Information Commissioner's Office

Consultation:
GDPR consent guidance

Start date: 2 March 2017
End date: 31 March 2017

Introduction

The General Data Protection Regulation (GDPR) will apply in the UK from May 2018 and replaces the Data Protection Act 1998 (DPA).

The GDPR sets a high standard for consent. It builds on the DPA standard of consent in a number of areas and it contains significantly more detail that codifies existing European guidance and good practice.

Our draft guidance on consent explains our recommended approach to compliance and what counts as valid consent. It also provides practical help to decide when to rely on consent, and when to look at alternatives.

We are now running a short consultation on the draft guidance to gather the views of stakeholders and the public. These views will inform the published version of the guidance.

We are provisionally aiming to publish this guidance in May 2017, although this timescale may be affected if we need to take account of developments at the European level. We intend to publish this guidance as a series of linked webpages that can be downloaded as a pdf.

As the GDPR is a new regulation which applies consistently across the EU, our published guidance will need to continue to evolve to take account of any guidelines issued in future by relevant European authorities (including the Article 29 Working Party of European data protection authorities and the EDPB), as well as our developing experience of applying the law in practice.

Responses to this consultation must be submitted by 31 March 2017. You can submit your response in one of the following ways:

Download this document and email to
joanne.crowley@ico.org.uk

Print off this document and post to:
Joanne Crowley
Information Commissioner's Office
Wycliffe House
Water Lane

Wilmslow
Cheshire SK9 5AF

If you would like further information on the consultation please telephone 0303 123 1113 and ask to speak to Joanne Crowley or email joanne.crowley@ico.org.uk.

Privacy statement

Following the end of the consultation we shall publish a summary of responses received. Information people provide in response to our consultations, including personal information, may be disclosed in accordance with the Freedom of Information Act 2000 and the Data Protection Act 1998. If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality.

Section 1: Your views

Please provide us with your views by answering the following questions:

1. Is the draft guidance clear and easy to understand?

☒ Yes

☐ No
Please explain why not:

2. Does the guidance contain the right level of detail?

☐ Yes

☒ No
Please explain why not: Overall the guidance provides an adequate level of detail on key topics however greater detail on scientific research consents would be helpful. We set out our views on this in the general comments in section 5.

3. Do you have any examples of consent in practice, good or bad, that you think would be useful to include in the guidance?

☐ Yes

☒ No
Please outline your examples:

4. Does the guidance cover the right issues about consent under the GDPR?

☒ Yes but please see our general comments in section 5.

☐ No
If not what do you believe is missing?

5. Please provide any further comments or suggestions on our draft guidance.

The Market Research Society (MRS) welcomes the publication of this document as a key first step for the ICO in providing detailed guidance to stakeholders on the new requirements for consent under the GDPR. It is an informative guide that is written in a clear and direct style. We consider that the guidance will be of particular value to smaller organisations, who generally have more limited capability to manage regulation and compliance.

We have set out below some areas on which we consider additional detail and/or clarification would be useful:

5.1 Detailed guidance on consent for scientific research purposes and interaction with the Art. 89 Research Regime

Recital 33 of the GDPR allows for broad consent for scientific research purposes, where consent cannot be secured for all specific purposes at the outset of data collection. An example of where this will be particularly useful is longitudinal studies where researchers are especially interested in measuring change or in specific outcomes over time. These may evolve over the course of the study. In these cases informed consent may be best sought at different points over the course of the study. The recital also highlights that consent for scientific research must also be in line with "recognised ethical safeguards".

Article 89 of the GDPR sets out the wider research exemption regime. This provision is critical for researchers as it allows some flexibility to researchers whilst protecting rights of research participants and maintaining public confidence in research. Publication of the consent guidance provides an ideal opportunity for the ICO to provide more detailed guidance on processing personal data for scientific research purposes.

Guidance on use of the research exemption should highlight that the ICO would expect the majority of scientific research (including market, opinion and social research)[1] to be undertaken primarily within standard data processing activities without the need for article 89 exemptions. It should also stress the need for researchers to follow ethical standards for scientific research such as industry codes with disciplinary regime and sanctions.[2]

Additionally it would be helpful for the Guidance to highlight additional nuances in processing data for scientific research purposes namely:

- Across the EU personal data can be stored for longer periods (although it should be pseudonymised);
- Across the EU personal data can be further processed for scientific research purposes
- Depending on the approach in individual Member States, data subjects may have restrictions on their right of access, right to rectification, right to restriction of processing and the right to object. The introduction of these derogations is subject to the UK implementing legislation in this respect. As the expectation is that this exemption will be included in the UK legislation in this area it should be covered in the guidance.

[1] Market and social research is expected to fall (as it currently does under the DPA 1998 within the definition of scientific research). The GDPR definition is not exhaustive but indicative of types of research using terms "such as" and "in particular" which does not preclude inclusion of market and social research.
[2] The MRS Code of Conduct is designed to support those engaged in market research in maintaining professional standards and to reassure the general public that research is carried out in a professional and ethical manner. MRS individual members and Company Partners must comply with the Code which applies, whether they are engaged in consumer, business to business, social, opinion or any other type of research project.

5.2 Greater focus on securing and demonstrating oral consents

Gaining consent in telephone research

In order for market, social and opinion research to have value for government, businesses and the public it must be representative of the views of all UK citizens. Conducting telephone research is one of the most efficient and cost-effective ways of ensuring a representative sample of the UK population, and is widely used in government research. It is also one of the best methods for researching otherwise hard to reach segments of the UK population, another key target for many public sector research projects. Research with our members indicates that telephone interviewing is used for about 15% of market, social and opinion research projects in the UK. It is used extensively in social research, to interview otherwise hard to reach groups and wherever a high quality random sample is required.

It is imperative that this mode of communication remains open to research and in light of this **requirements for oral consents must be workable and not adversely impact research participant response rates.**

Currently the process of obtaining consents in line with data protection and MRS Code of Conduct requirements can take up to 4 minutes. We would be happy to provide scripts to demonstrate the approach currently taken if this would be useful.

As the GDPR requires significantly more information to be conveyed (as is detailed in the ICO Privacy Notices Code) this will considerably expand and lengthen interview time with a consequential negative impact on response rates.

Additional detail on acceptable techniques in gaining consents and communication of data subject rights would be useful e.g. referral within the phone call to further information on a website or reducing the upfront information burden by

providing some information at the start of the phone call and conveying the rest of the information at the end of the call. The GDPR also recognises that there are flexibilities in information provision where it would pose a disproportionate effort

Demonstrating oral consents

The Guidance acknowledges that responding yes to a clear oral consent request will be valid consent. However oral consents are problematic in practice as the approaches used in the digital online space are practically unworkable in a telephone research context.

Demonstrating proof of oral consents should not be overly cumbersome. Organisations should be made aware that there is no absolute requirement to store recordings to prove consent and in indeed this runs counter to the "data minimisation" principle and could be cumbersome in light of data storage needs. Completed spreadsheets with date/time details or in a research context copies of transcripts should also suffice.

5.3 Flexibility on naming all of the individual third parties

MRS notes the requirement that consent must be specific and granular and in line with this ICO guidance proposes that third parties be named. We agree that general statements of intent to share data with third parties should be avoided but believe that the requirement on naming third parties goes beyond the GDPR requirements.

In the context of the information requirements placed on a data controller collecting personal data from a data subject, article 13(1)(e) of the GDPR states only that the "recipients or *categories of recipients* of the personal data" (own emphasis) need to be specified. Article 8 on consent does not provide any additional detail in this regard. In light of this a more useful approach would be to allow a sector or category

of third party to be properly particularised sufficient to provide individuals with a clear idea as to who data is being shared with e.g. sector organisation and/or type of product.

In circumstances where there is a requirement for third parties to be named it is important to encourage the use of and highlight the value of the layered approach to privacy notices. This "allows [organisations] to provide the key privacy information immediately and have more detailed information available elsewhere for those that want it."[3]

Presently under the DPA, data processors, such as cloud providers storing data for data controllers, are not third parties and consent from individuals is not required. However the GDPR provides for "the recipients or categories of recipients of the personal data" to be specified in the information notice. Is this intended to cover naming data processors?

5.4 Clarification on the link between data retention periods and duration of consents

GDPR information notices must detail the length of time that personal data will be held for or the underlying criteria for holding such data.

It would be useful if the guidance explored the interplay between communicated data retention periods and the time that expect consent will be valid for. For example if a consumer is told "we will keep your personal data for 3 years …" will this be taken into account in determining whether consents are still valid after that time? Recognising that if data is fully anonymised then it is no longer within the definition of personal data and can be kept indefinitely.

[3] ICO Privacy Notices, Transparency and Control – Code of Practice (2016)

5.5 Additional guidance on approaches to refreshing consents

The Guidance Note highlights that consents will only need to be refreshed if they do not meet the GDPR standard. As the bar for consent under GDPR has now been raised it would be helpful for additional details to be provided to organisations seeking to refresh their consents. This is particularly important in light of the recent ICO enforcement cases highlighting the importance of ensuring that customer service emails are not used for purposes such as marketing.

5.6.Supplementary guidance on legitimate interests

The ICO Consent Guidance is especially useful in highlighting to organisations processing data that consent may not always be the right legal basis. Legitimate interests is likely to be one of the grounds frequently used by organisations where consent is not appropriate or applicable. In light of this it would be valuable for ICO to provide similarly clear and detailed guidance on the use of legitimate interest as a processing ground.

About MRS

MRS is the world's largest research association. MRS represents both large businesses and SMEs and we have a range of research suppliers included in our membership. MRS supports best practice in the research industry by setting and enforcing industry standards. The MRS adopted its first self-regulatory Code in 1954 and the latest fully revised version of the MRS Code of Conduct came into effect on 1 September 2014.

The commitment to uphold the MRS Code of Conduct is supported by the MRS Codeline service and a range of specialist guidelines. ICO publications are also extensively used both within MRS and by our accredited members for guidance and information on data protection obligations.

Section 2: About you

Are you:

A member of the public who has used our service?	☐
A member of the public who has not used our service?	☐
A representative of a public sector organisation? Please specify:	☐
A representative of a private sector organisation? Please specify:	☐
A representative of a community, voluntary or charitable organisation, or of a trade body? Please specify: Market Research Society (MRS)	☒
An ICO employee?	☐
Other? Please specify:	☐

Thank you for completing this consultation.
We value your input.