

<b>Name and role of individual that submitted the question:</b>	[REDACTED]
<b>Name of organisation:</b>	[REDACTED]
<b>Case reference:</b>	00000007
<b>Name of case handler:</b>	[REDACTED]
<b>Type of processing proposed:</b>	Digitisation
<b>Approximate time until launch:</b>	0-3 months
<b>Date question confirmed:</b>	20/04/2023
<b>Date response provided:</b>	09/06/2023
<b>Question:</b>	<p><b>You are exploring the possibility of using the ChatGPT API to draft responses to clients and prospective clients. Once you have a contract for your clients you believe you may be able to rely on consent and explicit consent to process personal and special category data in this manner. However, you have asked whether you would be able to rely on legitimate interests when processing data of prospective clients, and whether updating your privacy policy would be sufficient for processing data of current clients.</b></p>
<b>Response:</b>	<p><b>Our comments do not present an exhaustive list of all the possible data protection issues relating to the use of ChatGPT. They are intended as a starting point, and we recommend that you seek your own legal advice in relation to this issue.</b></p> <p><b>Summary</b></p> <ul style="list-style-type: none"> <li>• You will firstly need to determine whether OpenAI are a controller, joint controller or a processor for the processing of personal data relating to the use of ChatGPT as described above.</li> <li>• You have identified legitimate interests as a potential lawful basis to process personal data of clients using ChatGPT, if necessary. To rely on legitimate interests, you would need to identify a</li> </ul>

	<p>legitimate interest or interests, and demonstrate that the processing is necessary to achieve it. You would then have to balance your interests against the rights and freedoms of individuals.</p> <ul style="list-style-type: none"><li>• Where special category data is processed, which includes health data, an additional condition for processing the data is required. The additional conditions can be found in Article 9 of the UK GDPR. This applies whether the data is requested or provided without prompting by individuals.</li><li>• To rely on consent as a lawful basis, you would need to make sure the consent is freely given, specific and informed. The data subject should signify agreement to the processing by a clear affirmative action.</li><li>• Updating your privacy policy would not be sufficient to rely on consent as a lawful basis as it would not satisfy UK GDPR consent requirements. However, you must still update your privacy policy with a detailed explanation of your use of ChatGPT.</li><li>• You must design and implement this new processing with data protection built in from the start. This will help you comply with your lawfulness, fairness and transparency obligation.</li><li>• If you choose to use ChatGPT to make decisions about your clients and prospective clients in future you will need to understand the restrictions that the UK GDPR currently places on solely automated decision making with legal or similarly significant effects.</li></ul> <p><b>Initial considerations when sharing data with OpenAI</b></p> <p>You will need to establish whether OpenAI are a controller, joint controller or a processor for the processing of personal data. If OpenAI are acting as a controller (i.e. where they are determining the purposes and means of processing) you will need to establish a lawful basis and, if relevant, an Article 9 condition for sharing personal data or special category personal data</p>
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with them. We have included a link to our guidance on controllers and processors at the end of this note for your reference.

### **Lawful bases and Article 9 conditions**

If OpenAI are acting as a controller or joint controller, you must identify an appropriate lawful basis for sharing personal data with them. You have identified legitimate interests and consent as possible lawful bases for sharing personal data with OpenAI.

#### *Legitimate interests*

Legitimate interests can be used where "processing is **necessary** for the purposes of the legitimate interests pursued by the controller ... except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject". In order to rely on legitimate interests to process personal data using ChatGPT you would therefore need to identify a legitimate interest(s), demonstrate that the processing is necessary to achieve it, (ie it's a targeted and proportionate way of achieving your purpose), and balance the identified legitimate interest against the individual's individual interests, rights and freedoms.

The UK GDPR does not define what factors to take into account when deciding if your purpose is a legitimate interest. As [our guidance](#) notes, it could be to grow your business. We understand that using ChatGPT to draft responses would improve customer service by reducing the time spent responding to these enquiries, improve response times and free up resources to dedicate to other areas.

In demonstrating whether the processing is 'necessary', you will need to consider whether the processing is proportionate and adequately targeted to meet its objectives, and whether there is any less intrusive alternative. As part of this, you will need to consider whether sharing personal data, including special category health data, with a third party organisation (OpenAI) is a proportionate response to the desire to improve customer service by reducing response times.

You will also need to balance the expected benefits to your business against the rights and freedoms of your existing and prospective clients. We recommend you complete a legitimate interest assessment (LIA) and keep a record of decisions you make based on this. I have included a link to a LIA template below.

*Special category data*

When clients and prospective clients are contacting you, we understand that there is a chance that they could submit special category data, for example, data concerning health such as details of injuries sustained in an accident. Where special category data is processed, an additional basis for processing is required, with the relevant bases outlined in Article 9 of the UK General Data Protection Regulation (UK GDPR).

Where an individual provides special category data and without prompting, the ICO understands that it's not always possible to have an Article 9 condition in place. However, special category data should be handled sensitively, and you should carry out a review of whether it is necessary to keep it as soon as possible. Where it isn't necessary, it should be deleted, and where you do need to keep it a suitable condition should be identified. Please note that this may (depending on the circumstances) include special category data that can be inferred from information provided, and not just personal data explicitly provided.

*Consent and explicit consent*

Consent may be an appropriate lawful basis where you have a direct relationship with the individuals whose data you want to process.

When relying on consent, you must ensure that it is freely given, specific, informed, and involve an unambiguous opt-in. You would also need to make it easy for individuals to withdraw consent at any time. Consent must provide genuine control to individuals, and you will need to consider whether, in practice, withdrawal of consent by an individual would be effective (eg if it would not affect processing operations taking place by OpenAI).

	<p>It can be difficult to ensure you collect valid consent for more complicated processing operations, such as those involved in AI. The key is that individuals understand how you are using their personal data and have consented to this use.</p> <p>Explicit consent (as a special condition, required to process special category data) goes further, requiring:</p> <ul style="list-style-type: none"><li>• confirmation through a clear statement rather than by any other type of affirmative action;</li><li>• specification of the nature of the special category data; and</li><li>• that it be kept separate from any other consents you are seeking.</li></ul> <p>We recommend that the consent for you to process clients' personal data via ChatGPT is not included in your contracts with clients, as consent is unlikely to be 'freely given' if the processing is a condition of the contract. Clear, written consent should be obtained before you process personal data through ChatGPT.</p> <p>You also need to reassure clients that any refusal to grant consent will not affect their access to use of your services. It is more challenging to obtain and demonstrate that consent is freely given if there is a power imbalance between the organisation and an individual. We would therefore recommend that you explain to individuals how they can still use your services without consenting to the use of ChatGPT.</p> <p>Please note, that due to the requirements for obtaining consent (an active opt-in) and explicit consent (a clear affirmative statement), updating your privacy policy for current clients would not be sufficient to satisfy the legal standards required by the UK GDPR for 'consent'. <i>Privacy policy requirements</i></p> <p>The UK GDPR requires controllers to be transparent with individuals about what they do with their personal data. Articles 13 and 14 UK GPDR specify the types of information that needs to be provided to individuals.</p> <p>We suggest that your privacy policy (in addition to the above requirements) includes an overview of the use of</p>
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	<p>ChatGPT, including the following information:</p> <ul style="list-style-type: none"><li>• What is ChatGPT;</li><li>• Why you are using it;</li><li>• How it works;</li><li>• What you do with the data;</li><li>• Information about any human review and editing; and</li><li>• How OpenAI use data – this could include a link to their terms.</li></ul> <p>Including this information will help you comply with your transparency obligation.</p> <p>We do not believe a high level of technical detail would be necessary in this case, but you should include sufficient detail to allow individuals to understand how and why ChatGPT is being used. This could also help reassure clients and prospective clients that you are using their data fairly. We have included a link to our “explaining decisions made using AI” guidance below, which could help you build your explanation.</p> <p>You will also need to comply with Article 12 UK GDPR, which specifies requirements about how the information detailed in Articles 13 and 14 UK GDPR is communicated.</p> <p><i>Further lawful bases and Article 9 conditions</i></p> <p>Although we have focused on legitimate interests and consent/explicit consent in our advice, it is important to highlight that these are not the only lawful bases for processing personal data and special category data available. You will need to determine the most appropriate lawful basis for your processing.</p> <p>You should also note that many of the Article 9 conditions for processing special category data have additional requirements laid out in Schedule 1 of the Data Protection Act 2018 (DPA18).</p> <p><b>Wider data protection considerations</b></p> <p><i>Automated decision making</i></p> <p>We note that at present you are only planning to use ChatGPT to draft response letters, which will then be</p>
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	<p>checked and edited where necessary before they are sent to your clients and prospective clients. We also note that you may consider using ChatGPT for additional purposes in the future. If you do decide to expand the use of ChatGPT, you should be aware of your obligations, particularly if you use it to make decisions about individuals.</p> <p>Article 22 of the UK GDPR says that individuals “have the right not to be subject to a decision based solely on automated processing, including profiling, which produces <i>legal effects</i> concerning him or her or <i>similarly significantly affects</i> him or her.” Where an organisation has satisfied certain conditions, such as receiving explicit consent from an individual, they can carry out solely automated decisions. However, the restrictions on this are a lot more significant than on decisions made with human involvement.</p> <p>We therefore suggest that you consider the possible implications of Article 22 in respect of whether a decision would have a legal or similarly significant effect, if you decide to use ChatGPT to make decisions in future.</p> <p>Below we have included links to our “guidance on AI and data protection”, our “explaining decisions made using AI” and further guidance on rights relating to automated decision making.</p> <p>If you do decide to use ChatGPT for other purposes and have any questions about compliance with your data protection obligations please feel free to contact this service again.</p>
<p><b>Next steps:</b></p>	<p>We hope this response is helpful and provides guidance on how you should approach compliance in processing personal data using ChatGPT. If you have any further questions, please submit them to us and we will aim to answer them in due course. Please find links to further guidance below that may help clarify our advice. In the next few days we will send you a link to a survey asking you to provide feedback on the service you have received. We would appreciate it if you could complete this at your earliest convenience.</p>

	<p><b>Note:</b> This response should not be considered legal advice, and you are advised to seek your own legal advice if required. This response is also without prejudice to any future intervention by the Commissioner in accordance with his tasks and powers, and in line with his Regulatory Action Policy<sup>1</sup>.</p>
<b>Further reading:</b>	<p><a href="#">Generative AI: eight questions that developers and users need to ask   ICO</a> <a href="#">Special category data   ICO</a> <a href="#">Legitimate interests   ICO</a> <a href="#">gdpr-guidance-legitimate-interests-sample-lia-template.docx (live.com)</a> <a href="#">Consent   ICO</a> <a href="#">Lawful basis interactive guidance tool   ICO</a> <a href="#">Rights related to automated decision making including profiling   ICO</a> <a href="#">Guidance on AI and data protection   ICO</a> <a href="#">Explaining decisions made with AI   ICO</a> <a href="#">Data protection by design and default   ICO</a> <a href="#">Controllers and processors   ICO</a></p>

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<sup>1</sup> [Regulatory Action Policy \(ico.org.uk\)](#)