

Advice - Lawful Basis for Processing

This might well be the most important piece of advice you read during the GDPR implementation period. We would ask that you read it in full because the implications are very significant for what you can do as a school with personal data. If you have any questions about the advice, particularly in relation to what lawful reason can be used for processing, then please contact us.

In order to process personal data, you **must** have a lawful basis. This is not a new concept, it is a requirement that also exists in the Data Protection Act 1998. GDPR does however require you to be more transparent about the lawful basis you are relying upon for processing and also, crucially, removes one of the more commonly used lawful bases from the suite available to public sector bodies such as schools.

Certain types of personal information, called '**special categories**', have further requirements which must be complied with in addition to the rules for normal personal information, and we will deal with these at the end of this advice note – please make sure that you read this section as well.

The six lawful reasons for processing the majority of personal data are:

1. The individual has given clear consent for you to process their personal data for a specific purpose (**Consent**)
2. The processing is necessary for a contract you have with an individual or because they have asked you to take specific steps before entering into a contract (**Contract**)
3. The processing is necessary for you to comply with the law (**Legal Obligation**)
4. The processing is necessary to protect someone's life (**Vital Interests**)
5. The processing is necessary to perform a task in the public interest or your official functions, and the task or function has a clear basis in law (**Public Task**).
6. The processing is necessary for your legitimate interests or the legitimate interests of a third party unless there is a good reason to protect the individual's personal data which overrides those legitimate interests. (**Legitimate Interests**)

GDPR has changed the Data Protection Act position so that the '**Legitimate Interests**' reason cannot be used by public authorities, including schools, as a reason to process information in performance of their tasks.

The loss of '**Legitimate Interests**' means that there are in reality only five lawful reasons available to schools. This advice paper explains which of these is suitable in which circumstances, and will enable you to both complete your data mapping, and also to ensure that appropriate Privacy Notices can be drawn up.

You will notice that four of the five lawful reasons available to you include the word “**Necessary**”. In the legal sense “Necessary” does not mean that processing always has to be essential. The lawful basis will not apply if you can reasonably achieve the purpose by some other less intrusive means. It is not enough to assert that processing is necessary because you have chosen to operate your business in a particular way. The question is whether the processing is necessary for the stated purpose, not whether it is a necessary part of your chosen method of pursuing that purpose.

The GDPR now places an additional requirement on data controllers to provide individuals with information about the lawful basis (reason) which is being relied upon to process information and details of this will need to be set out in your privacy notice.

Consent

This is often described as being a ‘default’ ground, in that you can do whatever you wish with a person’s personal information, so long as they have consented to it. We have already provided you with advice on obtaining consent, and in particular on ensuring that it is provided by a ‘clear affirmative act’, meaning that ‘implied consent’ is not lawful for these purposes and that written evidence of consent having been given should be held by the school.

Our advice would be that ‘Consent’ should not be regarded by you as being the lawful basis for processing personal information if another lawful reason is available because:

- you need to ensure that you have a record of the clear affirmative consent for use of personal information in the particular circumstances; and
- parents (and potentially pupils) have the ability to withdraw consent at any time and for any reason.

It therefore makes it difficult to plan for any long term processing with confidence.

We would therefore recommend that you only seek consent for the processing of personal information if no other lawful reason is available. This advice note should help you decide whether another reason can be used.

Contract

Personal information can be processed if it is necessary in order to comply with a contract you have with the person concerned. Please note however that you do not have legally binding contracts with pupils or parents (Home School Agreements do not meet the legal definition of a contract) and as such this lawful reason cannot be used in relation to any processing of their personal data.

This lawful reason may however be used in relation to information about members of staff which needs to be processed for reasons related to the contract, rather than for statutory purposes. This might, for example, include processing personal information to give staff access to certain benefits to which they are entitled as a result of their employment contract.

Legal Obligation

Much of the data sharing and processing that you carry out will be as a result of legal obligations that schools are subject to. This advice note is accompanied by a table of legal obligations which schools are required to comply with under education legislation. This should help you to understand which specific legal obligations you are complying with at any particular time. You should find this helpful when completing both the data mapping task and, in time, your Privacy Notices and Data Protection Policy.

We have kept this table deliberately short in order for it to not to be too confusing, and to cover what we feel are the vast majority of legal requirements you have to share information with others, as well as the requirement to hold an educational record, which includes all information that the school should need to have about a pupil. If you think that a legal obligation allows, or requires, you to process particular information but does not appear on our list then please let us know and we can advise you further. You should not use 'Legal Obligation' as your justification for processing unless you can identify the particular piece of legislation or other law which allows you to do so.

There are some circumstances where information sharing will not have a simple justification under GDPR, but where you are confident that a legal obligation does exist. In those circumstances we are happy to discuss with you what we feel is most appropriate.

The table of duties also includes the two sets of Regulations which govern Income Tax and National Insurance returns for staff, and these should therefore be included as the justification for sharing information with HMRC. Due to the complex nature of the legislation we would recommend just referring to the Regulations as a whole rather than to individual sections.

Please therefore look through your data mapping tool and, where legal obligations justify such tasks, complete with details of the legal obligations set out in the accompanying table.

Vital Interests

The 'Vital Interests' lawful reason is only to be used in an emergency, where a person's life is in danger. Appropriate circumstances might well therefore include the sharing of key information with paramedics, the police or the fire service where a risk of serious harm or death exists if information is not revealed. It may be worth having

an appropriate line in your data mapping tool to take account of the need to share information in such circumstances.

Public Task

It is worth taking account of the fact that much of the work involved in educating children and young people is not actually set out directly in legislation. It is the day-to-day task of ensuring that children receive the education and support that they require, and which will inherently require information sharing and use between staff to ensure that pupils are properly supported. This constitutes a 'Public Task' because your job as a school is to educate children, even though you will struggle to find a single piece of legislation which says this, and therefore internal processing and sharing which is necessary both to educate and safeguard your pupils is lawful.

You do need to note however that processing for 'Public Task' purposes must still be necessary. For example, it is not currently considered by the DPO Service that it would be appropriate or lawful for a school to justify the sharing of personal information with a web-based educational resource using the 'Public Task' lawful reason unless the use of such a resource was an educational requirement. In such circumstances it would be more appropriate to utilise 'Consent' as the lawful reason.

Special Categories

Personal information which reveals any of the following is classified as 'Special Category' information, and a separate set of rules governs whether this can be processed:

- Racial or ethnic origin
- Political opinions
- Religious or philosophical beliefs
- Trade Union membership
- Genetic and / or Biometric data
- Health information
- Information concerning a person's sex life or sexual orientation

It is likely that you do hold some of the above in relation to both pupils and staff members, for example some staff information concerning trade union status and health issues, as well as medical information about pupils.

In these circumstances you need to be able to demonstrate why the law allows you to hold/share the information (i.e. which one of the five legal reasons above applies) **and also** prove one of the following additional 'Lawful Reasons' apply.

There are ten 'Lawful Reasons' for holding and processing this information, but these are far more restrictive than in relation to general personal information referred to above.

Again, in order to process personal data, you **must** have a lawful basis (i.e. one of the five legal reasons above **and** one of the following Lawful Reasons must apply:

- 1) Data Subject has given explicit consent:** In the same way as for other forms of personal data, you should ensure that this is provided by a 'clear affirmative act', meaning that 'implied consent' is not lawful for these purposes and that written evidence of consent having been given should be held by the school. Consent can be withdrawn at any time.
- 2) Necessary for carrying out obligations and exercising specific rights in relation to employment and social security and social protection law:** This can be used in relation to staff information if a legal obligation requires you, or a legal right enables you, to hold particular information, so long as this is necessary.
- 3) Necessary to protect vital interests of the data subject or another person where the data subject is physically or legally incapable of giving consent:** This is similar to the 'Vital Interests' ground above, but can only be used where the person concerned is 'physically or legally incapable' of giving consent. Again, this can be used in emergency situations where a person's life is in danger and vital information needs to be given to health staff, police or fire crews, particularly in relation to health information relevant to emergency medical treatment.
- 4) Processing carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim:** This is not available to schools and academies
- 5) Processing relates to personal data which is manifestly made public by the data subject:** Being manifestly made public means that the person concerned has published this information publicly, either on the internet or for general public consumption – not just for use by a school. We would suggest that this is a ground that should not be relied upon by schools without expert advice.
- 6) Necessary for establishing, exercising or defending legal claims:** Only to be used when receiving legal advice or in relation to legal proceedings.
- 7) Necessary for reasons of substantial public interest:** This is highly unlikely to be suitable for use by schools or academies as it is intended for use to protect life or as a result of public interest investigations by the media, police, government or others.
- 8) Necessary for preventive or occupational medicine:** This will be used by schools regularly in relation to assessment of employee working capacity, and also in some circumstances relating to pupils (in less serious cases than the 'Vital Interests' reason above, but there must still be a strong element of necessity for processing).

- 9) Necessary for reasons of public interest in the area of public health:** This can be used if there are serious threats to health on a large scale, so is unlikely to be used in your data mapping as a regular processing issue.
- 10) Necessary for archiving, historical research or statistical purposes in the public interest:** This is not suitable for schools or academies.