

Using consent as the lawful basis for processing personal data

Under the GDPR and the new Data Protection Act 2018, relying on consent for processing personal data is more difficult and requires significantly more active management and monitoring. More information rights may need to be supported, and other actions taken where consent is used.

Reuse of the data is also likely to be restricted, as we are only permitted to do what the consent covers and nothing else.

DWP rarely uses consent as the lawful basis for processing personal data. In most circumstances, DWP relies on its authority as a Government Department or specific legislation when processing personal data. Where this is the case, we should be telling people what we will do with their data, not asking them for permission to do it.

Wherever consent is being used as the lawful basis to process and share data, processes must be reviewed and either:

- alternative lawful bases for processing identified and used; or
- the consent arrangements made compliant with the requirements of the GDPR.

The Information Commissioner has issued a strong steer that public authorities such as Government Departments should not normally be relying on consent as a lawful basis for processing data.

For each processing activity involving personal data you must identify the [appropriate lawful basis](#), of which consent is one possible basis.

Does it look like consent?

If wording could be interpreted by people as asking for their permission to process or share data, then this will need to be reviewed.

There may be various reasons for this:

- DWP may need to rely on consent (in which case the consent arrangements need to be confirmed as compliant with GDPR),
- DWP may be relying on consent inappropriately (in which case [another lawful basis](#) should be identified), or
- DWP is actually trying to tell people what will happen rather than asking for their permission, but the wording is inappropriate (in which case the wording needs to be changed).

Is consent appropriate?

The GDPR and guidance from the Information Commissioner both make it clear that public authorities such as DWP should not normally rely on consent, and are expected to rely on the authority that their public function provides in most circumstances as their lawful basis for processing data.

DWP's functions are set out clearly in legislation, and are quite straightforward. They are:

- social security (including Housing Benefit, Council Tax Reduction Schemes and Local Welfare Provision)
- child support
- employment and training
- promoting financial planning for retirement
- policy relating to occupational and personal pension schemes

There may be some limited situations (for example, research, pilot schemes) where people have a genuine choice, and the power imbalance between DWP and the individual does not undermine their freedom to choose, but this will rarely be the case in mainstream business processes.

If you think you need to use consent to conduct social research in DWP you must contact Central Analysis Division for advice. DWP's Lead Analyst has issued guidance on [what GDPR means for Social Research in DWP](#).

How can we still use consent if this is appropriate?

Clearly consent can only be used when there is no compulsion on either the data subject or DWP to process the data, and such circumstances are rare. But, if a business owner determines that the lawful basis for processing shall be by way of consent they must ensure that:

1. there is not a [more appropriate and potentially overriding lawful basis](#) for processing under Article 6 of the GDPR (or Article 9 in the case of Special Category data) and document their reasons and decisions, and
2. that they can fully satisfy the definition of consent in Article 7 of the GDPR.

They must also be able to demonstrate the evidence to show that consent has been appropriately used, and that all the rights that a person has, including the right to withdraw consent as easily as it has been given, can be fully complied with and within the timescales defined.

Make changes to comply with GDPR requirements

The GDPR makes significant changes to how consent works, the information that must be provided for consent to be considered valid, the burden of proof for consent, and various other aspects.

Follow the guidance on [obtaining and managing consent](#) to ensure your consent form and processes meet the new requirements.

Procedures will need to be able to support the right to data portability (which does not apply where other lawful bases for processing personal data are used), and also to cease processing if people withdraw their consent.

Amend notifications and other documentation to reflect new basis for processing

Refer to the guidance on [obtaining and managing consent](#) to ensure you include everything the data subject must be told about for consent to be fully informed. An example consent statement is given to help you.

In addition to forms and leaflets, communications in operational instructions and processes, telephony scripts, and online information and services must be reviewed and made compliant with the new requirements where consent is being used as the lawful basis for processing personal data.

Refresh consent for people already in the process

It is unlikely that consent obtained under the requirements of the 1998 Data Protection Act will be considered valid under the GDPR. When the consent forms and process have been updated to comply with the GDPR, existing consent should be refreshed using the new process in most circumstances. If consent is not refreshed the risks must be assessed, accepted, and recorded on the appropriate risk register.

Consider whether people already in the process should be informed

Where DWP changes the lawful basis for processing personal data, especially if it changes people's rights, you must give consideration to notifying those affected.

Cease processing for all people who withhold or withdraw consent

Of course, in circumstances where we are relying on consent, we must be prepared for people to refuse to give or withdraw their consent, and to cease processing for those individuals.