

Consultation on GDPR consent guidance

Summary of responses

Introduction

In March 2017 the ICO published its draft guidance on consent under the GDPR, and ran a consultation seeking stakeholder views. This document summarises the key themes emerging from the consultation responses we received.

We received more than 300 written responses to the consultation, and we are grateful to those who took the time to comment. A list of respondents is included below.

We have carefully considered the views we received, which we are using to inform the final version of our guidance and our input to the Article 29 Working Party of European Data Protection Authorities (WP29) work on consent guidelines.

Key themes

A wide variety of both general and detailed issues were raised. Whilst it is not possible to cover every point that was raised as a result of the consultation in detail, a number of key themes did emerge from the responses, which are summarised below.

Clarity and presentation of the guidance

In general, respondents felt that the guidance was written clearly and in plain language. A large proportion welcomed the use of 'In brief' summaries and the practical addition of a checklist.

There were some concerns about:

- the format of the document, lack of page numbers and fragmented structure with too many links;
- the length of the guidance and that there was some repetition of content;
- the presentation of the guidance and that it could be improved by better visuals, a glossary of terms and a contents page; and

- the guidance should clearly distinguish between content that represents the legal requirements of the GDPR and that which comprises good practice recommendations from the ICO.

Another common suggestion was that the guidance should include more practical examples (for example, of both good and bad practice), including some involving special category data, however the majority of respondents said that they did not have any examples that they could suggest for inclusion. There were also requests for a standard consent template, or examples of consent statements, such as for multiple processing purposes or channels.

ICO's response

We are intending to improve navigation and presentation, and believe that our intended format should deal with many of these concerns. The final guidance will take the form of a series of linked webpages rather than a pdf document – this will include a contents list on the left hand side of each one of the webpages to aid navigation. We are aware that not everyone will wish to read all of the guidance at once but may prefer to navigate to a particular section, which is why there is some repetition to ensure that key points are included in all relevant sections. We will however also take this point on board for future consultation documents.

Naming third parties who intend to rely on consent to process

A significant number of respondents expressed confusion in this area and some questioned whether there was actually a requirement in the GDPR to name third party controllers who intend to rely on the consent as their basis to process the personal data.

Others were of the view that it would be sufficient to simply name categories of third parties and Article 13(1)(e) of the GDPR was often quoted in justification for this (the requirement to provide the data subject with “the recipients or categories of recipients of the personal data”).

Concern was also widely expressed that the naming of all third parties will be onerous and unworkable in many cases. Some respondents also queried whether the requirement to name third parties included naming processors.

ICO's response

We accept the need for clarification in this area and will attempt to provide additional detail in the final version of the guidance. In brief, the requirements of Articles 13 and 14 concern information to be provided to the data subject (what was known under the Data Protection Act as 'fair

processing information'). These obligations are separate to the requirements placed on controllers relying on consent as their lawful basis. The information listed in Articles 13 and 14 needs to be provided to data subjects regardless of which lawful basis a controller is relying on. The consent provisions specifically say that in order for the consent to be informed the data subject "should be aware at least of the identity of the controller" (Recital 42 of the GDPR). This means that any third party controller who will be relying on the consent to process personal data will need to be identified, ie they will need to be named, whether in the original consent request or in their own subsequent specific consent request. This does not apply to processors.

Imbalance of power

Several respondents felt that further guidance was required on the subject of consent and imbalance of power between data subject and controller, which is referred to in recital 43 of the GDPR. For example, where consent is not possible in such circumstances, an indication of appropriate alternatives would be helpful, as well as suggestions that the guidance should make clear that consent should still be available for some of the processing in an employer/employee relationship.

ICO's response

We will look to include examples of when employers/public authorities may be able to rely on consent in the final version of the guidance. We have also fed this point into the WP29 work on consent.

"Opt-out consent"

Some respondents disagreed with the statement that "there is no such thing as 'opt-out consent'" and there were suggestions that an affirmative action together with an opt-out box would show valid consent.

ICO's response

We have considered the views provided, but our position has not changed. The GDPR is clear that silence and inactivity do not constitute consent, that consent must be separate from other matters, and that pre-ticked boxes do not constitute consent (even if together with an affirmative action). An affirmative action together with a failure to opt out (whether via an opt-out box or pre-ticked opt-in box) does not constitute the required active, unambiguous and separate demonstration of consent. An opt-out box might instead be valuable in demonstrating the legitimate interests basis for processing, which will be covered in separate guidance.

Existing consents

A number of respondents asked for more details on how to deal with existing consents. Requests were also made by some respondents for more time or a transitional period after May 2018 to ensure that their processing was in line with the GDPR consent requirements.

ICO's response

We appreciate that in some cases there may be a job to do in seeking new consent to comply with the GDPR standard. However, where existing consent falls short, this by definition is a necessary step in improving individuals' trust, understanding and control over use of their data (assuming there is not a more appropriate lawful basis).

In terms of a transitional period, we would emphasise that the GDPR applies from 25 May 2018, which is the date at which organisations must be compliant. The GDPR was published and technically came into force on 25 May 2016, so controllers were given two years to bring their processing into line with its requirements. In other words, the transitional period to ensure compliance is now. However, the ICO will continue to exercise its powers to achieve compliance in a fair and proportionate way.

Children

Several requests were made for further guidance on issues such as children's consent for information society services, verification of age and parental consent, Gillick competence, profiling and availability of alternative lawful bases.

ICO's response

The ICO is already developing separate guidance on the wider topic of the processing of children's personal data. These views will be taken into account in the development of that guidance.

Scientific research

There were some comments about the section on scientific research, including requests for further clarification on the specific issues affecting consent in this context such as:

- maintenance of consent over time;
- the need for more detailed guidance on the naming of parties and the future purposes of the processing at the time of data collection;
- reference to the protection offered by rules of research governance; and

- the difficulties in maintaining contact with individuals over the course of a lengthy project, and refreshing consent.

ICO's response

We will reflect some of these comments in the final draft, and are also considering a separate piece of guidance to cover the topic of scientific research, as it is likely to go beyond the issue of consent.

Guidance on other lawful bases

Most respondents acknowledged that the draft guidance is focused on consent only and is not intended to cover all the lawful bases. However, some felt that the guidance should also cover alternative bases for processing.

There were widespread calls for guidance on the application of the legitimate interests basis. For example, requests for more detail on how legitimate interests would apply to direct marketing, and some public sector organisations wanted clarification on the circumstances when this basis could be used by public authorities. Some respondents also felt that the guidance does not make it sufficiently clear that the legitimate interests basis is not limited to the private sector.

Many public sector organisations expressed a desire for guidance on the 'public task' basis. There were also several requests for guidance on what constitutes a public authority for the purposes of the GDPR and also clarification on what comprises a 'hybrid' body as referred to in the guidance.

ICO's response

This guidance will only cover consent. We do fully acknowledge the need for guidance on other lawful bases, and there is a separate project underway to develop and publish further guidance on other bases, including legitimate interests and public task, in due course. We will not be able to provide guidance on the definition of a public authority until the provisions of the new UK Data Protection Bill on this point are finalised.

ePrivacy Regulation (ePR)

Some respondents felt that there should be more reference to the proposed ePR and its interaction with the GDPR. It was suggested that without this there may be some inconsistencies and resulting confusion.

ICO's response

The ePR is currently in draft form and is still subject to debate and revision during the EU legislative process. We cannot provide any guidance on its requirements and implications until a final text has been agreed and adopted by the EU.

General issues

Other points included:

- too much emphasis on direct marketing (for example, it was felt to be unhelpful to use a direct marketing example for explicit consent);
- further clarity requested on withdrawing consent, refreshing consent, duration of consent, data retention;
- clarification of the distinction between consent and explicit consent;
- how to balance the need for separate consents against the need to be clear and concise; and
- a number of respondents pointed out that the FPS example quoted in the guidance is no longer accurate.

ICO's response

We are carefully considering the various comments received and where appropriate we will take steps to adjust, clarify or expand the guidance.

Sector themes and issues

There were numerous requests for sector specific guidance and some clear sectoral themes arising out of the responses. Some of the main sectoral issues were:

- **Health and social care** – some responses were received on the theme of the possible conflict between the requirements under the GDPR for consent and duties in the healthcare sector regarding, for example, the existing practice of relying on implied consent in order to comply with the common law duty of confidence. Other comments emphasised the need for clarity on this and related issues such as confirmation of what the appropriate lawful basis would be if consent is not available. This is relevant to both health bodies and their information sharing partners.
- **Education** – there was some overlap here with the responses relating to the definition of public authority, public task, hybrid bodies and consents for research, especially in relation to higher education institutions. Some comments were also made in the context of schools, for example in relation to the need for more

tailored guidance for small establishments, retention of records and parental consent.

- **Insurance** – several responses were received from the insurance sector raising issues such as the conditional nature of consent for insurance, how processing of special category data can be reconciled with the requirements for explicit consent and consent made on behalf of individuals (eg a family travel insurance policy). The sector recognised that there is a need to lobby Government to introduce further conditions under Article 9 in order to enable them to process special category data provided on behalf of another individual for insurance purposes.
- **Direct marketing** – a number of responses were received from this sector, but many of the issues raised are covered in the section above on 'common issues and themes' such as direct marketing as a legitimate interest (Recital 47), refreshing of existing consents and the need to distinguish between electronic and postal marketing. The ICO will shortly be consulting on content for a code of practice on direct marketing, and many of these issues may be reconsidered in that context.
- **Charities** – as with direct marketing, many of the issues raised have been referred to in the previous section. The availability of legitimate interests as a lawful basis for aspects of a charity's fundraising and more clarity on consent in the context of wealth screening/donor prospecting were other sectoral issues that were raised. Again, these issues may be reconsidered as part of our forthcoming consultation on content for a code of practice on direct marketing.

ICO's response

The ICO will focus on guidance of general application and is not able to produce sector specific guidance. However, we will seek to identify and engage with sectoral representatives where appropriate to provide sector specific advice which can inform key pieces of guidance produced by influential industry bodies.

Next steps

We are in the process of considering the comments received in response to the consultation and these will feed into the final web version of the consent guidance. As WP29 is currently intending to publish their consent guidelines in December, we anticipate being in a position to publish the final version of our guidance shortly afterwards. In the meantime, our

draft guidance remains a valuable resource for controllers seeking to comply with the GDPR.

We are also currently working on other topics under the GDPR, such as children's data, and the intention is for there to be a suite of guidance available prior to the GDPR coming into force, including on the other lawful bases.

We will also shortly be consulting on content for a statutory code of practice on direct marketing.

For further guidance the GDPR and details of what to expect when can be found on our [Data protection reform webpages](#).

List of respondents

Aberystwyth University
ABTA
Action for Children
Action on Hearing Loss
Advertising Association
Advertising Standards Authority
Aegon UK
Aetna Insurance Company Ltd
Altus Ltd
Amaze One
American Express
Anthony Nolan (the UK's blood cancer charity)
Arthritis Research UK
Association for digital rights protection (ADRP)
Association of British Insurers
Association of School and College Leaders
Atom Bank Plc
Aviva
AXA UK
Baker McKenzie LLP obo CACI Limited
Barbican Centre
Bates Wells Braithwaite
BetFred
Betsi Cadwaladr University Health Board
Betway Ltd
BGL Group
Bible Society
BIPAR
Bircham Dyson Bell LLP
Bird & Bird
BlacklerRoberts Ltd
Blackpool Council
Blesma, The Limbless Veterans
Blue Cross
Bortstein LLP
Brethertons LLP
British Bankers' Association (joint response with the Association for Financial Markets in Europe)
British Healthcare Business Intelligence Association
British Heart Foundation
British Insurance Brokers' Association (BIBA)
British Parking Association
BT
Bupa UK
Cabot Credit Management Ltd

Callcredit
Campaign to Protect Rural England
Cancer Research UK
CASE Europe
Catholic Agency for Overseas Development (CAFOD)
Cats Protection
Cheshire Datasystems Ltd
Children's charities' coalition on internet safety
Children's Hearings Scotland
Christian Witness to Israel
Church Army (four responses)
Citizens Advice
City of Edinburgh Council
Claire House Children's Hospice
CLOSER - the UK longitudinal studies consortium
Coalition
Colleges of the University of Cambridge
Comic Relief
Complianitee Ltd
Computer Network Defence Ltd
Consentua Trading, trading as KnowNow Information Ltd
Consumer Data Research Centre, UCL
Consumer Finance Association
Co-operative Group Limited
Copart UK Limited
Craven District Council
Crisis
Criteo
Cunningham Lindsey
Czech Data Protection Association
Data Analysts User Group (DUG)
Data Locator Group Ltd
DBS Datamarketing
Defend Digital Me
Department for Transport
Department for Work and Pensions
Derbyshire County Council
Direct Line Group
Direct Marketing Association (DMA)
DMG Media
Donor Experience
DST Applied Analytics Limited
Durham University
DYNA Consulting Ltd
E.ON
Eduserv
Email Sender & Provider Coalition

eMBED Health Consortium
Engineering Employers' Federation (EEF)
Engineering Employers' Federation, Northern Ireland (EEF NI)
Entity Group
Euro Surf Ltd & Taycliff Ltd
European Powder Metallurgy Association
Eversheds Sutherland LLP
Experian
Feba Radio
Forbes Solicitors
FPM Dingo
Fundraising regulator
GB Group
General Medical Council
Genetic Alliance UK
Gigya
GLH Hotels Management (UK) Limited
Godpo
Great Ormond Street Hospital Children's Charity
Habitat for Humanity Great Britain
Hampshire County Council
Haymarket Media Group Limited
Health Research Authority
HeLEX - Centre for Health Law and Emerging Technologies
Help For Heroes
Hiscox
Hogan Lovells International LLP
Homeserve Plc
Hospice of St Francis
Huawei Technologies Ltd
iCompli Limited
Imperial College
Imperial War Museum
Independent Fundraising Standards and Adjudication Panel for Scotland
Independent Schools Council
Institute of Development Professionals in Education
Institute of Fundraising
Institute of Practitioners in Advertising
International Fund for Animal Welfare
International Fundraising Consultancy
Internet Advertising Bureau UK
Irwin Mitchell LLP
ITM Ltd
Jisc
Johnston Carmichael LLP
Join the Dots (Research) Ltd
Kantara Initiative

Kent Community Health NHS Foundation Trust
Kidney Research UK
Krowdthink Ltd
Lawyers in Charities
League Against Cruel Sports
Leeds City Council
Lloyd James Media Ltd
Lloyd's Market Association (LMA)
London Borough of Barnet
Lucy Air Ambulance for Children
Maclay Murray & Spens LLP
Market Research Society
Marketing Innovation Group
Mass Consultants Ltd
Meeco
Merton Council
Methodist Homes (MHA)
Mills & Reeve LLP
Mondelez
Moravia IT
Mydex
MyLife Digital
National Association of Welfare Rights Advisers
National Council for Voluntary Organisation
National Data Guardian
National Portrait Gallery
National Records of Scotland
National Union of Journalists
NCC Group
NHS Calderdale Clinical Commissioning Group
NHS England (joint response with NHS Digital and NHS Confederation)
NHS Grampian
NHS Wales Informatics Service
North Wales Information Governance Group
NSPCC
Office of the Scottish Charity Regulator
Open University
Opt-4
Oxfam
Ozan Ltd
PDSA
Peak District National Park Authority
Percipience/Fusion Group
Polaris U.K. Limited
Police Scotland
Poole Housing Partnership Ltd
Prisoners' Education Trust

Pritchetts Law
PrivacyCheq
Priviness
Professional Publishers Association (PPA)
PromoVeritas Ltd
ProspectSoft Ltd
Public Health Wales
QBE Insurance (Europe) Ltd
Quntm Ltd/Security Circle
Rawlison Butler LLP
REaD Group
Reed Smith LLP
Research Partnership
Response One
Royal College of Paediatrics and Child Health
Royal College of Physicians
Royal Free Charity
Royal Mail Group
Royal Marsden Cancer Charity
RSPCA
Rux Burton Associates
Saint Francis Hospice
Sandettie Ltd
Scottish Government
Selectabase Limited
Signatu AS
Simmons & Simmons LLP
Skyhigh Networks
Somerset County Council (2 responses)
South Central and West Commissioning Support Unit
South Lanarkshire Leisure and Culture
South Somerset District Council
South West Water
Southern Health and Social Care, Northern Ireland
Southern Water
St Albans City & District Council
Staysure
Sussex Partnership NHS Foundation Trust
Symantec
Tearfund
techUK
Teeside University
Telford & Wrekin Council
The Bible Reading Fellowship (BRF)
The Community Scheme
The Economist
The Geffrye Museum of the Home

The Guide Dogs for the Blind Association
The Guinness Partnership
The Incorporated Society of British Advertisers (ISBA)
The Institute of Chartered Accountants in England and Wales (ICAEW)
The John Lyon School
The National Gallery
The Natural History Museum
The Royal British Legion
The Toy & Hobby Association
UCL
UK Asset Resolution
UK Data Archive
UK List & Press Services Ltd
UNISON
Universities and Colleges Information Systems Association
University Hospital Birmingham NHS Foundation Trust
University of Birmingham
University of Manchester (2 responses)
University of Oxford
University of Southampton
University of Westminster Students' Union
Vanquis Bank
Verastar Limited
Visma Spcs AB
Warner Bros
Warrington Borough Council
WaterAid
Wealth Management Association
Wellcome Trust (joint response with The Academy of Medical Sciences, British Heart Foundation, Economic and Social Research Council, Medical Research Council, NHS European Office, PHG Foundation and Wellcome Trust Sanger Institute)
Welsh Government
Western Sussex Hospitals NHS Foundation Trust
Willis Towers Watson
World Cancer Research Fund
World Horse Welfare
WWF UK
Yoti Ltd
4 Life Direct International
30 individuals