

Data Protection and Social Care

Ben Fullbrook

Introduction – Key sources of data protection law

- General Data Protection Regulation (EU 2016/679)
- Implemented and supplemented by Data Protection Act 2018
- Will still be relevant post Brexit!
- Big fines!

When will the GDPR apply?

- Applies to the processing of personal data by a controller or processor in the EU, regardless of whether processing takes place in the EU

What is personal data?

- *Personal data* is defined as any information relating to a data subject.
- A *data subject* is the identified, or identifiable, person to whom the personal data relates.
- An *identified, or identifiable* person is a person who can be identified directly or indirectly by reference to an identifier (e.g. a name or reference number), or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual
- *Indirect identification* is where a person is identified using a combination of the stored information and means reasonably likely to be used to identify them (e.g. a number plate or an IP address – see ***Mircom v Virgin Media*** [2019] EWHC 1827 (Ch) and ***Case C-582/14 Breyer v Federal Republic of Germany*** [2017] 1 WLR 569
- “*Relating to*” has been the subject of case law: see ***Durant v FSA*** [2003] EWCA Civ 1746 & ***TLT v SSHD*** [2018] EWCA Civ 2217

Other definitions

- *Processing* is widely defined and, among other things, covers collecting, recording, storage, use and erasure or destruction of data. Simply having the name of an identifiable individual on a database will amount to processing personal data.
- A *controller* is a person (including a company) who determines the purposes and means of processing personal data. It is a concept that those in the data protection sector are already familiar with. Most obligations under the **GDPR** fall on controllers.
- A *processor* is a person who processes personal data on behalf of the controller

Key principles of GDPR

- **Lawfulness, fairness and transparency.** Personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. The controller must only process personal data on the basis of one or more of the legal grounds set out in Article 6 of the GDPR
- **Purpose limitation.** Personal data must only be collected for specified, explicit and legitimate purposes. It must not be further processed in any manner incompatible with those purposes
- **Data minimisation.** Personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed.
- **Accuracy.** Personal data must be accurate and, where necessary, kept up to date.
- **Storage limitation.** Personal data must not be kept in a form which permits data subjects to be identified for longer than is necessary for the purposes for which the data is processed.
- **Integrity and confidentiality.** Personal data must be processed in a way that appropriately ensures its security. Controllers and processors must use appropriate technical or organisational security measures to ensure this.
- **Accountability.** The controller is responsible for, and must be able to demonstrate, compliance with the other data protection principles

Processing

- A controller may only process personal data on one of the legal grounds set out in Art.6 GDPR. These include where processing:
 - Has been done with the "freely given, specific, informed and unambiguous" *consent* of the data subject for one or more specific purposes
 - Is necessary for compliance with a legal obligation to which the controller is subject
 - Is necessary for protecting the vital interests of the data subject
 - Is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data is disclosed
 - Is necessary for the performance of a contract

Performance of a task carried out in the public interest

- DPA 2018 clarifies that this includes processing that is necessary for the exercise of a function conferred by enactment or rule of law
- ICO guidance makes clear that a processor do not need a specific statutory power to process personal data, but its underlying task, function or power must have a clear basis in law
- But remember it must be necessary – so no reasonable less intrusive means could have been adopted to carry out the testing

Issues with consent for “public authorities”

- Recital 43 of the GDPR notes that where a controller is a public authority there is likely to be a clear imbalance between it and the data subject, and it is therefore unlikely to be the case that consent can be freely given for the purposes of the GDPR
- Also consent can only be “freely given” and so requires a genuine choice and ability to refuse without detriment, which not always possible in social care situation
- ICO guidance actively encourages public authorities to rely on grounds other than consent
- Where consent is obtained, the subject needs to be told specific information (see Art. 7 GDPR) and it must be recorded.

Processing special categories of personal data

- Subject to exceptions, the GDPR prohibits the processing of certain special categories of personal data, including racial or ethnic origin, sex life and sexual orientation and data concerning health (Article 9 GDPR)
- *Data concerning health* is defined as personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about that person's health status (Article 4(15), GDPR).

Exceptions

- Special categories of personal data may be processed where one or more of the following exceptions apply (additional exceptions are contained in Art. 9(2) GDPR) AND one of the legal grounds in Art. 6 is satisfied
 - (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes
 - (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law
 - (c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;
 - *(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional subject to the conditions and safeguards referred to in paragraph 3 (in UK – where by or under the responsibility of a health professional or a social work professional, or by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law (s. 11(1) DPA 2018));*
- For (b) & (h) must also meet one of the conditions in Sch. 1 pt. 1 DPA 2018 (see s.10)

Conditions (Sch 1 DPA 2018)

Health or social care purposes

2(1) This condition is met if the processing is necessary for health or social care purposes.

- (2) In this paragraph “health or social care purposes” means the purposes of—
- (a) preventive or occupational medicine,
 - (b) the assessment of the working capacity of an employee,
 - (c) medical diagnosis,
 - (d) the provision of health care or treatment,
 - (e) the provision of social care, or
 - (f) the management of health care systems or services or social care systems or service

Top tips for social care providers

- Take great care when obtaining consent: give clear information and record unambiguous agreement
- Store records of consent safely
- Public authorities should generally avoid relying on consent
- Create and maintain clear data processing policies; seek professional assistance where uncertain
- Don't forget your other responsibilities and remember that the exemptions are there to be used in appropriate circumstances

Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

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