

Lawfulness of processing for statistical purposes – UK Statistical Authority guidance

The following provides guidance on some of the lawful bases for processing set out in Data Protection legislation, as a guide only. It is for individual controllers to decide on which is the appropriate processing condition to use in any given circumstance. The General Data Protection Regulation separates personal data and special category data, with different requirements for each.

Personal data

For any processing of personal data to be lawful at least one of the conditions set out in Article 6 of GDPR must apply. The data subject must be advised which legal basis for processing is used in each case (see Article 13(1)(c), Article 14(1)(c)). The following provides advice on those conditions most likely to be relevant to government departments processing personal data for statistical purposes.

Public interest / official authority

“processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller” – Article 6(1)(e), GDPR

“Where processing is carried out in accordance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, the processing should have a basis in Union or Member State law. This Regulation does not require a specific law for each individual processing. A law as a basis for several processing operations based on a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority may be sufficient” – Recital 45, GDPR

“Where this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it” – Recital 41, GDPR

In this context, the word ‘necessary’ does not mean essential. We take the view that we would not have to show that the task could not be accomplished without the processing in question, just that the task is made significantly simpler/quicker/better with the processing, to an extent that justifies any additional risks to the rights and freedoms of data subjects. Official authority is not defined in the Regulation; however, clarification can be found in the Data Protection Act 2018.

“Lawfulness of processing: public interest etc

In Article 6(1) of the GDPR (lawfulness of processing), the reference in point (e) to processing of personal data that is necessary for the performance of a task carried out in the public interest or in the exercise of the controller’s official authority **includes** processing of personal data that is necessary for—

(a) the administration of justice,

(b) the exercise of a function of either House of Parliament,

(c) the exercise of a function conferred on a person by an enactment, or

(d) the exercise of a function of the Crown, a Minister of the Crown or a government department.

(e) an activity that supports or promotes democratic engagement.” – Part 2, Chapter 2, Section 8, DPA 2018

All government departments should be covered by at least one of the above conditions, most likely (d), particularly in instances where reliance was previously placed on section 5 of Schedule 2 of the Data Protection Act 1998. Note the ‘includes’ above which implies there are other categories that will fall under ‘official authority’.

Legal Obligation

“processing is necessary for compliance with a legal obligation to which the controller is subject” – Article 6(1)(c), GDPR

See also recitals 41 and 45 above.

The legal obligation must be on the controller not the data subject. For example, ONS is required by law to undertake the Census. A legal obligation does not have to come directly from legislation e.g. court orders. Legal obligation here is not to be confused with a ‘legal gateway’, which can be used to legally process personal data but is not necessarily a statutory obligation. For example, the Statistics and Registration Act 2007 provides a gateway for ONS to receive births and deaths registration data from the Registrar General but this is not a legal obligation.

Consent

“the data subject has given consent to the processing of his or her personal data for one or more specific purposes” – Article 6(1)(a), GDPR

“consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation” – recital 43, GDPR

This suggests that public authorities (particularly government departments) should not usually be relying on consent. The imbalance will be greater in departments that also provide services to data subjects.

The following enhanced rules around consent mean that it is less suitable for statistical purposes:

- Controllers must be able to demonstrate consent has been given, this could require additional resources to store records.
- Data subjects have the right to withdraw consent, so unless their data has been fully anonymised it would need to be removed from the statistical production chain which, in sufficient numbers, could adversely affect statistical outputs.
- Additional data subject rights are engaged where data is processed using consent.

While a survey that is voluntary may only be completed with the data subject's consent, this should not be confused with using consent as a processing condition. It is perfectly acceptable, maybe even preferable, to rely on a processing condition other than consent for voluntary surveys. However, this will need to be explained clearly to data subjects to avoid confusion.

Likewise, it is worth noting that other references to 'consent' in legislation (for example at section 39(4)(h) of the Statistics and Registration Service Act 2007) are not subject to the stricter rules around consent that are present in the GDPR, if consent is not used as the lawful basis.

Consent may also be sought for ethical reasons but again, this does not mean it must be the lawful basis used. If another lawful basis is used then this must be clearly explained to data subjects.

Legitimate interests

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child" – Article 6(1)(f), GDPR

"[the above] shall not apply to processing carried out by public authorities in the performance of their tasks" – Article 6(1), GDPR

"Given that it is for the legislator to provide by law for the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks" – Recital 47, GDPR

This processing basis is no longer available to public authorities, as it was under the 1998 Act, so any processing currently undertaken relying on this basis will require a new processing basis.

Special Category Data

"Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited." – Article 9(1), GDPR

The above restriction on the processing of special personal data is lifted so long as at least one of the lawful bases for processing listed in Article 9 applies, in addition to a lawful basis from Article 6. Only one of the bases is likely to be relevant here and that is that the processing is necessary for statistical purposes.

Statistical purposes

“processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject” – Article 9(2)(j), GDPR

The condition ‘based in member state law’, does not require a department’s statistical processing to be set out in legislation, instead the DPA 2018 sets out the circumstances under which this condition is met:

“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.” – Schedule 1, Part 1, paragraph 4, DPA 2018

This guidance has previously discussed ‘necessary for’, and its likely requirements, and all statistical processing must in any event be in accordance with the safeguards set out in Article 89(1) GDPR and Section 19 of the DPA 2018 [see separate guidance on statistical processing safeguards]. The final test ‘in the public interest’ will likely require, given the focus on transparency and accountability, a record to be made of what that public interest is. However, note that this is not a balancing test so the public interest does not need to outweigh other factors.

Activities outside the scope of GDPR

Processing of personal data for activities outside the scope of EU law, for example immigration and national security, are also outside the scope of the EU GDPR. However, the DPA 2018 provides that these activities be subject to the same provisions as if they existed in UK law – the so-called ‘applied GDPR’. As such, the same processing conditions as above would apply.