the Court of Appeal) deals with the provision of transcripts for use in the Court of Appeal at public expense.

(6) At any hearing, whether in public or in private the judge may give appropriate direction to assist a party, in particular one who is or has been or may become unrepresented, for the compilation and sharing of any note or other informal record of the proceedings made by another party or by the Judge.

Question 13: Does the requirement to assist in the preparation of a note, agreed with judge or otherwise, place too much of a burden on the represented party?

Question 14: What status, in respect of any Appellant's Notice, should an agreed note have?

Question 15: Is there any other way an unrepresented party can be assisted to obtain an accurate note of the hearing?

Impact assessments

A full impact assessment has not been produced as these proposals do not fall under the definition of a regulatory provision, and because we estimate the costs to be minimal. Our assessment is that there may be some administrative costs associated with these proposals but we expect them to be minimal and if that is the case that they should be absorbed within MoJ's existing budget. We would welcome views to help us assess and quantify any impacts, preferably with supportive evidence.

Question 16: How will the proposed changes affect your work in the legal sector?

Under section 149 of the Equality Act 2010, the MoJ has a legal duty to consider how these proposals are likely to impact on people with the protected characteristics of race, age, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity. In particular, the MoJ must have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Equality Act;
- Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

We do not consider that these proposals have particular impacts on people with protected characteristics or that they result in direct or indirect discrimination.

Question 17: Do you have any evidence or information concerning equalities that you think we should consider?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 23/08/18 to:

David Hamilton
Ministry of Justice
9.22, 102 Petty France
London SW1H 9AJ

Tel: 020 3334 3555

Email: Part39condoc@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at https://consult.justice.gov.uk/.

Alternative format versions of this publication can be requested from David Hamilton (as above).

Publication of response

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation. The response paper will be available on-line at https://consult.justice.gov.uk/.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities

must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

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Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

https://www.gov.uk/government/publications/consultation-principles-guidance

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Alternative format versions of this report are available on request from David Hamilton as above.