

## Response to Consultation: Social Services & Wellbeing (Wales) Act 2014. *Statutory guidance in relation to part 7 of the Act, on Handling Individual Cases to Protect Children and Adults at risk.*

### Background to the Information Commissioner's Office

The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations (EIR) and the Privacy and Electronic Communications Regulations. She upholds information rights in the public interest, promotes openness by public bodies and data privacy for individuals. She does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken. The opportunity to respond to this consultation is therefore welcomed but comments will only be made in respect of issues relevant to the scope of her responsibilities.

### A) The General Data Protection Regulation

Both the Adult and Child guidance makes reference to the Data Protection Act 1998 (DPA) which is welcomed. Welsh Government may wish to address in the guidance that on 25 May 2018 the DPA will be replaced by the EU's General Data Protection Regulation, and that post Brexit the UK government may choose to amend their approach to data protection. However, indications at this stage are that the UK intends to remain compatible with GDPR.

The implication of course for this guidance is that references to the DPA will need to encompass GDPR and any future data protection legislation.

### B) Consent

The ICO has recently consulted on draft guidance about the GDPR interpretation of consent in the context of data protection. The draft guidance on consent can be accessed [here](#), and the final version will be available on our website in due course. The draft sets out the GDPR line that consent will not be a valid basis for processing personal data by the public sector in the course of their duties. This is based on the imbalance of power in the relationship between the individual service user and the public sector organisation, which means that consent cannot be freely given. When delivering their functions, the public sector should rely on

25 April 2017 V1

one of the other bases for processing, such as Article 6(e) "performance of a task carried out in the public interest or the exercise of official authority vested in the controller". However, please note that Article 6(f) "legitimate interests" is also not available to the public sector in the course of performing their functions.

The ICO guidance does not apply to use of consent in relation to the Duty of Confidence, or of course, to consent to receive care or other services from the public sector.

### C) Rights of the Individual

The DPA, and the GDPR both contain strong information rights for the individual which might usefully be covered in your guidance, perhaps in the same section as the Complaints Process.

A key right under both pieces of legislation is that of Subject Access. This gives the data subject a very strong right of access to all the recorded personal information that a data controller holds about them. It would be helpful to make clear that this right covers all aspects of protecting adults and children, with the proviso that each organisations' information governance team will be able to advise on application of any exemptions that may be appropriate in each case.

GDPR creates a new "Right to be Informed" which sets clear and high standards for fair processing information (or privacy notices) which should be provided to data subjects explaining how their information will be used and what their information rights are.

The "Right to Rectification" will also impact on services involved in safeguarding processes, with GDPR strengthening the right for the data subject to have factual errors in their records corrected without having to apply to a court.

For more information on the individual's rights under GDPR, and advice on fair processing information, see the ICO's [Overview of the GDPR](#).

Please contact Helen Thomas at the ICO's Cardiff Office on 01625 545298 if you would like to discuss any aspect of the above response.

25 April 2017