

## Introduction

When a business or organisation processes an individual's personal data it must meet a lawful condition set out in Schedule 2 to the Data Protection Act 2002 (the DPA). If the processing includes sensitive personal data, such as, health records, the business must also meet a lawful condition set out in Schedule 3 to the DPA.

One of the lawful conditions set out in Schedule 2 to the DPA is:

*"The data subject has given his consent to the processing"*

while one of the conditions for processing sensitive personal data set out in Schedule 3 to the DPA is:

*"The data subject has given his explicit consent to the processing of the personal data."*

This advice note is intended to provide some general advice on what is meant by consent. There is a variety of case law concerning consent from different areas of law such as contract law, criminal law and confidentiality cases. Legal practitioners may wish to refer to the UK Law Commission Consultation Paper No 139 on Consent in the Criminal Law.

**The Information Commissioner shares the view of other Data Protection Authorities that consent can at times be difficult to rely upon when processing personal data and recommends that other lawful conditions should be considered before relying on consent.** For example, if consent is relied upon for the basis of processing what will happen if the data subject withdraws that consent?

## Definition of Consent

Consent is not defined in the DPA; however, Article 2 of the European Data Protection Directive 95/46/EC, upon which the DPA is based, defines "the data subject's consent" as:

*"...any freely given, specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed"*

### **'Freely Given'**

Consent must be freely given by the data subject and suggests that the data subject has some degree of choice. In the absence of choice the validity of consent will be questionable.

Consent obtained under duress or on the basis of misleading information is unlikely to be a valid basis for processing and may be set aside.

*(The Sibeon and the Subotre [1976] 1 Lloyds Rep 293)*

Reluctant consent may be a valid basis for processing provided it is voluntary. If consent is reluctant, other factors to consider include whether the person has protested or had an alternative option available to him.

*(PavOn v Law Yill Long [1980] A.C. 614)*

### **'Specific'**

In seeking consent for processing a data controller cannot rely on a general statement. For example if consent is to be used as a basis for marketing, then the data controller will need to advise what company or companies will undertake the marketing.

Consent will not endure forever; while it can be expected that consent will endure for as long as necessary for the specified processing, consent may be withdrawn and does not mean that consent has been given to similar processing. Withdrawing consent does not affect the validity of anything already done on the understanding that consent had been given.

You should review whether consent you have been given remains adequate as your organisation's relationship with an individual develops, or as the individual's circumstances change.

### **'Informed'**

No one can give consent to something of which he has no knowledge.  
*(Caughey, re ex p. Fordee (1876))*

While the data subject does not need to be informed of every detail of the processing, he/she must be made aware of the fundamental nature of the processing and how that processing will affect him/her.

### **'Agreement Signified'**

It is not necessary in all cases for a data subject to signify agreement in writing; however it does mean that there must be some active communication between the parties. It cannot be inferred that a data subject has consented to processing if the data subject fails to respond to a communication or does not object.

Consent may be express or inferred from some relevant action (implied consent) but cannot be inferred from silence.

## **Explicit Consent**

Where consent is relied upon to process "sensitive personal data" that consent must be explicit. The data subject's consent must be clear and cover the specific processing and any particular aspects of that processing which may affect the data subject, such as disclosures (sharing).

Explicit consent suggests that the data subject should signify agreement in writing. While this is recommended, it is accepted that it would not be appropriate in all cases, particularly where confidentiality is required. If explicit consent is not obtained in writing, it is recommended that a data controller keep some form of permanent record, such as a file note, indicating how explicit consent was obtained. This would be important if a complaint arose.

For medical practitioners processing sensitive personal data (information about the physical or mental health or condition of a person), further information about the practicalities of seeking and recording consent is available from their appropriate regulatory body, or the NHS website, for example.

## **Mental Incapacity**

A person over 18 who lacks capacity through mental impairment cannot give valid consent. Where a person has some form of mental impairment then consent may be obtained from another person with the power of attorney for the data subject.

## **Consent and Minors**

It is generally accepted that a person who has attained the age of 16 can give consent, provided he or she is capable of understanding the action to which he or she is consenting. However, a person cannot consent to a contract if he or she is incapable of understanding the nature of the contract. (*Galloway v Galloway (1914 )*)

Therefore although the data subject has attained the age of 16 years, if the nature of the processing could adversely affect the data subject and the data controller is not certain that the data subject does not fully understand the implications, then the consent of a parent or guardian should be sought. In the case of medical or dental treatment Section 8 of the Family Law Reform Act 1971, states that a person who has attained the age of 16 years may consent to medical treatment.

It is also generally accepted that a person under the age of 12 years cannot give consent and the consent of a parent or guardian must be sought.

Whether a person between the ages of 12 and 16 years of age can give consent depends upon the circumstances of the case. It is recommended that, unless a data controller is certain that the processing will not or could not cause any adverse effect to the data subject, then the consent of a parent or guardian should be sought.