

## Guidance on the Lawful Bases for Processing Personal Data

### 1. Introduction

The General Data Protection Regulation (GDPR) requires us to have an identified lawful basis for each processing activity we carry out on personal data.

Most lawful bases require that processing is 'necessary' for a specific purpose. If you can reasonably achieve the same purpose without the processing, you won't have a lawful basis.

If your purposes change, you may be able to continue processing under the original lawful basis, if your new purpose is compatible with your initial purpose (unless your original lawful basis was consent).

It is important that your lawful bases are documented as part of your school/trust's body of evidence of GDPR compliance. Including them in your data asset register is one way of doing this.

Your **privacy notices** should include your lawful bases for processing, as well as the purposes of the processing.

### 2. Lawful Basis

There are **6 lawful bases** and no single basis is better, or more important, than the others. They are:

- ❖ **Contractual obligation:** the processing is necessary for a contract with an individual, or because they have asked for specific steps to be taken before entering into a contract
- ❖ **Legal obligation:** the processing is necessary to comply with the law (not including contractual obligations)
- ❖ **Vital interests:** the processing is necessary to protect someone's life
- ❖ **Public task:** the processing is necessary to perform a task in the public interest or for your school/trust's official functions, and the task or function has a clear basis in law
- ❖ **Legitimate interests:** the processing is necessary for your school/trust's 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)
- ❖ **Consent:** the individual has given clear consent for their personal data to be processed for a specific purpose. It must be as easy to withdraw as it is to give, at which point the processing must stop.

### 3. Lawful Basis in the School Context

There will be some data processing that schools and ODST are required to do by law, and is therefore a **legal obligation**, e.g., provide information to the DfE or LA.

**Contractual obligation** will be applicable for the data processing necessary for the delivery of staff employment contracts, e.g., payroll, benefits and certain disciplinary issues.

**Public task** will be appropriate for many of the data processing tasks you carry out as they are about keeping the children and staff safe and running your school and ODST effectively.

Sometimes **legitimate interests** will be the most appropriate lawful basis, e.g., data sharing to take part in a national research project, for example or introducing a system for recording phone calls.

**Consent** can be applicable in circumstances where you can give parents and/or pupils and staff a free choice as to whether you process their data in a particular way. It must be as easy to take away as it is to give.

### 4. Special Category Data

The GDPR identifies some types of personal data as special category data because they are likely to be more sensitive, and it provides them with extra protection.

The GDPR defines special category data as:

- ❖ personal data revealing **racial or ethnic origin**
- ❖ personal data revealing **political opinions**
- ❖ personal data revealing **religious or philosophical beliefs**
- ❖ personal data revealing **trade union membership**
- ❖ **genetic data**
- ❖ **biometric data** (where used for identification purposes)
- ❖ data concerning **health**
- ❖ data concerning a person's **sex life**
- ❖ data concerning a person's **sexual orientation**.

### 5. Conditions for processing Special Category Data

The GDPR prohibits the processing of special category data unless the processing is covered by an exception.

There are 10 exceptions, usually referred to as 'conditions for processing special category data':

- ❖ Explicit consent
- ❖ Employment, social security and social protection (if authorised by law)
- ❖ Vital interests
- ❖ Not-for-profit bodies

- ❖ Made public by the data subject
- ❖ Legal claims or judicial acts
- ❖ Reasons of substantial public interest (with a basis in law)
- ❖ Health or social care (with a basis in law)
- ❖ Public health (with a basis in law)
- ❖ Archiving, research and statistics (with a basis in law).

When you are processing special category data you need to identify both a lawful basis for general processing, plus a condition for processing this sensitive data.

Again, you should document both your lawful basis for processing and your special category condition so that you can demonstrate compliance and accountability.

### **6. Additional Requirement under the UK's Data Protection Act 2018**

Having identified a condition in the GDPR for any processing of special category personal data, there is a further requirement under Section 10 of the UK's Data Protection Act 2018 (UK DPA 2018) for any of the conditions that require authorisation by law or a basis in law. As shown above this applies to:

- ❖ Employment, social security and social protection (if authorised by law)
- ❖ Reasons of substantial public interest (with a basis in law)
- ❖ Health or social care (with a basis in law)
- ❖ Public health (with a basis in law)
- ❖ Archiving, research and statistics (with a basis in law).

Section 10 of the UK DPA 2018 says that if you are relying on a GDPR condition which requires authorisation by law, or a basis in law, you must meet one of the additional conditions in Schedule 1 of the UK DPA 2018.

### **7. So, what does this mean when processing Special Category Data in the School Context?**

To process special category data, schools/trusts are most likely to be relying on the following conditions:

- ❖ Explicit consent

or

- ❖ Employment, social security and social protection (if authorised in law)
- ❖ Reasons of substantial public interest (with a basis in law)

Or more rarely - for the establishment, exercise or defence of legal claims.

[Don't forget that a lawful basis also needs to have been identified.]

## Explicit Consent

Like the lawful basis of standard consent, explicit consent must be freely given, specific, affirmative (opt-in) and unambiguous, and able to be withdrawn at any time.

To be explicit, the Information Commissioner's Office (ICO) advises that it must be:

- ❖ confirmed in a clear statement (whether oral or written), rather than by any other type of affirmative action
- ❖ specify the nature of the special category data; and
- ❖ it should be separate from any other consents being sought.

When processing special category data, it would be sensible to consider explicit consent first, if you are able to give individuals a free choice whether their data is processed for your particular purpose.

However, as an employer of staff or for safeguarding reasons, explicit consent is often not the most appropriate lawful basis. This is due to the balance of power in the employer/employee relationship, so it is not really free choice, or because of the school/trust's statutory safeguarding duties, respectively.

## Employment, social security and social protection (if authorised by law)

This condition is particularly relevant to the employment of staff

- ❖ checking if individuals are entitled to work in the UK
- ❖ ensuring health, safety and welfare of employees
- ❖ maintaining records of statutory sick pay and maternity pay; or
- ❖ deducting trade union subscriptions from payroll.

## Reasons of substantial public interest (with a basis in law)

There are 23 specific substantial public interest conditions set out in Schedule 1, Part 2 of the UK DPA 2018. They are narrowly drawn and the ones most likely to be relevant for schools are:

- ❖ Equality of opportunity or treatment (para 8)
- ❖ Safeguarding of children and of individuals at risk (para 18).

The UK DPA 2018 says that for each of these there must be an **Appropriate Policy Document** in place as a specific accountability and documentation measure.

Likewise, an **Appropriate Policy Document** must also be in place if schools/trusts are relying on the employment, social security and social protection condition.

One document can cover all of the special category data processing your school or trust carries out, there do not need to be separate ones.

## **8. Appropriate Policy Document**

An appropriate policy document is a short document outlining your school/trust's compliance measures and retention policies for special category data.

This document doesn't have to take any particular form, as long as it briefly outlines:

- the Schedule 1 condition (or conditions) being relied on
- procedures for complying with each of the (GDPR) principles
- retention and deletion policies
- an indication of the retention period for the specific data.