

Special Category and Criminal Conviction Data

Introduction

The provisions of the *General Data Protection Regulation* (GDPR) and the *Data Protection Act 2018* have now come into effect. This short briefing looks at the particular aspects relating to the processing of what has previously been known as sensitive personal data.

Special category data

Special category data is broadly similar to the concept of sensitive personal data under the old 1998 Act, but now includes some biometric data in the definition. Examples of special category data include race, sexual orientation, trade union membership, genetics, religion, politics, health etc. Criminal conviction data is now regarded as a separate, although similarly processed type of data.

To process special category data you must still have a lawful basis for your processing in exactly the same way as for any other personal data. The difference is that you will also need to satisfy a specific condition (see below *What are the specific conditions?*).

Your choice of lawful basis for processing does not dictate which special category condition you must also apply, and vice versa. For example, if you use consent as your lawful basis, you are not restricted to using explicit consent for special category processing. You should choose whichever special category condition is the most appropriate in the circumstances.

Criminal conviction data

To process criminal conviction data you must also have a lawful basis, but additionally, be processing the data in an official capacity, or have specific legal authorisation to do so. On the face of it, this would prevent organisations undertaking DBS checks on people working with children or vulnerable adults. However, the new *Data Protection Act 2018* adds a number of conditions relating to processing criminal conviction data, including in employment.

What is the lawful basis for processing?

To process special category or criminal conviction data you must have a lawful basis. There are six different bases described in the GDPR, and one or more bases must be used for each processing operation. For more information, please refer to the Information Commissioners Office (ICO) guidance on the GDPR.

What are the specific conditions?

Although the GDPR sets out 10 specific conditions for processing special category data, the new *Data Protection Act 2018* specifies a large number of additional conditions. Please refer to schedule 1 of the Act for a full list of conditions, but examples of these are:

- The special category data has been made public by the data subject.
- The data subject has given their consent.
- Processing membership data (past or present) by non-profit organisations that have a political, philosophical, religious or trade union aim.
- Complying with any employment or social security law (perhaps to undertake a DBS check);
- Monitoring equal opportunity or treatment.
- Safeguarding children and vulnerable adults without their consent
- Enabling the provision of confidential counselling, advice or support without the consent of the data subject.

Many of the conditions require the additional safeguard of a written policy which explains the controller's procedures for securing compliance with the GDPR data protection principles in respect of the specific condition, and their policies as regards the retention and erasure of special category or criminal conviction data (see *Your Written Policy* below).

Your Written Policy

As mentioned above, many of the conditions for processing special category or criminal conviction data set out in the *Data Protection Act 2018* require the data controller to have a written policy. In the absence of specific guidance, it would be prudent to include the following:

- a description of the data that is being processed,
- the reasons for processing such data,
- the processing method,
- the particular special conditions (in addition to the lawful basis) upon which you are relying in order to comply with the GDPR/Data Protection Act, and,
- how long the data is kept, and how it is destroyed/deleted.

Such a document could either be a standalone policy, or form part of a more general data protection policy.

Further reading

Comprehensive advice and guidance on processing personal data, can be found on the Information Commissioner's Website <https://ico.org.uk>

A number of briefings and checklist can also be found on the [Green Pepper website](#).