

Data Protection and PECR Training

Supporting notes and further reading

Module 4 : Processing special category data



Introduction

These notes are designed to set out the key points covered during module 4 of our data protection online training programme. These notes are not designed to replace the online module, but are intended to be a point of reference for your follow-up study. You may find it helpful to have these notes and the relevant legislation open whilst watching the online module:

- [The UK General Data Protection Regulation \(UK GDPR\)](#)
- [The Data Protection Act 2018 \(DPA\)](#)

This document contains:

- [Supporting notes](#)
- [Further reading](#)

Supporting notes

Module 4 looks at processing special category data. It covers:

- [Special categories of data](#)
- [Article 9 conditions for processing](#)

- [Article 9\(2\) conditions \(a\) and \(c\) to \(f\)](#)
- [Article 9\(2\)\(a\) explicit consent](#)
- [Article 9\(2\)\(c\) vital interests](#)
- [Article 9\(2\)\(d\) not-for-profit \(d\)](#)
- [Article 9\(2\)\(e\) manifestly made public](#)
- [Article 9\(2\)\(f\) legal claims](#)
- [Article 9\(2\) conditions \(b\) and \(h\) to \(j\)](#)
- [Schedule 1 Part 1 paragraph 1: employment, social security and social protection](#)
- [Schedule 1 Part 1 paragraph 2: health or social care purposes](#)
- [Schedule 1 Part 1 paragraph 3: public health](#)
- [Schedule 1 Part 1 paragraph 4: archiving, research and statistics](#)
- [Article 9\(2\) condition \(g\)](#)
- [Schedule 1 Part 2 substantial public interest conditions](#)
- [Schedule 1 Part 2 paragraph 6: statutory and government purposes](#)
- [Processing for reasons of substantial public interest](#)
- [Schedule 1 Part 2 paragraph 8: equality of opportunity or treatment](#)
- [Consent and the substantial public interest conditions](#)
- [The Appropriate Policy Document \(APD\)](#)

Special categories of data

[Special categories of data](#) are listed in Article 9 of the UK GDPR.

These are data concerning:

- Racial or ethnic origin
- Political opinions
- Religious or philosophical beliefs
- Trade union membership
- [Genetic data](#)
- [Biometric data when used for identification purposes](#) (this might involve using facial recognition technology or fingerprint scanning to identify an individual)
- [Health data](#) (physical or mental)
- Data concerning an individual's sexual life or orientation

Article 9 conditions for processing

In order to give this data [extra protection](#), processing is prohibited unless certain conditions apply.

There are [ten conditions](#) listed in Article 9. These are listed (a) to (j). These conditions divide into two groups:

1. The first group is (a) and (c) to (f).
These conditions are all complete as they stand in the UK GDPR.
2. The second group is (b) and (g) to (j).
These conditions refer to processing authorised by, or on the basis of, UK law.

This means that for these conditions, we have to go to the DPA to find that authorisation or basis in UK law.

Article 9(2) conditions (a) and (c) to (f)

These conditions are grouped together because they are complete as they stand in the UK GDPR.

They cover in summary:

- (a) explicit consent;
- (c) vital interests;
- (d) certain types of processing by a not-for-profit organisation;
- (e) data which has manifestly been made public by placing it in the public domain; and
- (f) processing necessary for the exercise or defence of legal claims.

Article 9(2)(a) explicit consent

The first condition in Article 9(2) is (a) [explicit consent](#).

Explicit consent is not defined but is not that different from the usual high standard of consent. This means that it must be freely given and involve a specific, informed and unambiguous indication of the individual's wishes.

The key difference is that 'explicit' consent must be affirmed in a **clear expressed statement of consent** (this can be oral or written).

Example: in Module 1 we discussed my gym asking me for consent to process my health data

- Remember a controller must always have an Article 6 lawful basis for processing. In these circumstances, this might be consent.
- Because health data is special category data, the gym will also need an Article 9 condition for processing.
- The most appropriate condition is explicit consent.
- The gym membership form has a section which explicitly states I agree to it processing my health details should I require medical help. I sign it to clearly signal my agreement.
- In this example, there is a clear link between the Article 6 lawful basis (consent) and the Article 9 condition for processing (explicit consent) but we will see that this is not always the case with the other special category conditions.

Example: the gym now wants to take a biometric fingerprint from me and then use this to grant me access to the facilities

- Because it is proposing the processing of biometric data for the purposes of identification, it needs an Article 9 condition for processing, as well as the usual Article 6 lawful basis.
- The gym asks me for my explicit consent to process this biometric data.
- The membership form has a section which explicitly states I agree to the gym processing my biometric data to identify me. This consent should be clearly separate to the consent to process my medical details – they should not be bundled together.
- Remember though that consent must be freely given. If I am given no choice in the matter, and must agree to this processing in order to gain access to the facilities, the consent is not valid. I have not been given a genuine choice.
- This means the gym must offer an alternative means of entry which is not detrimental to me in any way - a swipe card would be an acceptable alternative.

Article 9(2)(c) vital interests

The [vital interests](#) condition might be applicable if a controller needs to process special category data in order to protect the vital interests of an individual in situations where they are incapable of giving consent.

This almost exactly mirrors the vital interests basis for processing in Article 6.

Remember this is a matter of life and death - for example, processing to enable the treatment of an unconscious traffic accident victim.

The Article 9 condition states that this only applies if the data subject is physically or legally incapable of giving consent.

Article 9(2)(d) not-for-profit

The [not-for-profit](#) condition is designed for use for not-for-profit bodies, for example by charities, clubs, political parties, churches, trade unions and other associations. All the organisations must have a political, philosophical, or religious aim.

A charity will be considered to have a philosophical aim if it aims to help people for social reasons, for example, if it helps the homeless.

The condition is aimed at organisations managing their membership and processing their member's personal data for administrative purposes.

The condition does not permit disclosure of personal data outside that body without the consent of the data subjects.

Example: a not-for profit charity supporting refugees

- The charity is an organisation with religious and philosophical aims.
- It might process the personal data of the refugees if they have regular contact with the charity and are being supported by it.
- The data might include special category data if the charity records whether a migrant has a particular medical condition which affects this support.

- The charity might rely on legitimate interests as its Article 6 lawful basis for processing and its Article 9 condition could be not-for-profit.
- If relying on this condition, then the charity is not able to disclose this data to any third party.

Article 9(2)(e) manifestly made public

If the data subject [manifestly makes their special category data public](#) then it may be possible to rely on this condition to process that particular data.

The controller must be confident that it was the individual themselves who actively chose to make their data public, and that this was unmistakably a deliberate act on their part.

For example, a MP who has stated their political views in a published leaflet has manifestly made this data public.

An organisation might reproduce this data in a blog and rely on this condition for processing.

Article 9(2)(f) legal claims

The [legal claims or judicial acts](#) condition may apply if the controller can demonstrate that it is necessary to process special category data in order to establish, exercise or defend legal claims, or if it is a court acting in its judicial capacity.

It includes processing necessary for:

- actual or prospective court proceedings;
- obtaining legal advice; or
- establishing, exercising or defending legal rights in any other way.

Example: a child falls off a horse at a riding stable and breaks their arm

- The stable records details of the injury and makes a record of what happened.

- Although there is no actual or expected court claim, the purpose is to establish that the stable fulfilled its duty of care to the child, and to defend against any prospective personal injury claims.
- the Article 6 lawful basis might be legitimate interests and the Article 9 condition might be legal claims.

Article 9(2) conditions (b) and (h) to (j)

These five conditions cover processing necessary for:

- (b) employment and social security and social protection;
- (g) substantial public interest;
- (h) health and social care;
- (i) public health; and
- (j) archiving, research and statistical purposes.

These five conditions all require authorisation, or a basis, in UK law.

This means we must refer to the DPA and the relevant section is in Part 2 Chapter 2.

Section 10 subsection 2 tells us that processing for reasons covered in (b) (h), (i) or (j) of Article 9 of the UK GDPR must meet a condition in Part 1 Schedule 1 of the DPA.

Condition (g) substantial public interest is not covered here – this is addressed below.

There is one paragraph in Schedule 1 Part 1 of the DPA for each of the Article 9 conditions we have just identified – (b), (h), (i) and (j).

Schedule 1 Part 1 paragraph 1: employment, social security and social protection law

[Paragraph 1](#) says that the processing is necessary for the purposes of performing or exercising obligations or rights which are imposed or conferred by law on the controller or the data subject in connection with employment, social security or social protection.

The controller must be able to identify the relevant law.

Example: an employer recording the number of days an employee has been absent due to sickness

- The employer has a legal obligation in connection with employment law and the payment of statutory sick pay to do this.
- This provides the Article 6 lawful basis for processing.
- It also means the employer can apply the Article 9 employment, social security and social protection condition with reliance on Schedule 1 paragraph 1.
- The employer must identify the specific legal obligation imposed by law.

Schedule 1 Part 1 paragraph 2: health or social care purposes

[Paragraph 2](#) lists the purposes of the processing it is relevant to:

- (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 services.

It also goes on to outline conditions and safeguards regarding obligations of secrecy which are required.

These are the conditions and safeguards in Article 9(3) of the GDPR (obligations of secrecy) and section 11(1) of the DPA.

Example: a doctor may process the health data of a patient to provide a medical diagnosis

- The Article 6 lawful basis for processing might be legitimate interests.
- The Article 9 condition is health or social care purposes with reliance on Schedule 1 paragraph 2.
- The doctor has a professional obligation of secrecy.

Schedule 1 Part 1 paragraph 3: public health

[Paragraph 3](#) states this condition is met if the processing -

- (a) is necessary for reasons of public interest in the area of public health,
and
- (b) is carried out –
 - (i) by or under the responsibility of a health professional,
or
 - (ii) by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law.

Confidentiality is a key safeguard when relying on this condition.

Organisations must make sure that they are able to demonstrate that they will owe a duty of confidentiality to the individuals whose data they are processing. This will be easiest to demonstrate if organisations make it clear at the point of collection that the relevant data is being provided in confidence, will be treated as confidential, and only disclosed in defined circumstances for public health purposes.

Organisations must also explain why processing is necessary for reasons of public interest in the area of public health.

Example: an organisation processing health data to monitor an epidemic or pandemic

- The processing must be necessary for reasons of public interest in the area of public health.

- The Article 6 lawful basis for processing might be legitimate interests or public task.
- The Article 9 condition is public health with reliance on Schedule 1 paragraph 3.
- The organisation must owe a duty of confidentiality to the individuals whose data it is processing.

Schedule 1 Part 1 paragraph 4: processing necessary for archiving, research or statistical purposes

[Paragraph 4](#) states this condition is met if the processing –

- (a) is necessary for archiving purposes, scientific or historical research purposes or statistical purposes,
- (b) is carried out in accordance with Article 89(1) of the GDPR (as supplemented by section 19), and
- (c) is in the public interest.

The safeguards and restrictions for this processing are set out in Article 89 of the UK GDPR and section 19 of the DPA.

For example, a controller should consider anonymisation or pseudonymisation of the data and must be able to demonstrate that the processing is not likely to cause damage or distress to the individuals.

Example: a hospital wishes to process a patient's medical data as part of a clinical trial

- In accordance with clinical trials regulations, the hospital will ask the patients for their informed consent to take part in the trial but it will use the scientific research condition to actually process the personal data.
- This means that even if the patient drops out of the trial, the data already collected can continue to be used.
- The Article 6 lawful basis for processing might be public task.
- The Article 9 condition is scientific research with reliance on Schedule 1 paragraph 4.

Article 9(2) condition (g)

Article 9(2)(g) - [processing for reasons of substantial public interest](#) - is addressed separately.

Section 10 subsection 3 states that for condition (g), the processing must meet a condition in Part 2 of Schedule 1.

Part 2 contains [23 different substantial public interest conditions](#) to choose from.

Schedule 1 Part 2 substantial public interest conditions

The 23 substantial public interest conditions are set out in paragraphs 6 to 28 of Schedule 1 Part 2 of the DPA:

6. Statutory and government purposes
7. Administration of justice and parliamentary purposes
8. Equality of opportunity or treatment
9. Racial and ethnic diversity at senior levels
10. Preventing or detecting unlawful acts
11. Protecting the public
12. Regulatory requirements
13. Journalism, academia, art and literature
14. Preventing fraud
15. Suspicion of terrorist financing or money laundering
16. Support for individuals with a particular disability or medical condition
17. Counselling
18. Safeguarding of children and individuals at risk
19. Safeguarding of economic well-being of certain individuals
20. Insurance
21. Occupational pensions
22. Political parties
23. Elected representatives responding to requests
24. Disclosure to elected representatives
25. Informing elected representatives about prisoners
26. Publication of legal judgments
27. Anti-doping in sport
28. Standards of behaviour in sport

Remember these are the possible conditions a controller can rely on when applying Article 9(2)(g) substantial public interest.

They are wide ranging and the controller must choose which one is applicable and look at the provisions to see how each one works.

Many are very specific and relevant to particular processing or a category of data.

Schedule 1 Part 2 paragraph 6: processing necessary for statutory and government purposes

- (1) This condition is met if the processing -
 - (a) is necessary for a purpose listed in sub-paragraph (2), and
 - (b) is necessary for reasons of substantial public interest.
- (2) Those purposes are -
 - (a) the exercise of a function conferred on a person by an enactment or rule of law;
 - (b) the exercise of a function of the Crown, a Minister of the Crown or a government department.

To rely on paragraph 6(2)(a), the controller must be able to identify the specific enactment or law which confers the function.

To rely on this condition, the controller must be able to identify the specific function in question.

At subsection (1)(b) the condition states the processing must be necessary for reasons of substantial public interest.

Processing for reasons of substantial public interest

For some of the Part 2 conditions, the [substantial public interest](#) element is built in. For others, the controller needs to be able to demonstrate that its specific processing is "necessary for reasons of substantial public interest" on a case-by-case basis.

This is required by paragraph 6 when processing special category data.

This means the controller must explain why the specific processing is necessary for the public interest. This covers a wide range of values and

principles relating to the public good, or what is in the best interests of society.

Commercial or private interests are not the same as a public interest, and it is not enough for a controller to point to its own interests. There must be a wider public benefit.

Substantial public interest means the public interest needs to be real and of substance. Given the inherent risks of special category data, it is not enough for a controller to make a vague or generic public interest argument – it should be able to make specific arguments about the concrete wider benefits of its processing.

Our guidance discusses this further and there is a [table](#) showing which conditions require the controller to show their substantial public interest arguments.

Example: processing for statutory and government purposes – Article 9(2)(g) with reliance on Schedule 1 Part 2 paragraph 6

- The Health and Safety Executive (HSE) may have a function to undertake inspections at an industrial site to assess chemical emissions and may need to process health information to perform this function.
- The HSE is exercising a function which has a basis in law. It must be able to identify the relevant law. It must also explain why the processing is necessary for reasons of substantial public interest.
- The same basis in law means public task can be applied as the Article 6 lawful basis for processing.
- The HSE can apply Article 9(2)(g) substantial public interest with reliance on paragraph 6 statutory and government purposes for the processing.

Schedule 1 Part 2 paragraph 8: processing for the purposes of monitoring equality of opportunity or treatment

Processing for the purposes of monitoring equality of opportunity or treatment must be with a view to enabling such equality to be promoted or maintained.

There is more to this condition - for example, it lists the specified categories of personal data it applies to.

There are also various exceptions given – for example, the controller cannot rely on this condition if the processing is likely to cause damage or distress to an individual.

Example: processing for the purposes of monitoring equality of opportunity or treatment – Article 9(2)(g) with reliance on Schedule 1 Part 2 paragraph 8

- An employer like the ICO might process special category data about its employees.
- This might be racial and ethnic data or data about religious beliefs and the intention is to monitor equality of opportunity across the organisation.
- The Article 6 lawful basis might be legal obligation.
- The condition for processing is Article 9(2)(g) substantial public interest with reliance on Schedule 1 paragraph 8 equality of opportunity or treatment.

Consent and the substantial public interest conditions

Many of the substantial public interest conditions only apply if there is a good reason why a controller cannot get [valid explicit consent for processing](#).

As a general rule, for these conditions a controller should first consider whether it could give individuals a choice and only process their special category data with their explicit consent. However, there may be a good reason why a controller should not give individuals an upfront choice.

For example, the condition at paragraph 18 is concerned with the processing of data for the safeguarding of children or individuals at risk.

Asking for consent for the processing might prejudice the provision of the required protection, for example, protecting an individual from physical, mental or emotional harm.

There is a [table](#) in the guidance which shows which conditions require the controller to justify why consent for the processing was not obtained from the data subject.

The Appropriate Policy Document (APD)

An [appropriate policy document](#) (APD) is a short document outlining a controller's compliance measures and retention policies for special category data.

An APD is required by almost all of the substantial public interest conditions (and also for the employment, social security and social protection condition).

In its APD, a controller should briefly outline:

- the Schedule 1 condition (or conditions) it is relying on
- its procedures for complying with each of the principles
- its retention and deletion policies
- an indication of the retention period for the specific data

The ICO has produced an [APD template](#) to help controllers meet this requirement. There are links to this template in the guidance.

There is also a [table](#) showing which conditions require an APD.

[Back to top](#)

Further reading

In the [Guide to the UK GDPR](#) have a look at the section '[Special category data](#)'. Read the 'At a glance' and 'In brief' questions and answers.

At the bottom of the page click on the link to take you to the detailed [guidance on special category data](#). You should take some time to read these paragraphs but in particular, look at:

- ['What is biometric data?'](#)
- ['What about inferences and educated guesses?'](#)
- ['How do the conditions work?'](#)

Then look at each of the [conditions for processing](#) which are listed.

Find an example of an employer who is being sued by an employee following an accident at work. Which condition for processing can the employer apply in order to pass health details concerning the accident to its solicitors (see the yellow boxes for examples).

Find an example where a church is processing personal data of its members and supporters in order to run church activities and provide pastoral care. Which condition for processing might it apply to process the data which reveals their religious belief? (See the yellow boxes for examples).

The questions concerning the substantial public interest conditions are all worth a read:

- [What substantial public interest conditions are available?](#)
- [How do the substantial public interest conditions work?](#) (Note the useful table)
- [What are 'reasons of substantial public interest'?](#)
- [What is the role of consent?](#)
- [What is an appropriate policy document?](#)

Don't forget to look at our [appropriate policy document template](#). The ICO's [APD](#) shows you what one might look like in practice.

[Back to top](#)

KNOWLEDGE SERVICES
UPDATED: 29 APRIL 2022