



Guide for local authorities on consent in data protection

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What does consent mean in data protection law?

In data protection law, consent has a specific meaning as one of the conditions that allows the lawful processing of personal data. To process (collect, use, hold, share) personal data, we must meet a lawful basis condition for processing from within the [UK General Data Protection Regulation \(UK GDPR\)](#).

UK GDPR Article 6 lists conditions for processing personal data, and Article 9 has conditions for processing special category data (information about race, ethnic origin, political opinions, religious beliefs, trade union membership, genetic data, biometric data used for ID purposes, health, sex life or sexual orientation). Consent is one of the available conditions in both Article 6 and Article 9, but there are others that are more appropriate to most of the work of a local authority.

Consent in data protection law is different from when we talk about consent/implied consent in other areas, such as:

- ethical consent to take part in research.
- receiving medical treatment - explicit consent to agree to an operation or implied consent when you hold your arm out for a blood test.
- consent to take part in an activity, like a children's holiday club.

Do we need to ask individuals for their consent when carrying out our work in a local authority?

In most cases, no. For personal data processing to be consent-based, individuals must have true choice and control, with consent freely given. There is a significant imbalance of power between a local authority and an individual, and the individual may feel they have no choice but to agree because they depend on local authority services or fear adverse consequences.

It must be possible for consent to be withdrawn and for the use of personal data to either stop, or not start at all. This is not possible for most local authority activities.

Using consent as the lawful basis for processing personal data is different to engaging collaboratively with an individual and being open with them about what is happening.

What lawful basis should we use?

You must identify which condition applies to your work. Consent is at the top of both the Article 6 and Article 9 lists, but you are not expected to start at the top of the list and work down.

Article 6 Conditions

(a) Consent: the individual has given clear consent for you to process their personal data for a specific purpose.

(b) Contract: the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.

(c) Legal obligation: the processing is necessary for you to comply with the law (not including contractual obligations).

(d) Vital interests: the processing is necessary to protect someone's life.

(e) Public task: the processing is necessary for you to perform a task in the public interest or for your official functions, and the task or function has a clear basis in law.

(f) Legitimate interests: the processing is necessary for your legitimate interests or the legitimate interests of a third party, unless there is a good reason to protect the individual's personal data which overrides those legitimate interests. (This cannot apply if you are a public authority processing data to perform your official tasks.)

The conditions a local authority uses most often are that you have a legal obligation to process personal data (eg safeguarding activities), or that you are performing a task in the public interest (much of the work of a local authority).

Article 9 Conditions

(a) Explicit consent

(b) Employment, social security and social protection (if authorised by law)

(c) Vital interests

(d) Not-for-profit bodies

(e) Made public by the data subject

(f) Legal claims or judicial acts

(g) Reasons of substantial public interest (with a basis in law)

(h) Health or social care (with a basis in law)

(i) Public health (with a basis in law)

(j) Archiving, research and statistics (with a basis in law)

The conditions a local authority uses most often when processing special category data are that there is a substantial public interest in doing so, or because you are delivering health and social care services. A local authority also has public health duties, and carries out research or archiving.

Speak to your DPO or Information Governance Team about how to identify your lawful basis. You can learn more about this in the [ICO guidance on identifying a lawful basis](#).

Vital interests

The lawful basis of vital interests is used occasionally, but this is for immediate and significant risk to life or serious harm. A local authority processing personal data to manage an immediate risk is usually part of the authority's safeguarding or crime prevention duties and therefore a legal obligation (Article 6) and substantially in the public interest (Article 9). An example of when you may use vital interests is telling a paramedic that your unconscious employee has epilepsy.

Do I have a statutory duty?

Many of your tasks and the actions you take as a local authority are required by law (statutory duty). Sometimes a task is specifically required and sometimes you have a choice of how you meet the requirements. Individuals have no choice about you using their data for:

- Benefits
- Fraud investigations
- Safeguarding
- School admissions
- Council tax collection

The appropriate lawful basis is either legal obligation or public task. This usually depends on how specific the law is in telling you what to do, and your Data Protection Officer (DPO) or Information Governance Team can help you to choose which is appropriate.

Our clients have a choice whether to work with us, do we need their consent?

You rarely need consent for processing the personal data, even when there is an element of choice for the individual to use the service you're delivering. Consent is not the lawful basis for processing the data in these examples:

Example 1

It is optional whether an individual wants to build a structure requiring planning permission, but if they do, planning law says that they have to engage with the local planning authority and that the authority has to keep records. The correct lawful basis is legal obligation, and substantial public interest for special category data, mainly from duties described in the Town & Country Planning Act 1990 (although there is a lot of planning law).

Example 2

An individual can choose to accept substance misuse support. You don't need their consent to keep a record of them and share data as part of a referral for treatment and support, but they still have a choice of whether to accept that support. The correct lawful basis can be considered either legal obligation, because of the duty of a local authority under the Health & Social Care Act 2012 to improve the health of the people in its area, or public task, because while the duty says services must be provided, it doesn't specify exactly which ones. Your DPO will help you decide for your organisation.

We want an open relationship with our clients

Being open with individuals is necessary and expected in most cases, so that we meet the requirement in data protection law to be fair.

Many local authority services are person-centred and are more successful when the authority and the individual travel the path together, with the individual actively engaged in the process. You may work closely with an individual to agree which activities and referrals happen.

However, this type of collaborative decision making does not mean that the lawful basis for processing the data is consent. There is an imbalance of power and it's usually necessary to record personal data, even if an individual changes their mind. For example, we must keep a record that a referral was made to substance misuse support, even if the individual changes their mind about receiving support.

What if I have to use the word consent?

Sometimes individuals expect to see the word consent. This may be where a medical professional wants a patient's consent to disclose information to you (sometimes called 'consent for checks'), or where you expect a parent to consent to their child engaging in activities (usually called a 'parental consent form'). In these cases, you need to look more carefully at the language you use.

You must be clear on why you are processing their data, and separate that aspect from the part of the work where people expect to see the word 'consent'. Gaining confirmation of understanding is not the same as consent.

Example 3

You are legally required to ask for medical history when an individual applies to be approved as a foster carer. You don't need their consent to ask the doctor for the information because the law says that you must, but the doctor may expect to see the individual consenting to the release of information.

In this case you don't ask for consent but will instead use language like:

"I understand the council's foster carer application process will involve collecting and assessing XYZ information about me. I consent to my doctor releasing information to the council".

This statement is the type of information that is required to be covered in a privacy notice, as you're telling people why you are collecting their personal data and what you are doing with it.

Example 4

You're running school holiday activities and need to keep a booking and perhaps payment record, along with details of medical conditions that may affect the activity, or religious-based food requirements. Your statements can be;

“I consent to my child taking part in XYZ activity. I understand that the following data will be collected about my child and I, and that the council will do XYZ with that data.”.

You have separated the consent aspect from the confirmation of understanding or agreement for an activity. You can then add to this statement if necessary:

“I understand that if my child's behaviour does not meet the standards listed on this form, that they will be removed from the activity and I will be called to collect them.”

What if consent is my only condition for processing?

It is rare in your work as a local authority that consent will be the lawful basis condition for processing, but it does happen. Photography for publicity purposes is one example. Speak to your Data Protection Officer (DPO) or Information Governance Team before you start processing data if you think this is the case for your work.

If you do need consent, it needs to be collected openly and explicitly, by telling the individual why you need their consent and what you plan to do with their personal data. Consent must be recorded and you must have a clear process for an individual to withdraw consent, and a way for you to record that withdrawal. You also need to tell anyone with whom you have shared the data that consent has been withdrawn.

Remember, consent must be a genuine choice. Think carefully about whether you would still have an obligation to continue processing that person's data if they withdrew their consent. If you do, then you shouldn't seek consent.

What about children?

There is no age limit set in legislation of when a child is considered capable to provide consent for you to process their personal data (except if you are delivering web services and apps for children). If you process personal data about children and consent is needed for that work, then you must decide whether the child is mentally capable of understanding what they are consenting to, or whether it should be someone with parental responsibility consenting on their behalf. You do not automatically have to seek parental consent if a child is under 18, you may however need to consider whether both child and parent consent is necessary.

It may be appropriate to set an age limit for a process, as this is easier to manage day to day. However, you must review individual cases when appropriate and where requested by the individual.

Example 5

You set a 13-year-old limit for young people to join a youth group mailing list. You must still consider their specific situation if a parent or young person asks you to change, or perhaps if the young person has learning difficulties that impact their capacity to fully understand.

Speak to your Data Protection Officer (DPO) or Information Governance Team for advice on children's consent.

Does my client have the capacity to consent?

If you have determined that consent is your lawful basis condition, then it must reasonably be considered that an individual is capable of understanding and providing consent. For some of your clients, usually in social care situations, you may need to consider their capacity to consent under the Mental Capacity Act 2015.

Your local authority has processes to assess capacity, sometimes called Deprivation of Liberty decisions (DoLs). Assessing capacity for data protection purposes is the same as any other capacity assessment. Speak to your Adult Social Care specialists or your DPO for advice.

Since it is rare for a local authority to use consent as its lawful basis, it is even more rare for a capacity decision to affect the lawful basis for processing personal data.

Do I need consent to talk to next of kin?

In most cases you would need the consent of an individual who has capacity to disclose information to a third party like next of kin, unless you consider it a necessary part of a safeguarding activity.

Speak to your Data Protection Officer (DPO) or Information Governance Team to learn more and to ensure that your daily practices are appropriate. Managers should ensure that there are agreed local procedures in place so that officers are clear on their responsibilities.

Whilst data protection legislation does not cover deceased individuals, there are still confidentiality requirements that apply, so ask for advice if this is something that impacts you.

My contractor/regulator/client etc tells me I need consent

Consent relevant to data protection can be misunderstood. If you are being told that you need consent for your work then speak to your Data Protection Officer (DPO) or Information Governance Team for support. It is rare that your work as a local authority will be considered consent-based processing.

I'm going to ask for consent anyway

Incorrectly asking for consent and using it as your lawful basis can delay your work, confuse and upset your clients and impact your ability to deliver services.

Example 6

You plan to ask for consent to make a referral but will make the referral anyway if the individual refuses. If you plan to make the referral anyway then consent was never a suitable lawful basis. You will cause the authority to breach data protection law and confuse and annoy individuals.

If you ask for consent where it is not needed, you are giving your client a false sense of control. Consent must be freely given and it must be possible for consent to be withdrawn and for the processing to stop. If you have a statutory duty that requires you to keep processing their data regardless of their wishes, then you should not be seeking consent from them in the first place.

How do I tell people what we're doing with their personal data?

It is important to recognise that communicating clearly and being open and honest with individuals is a fundamental part of being fair. You must be transparent in your use of personal data and individuals must be informed of what you plan to do with their data, even if they don't need to consent.

There are exceptions to this requirement to inform people, for example when investigating a crime or fraud.

In most cases you must use a [privacy notice](#) to tell people:

- what data you collect about them
- what you do with it

- why you do that
- with whom you share the data.

A local authority usually has a short privacy notice on forms when you are collecting personal data, which links to a more detailed online privacy notice.

You may have privacy information that has been drafted specifically for children, and you should look at whether anything further is needed for children to help them better understand. For example, a social worker may need to sit with a young person to read the privacy notice with them and answer any questions.

In some of your work, such as fraud or safeguarding investigations, you won't always specifically tell people that you are processing their data, but you are still required to inform people on a general basis that fraud investigation activities take place. Your Data Protection Officer (DPO) or Information Governance Team will help you to identify when and how you should be letting individuals know that you are processing their personal data.

You need to be careful with the language you use so that you don't confuse individuals or unnecessarily limit what you can do with their data.

Avoid statements like "I agree", "I consent", or "I give permission".

Instead, use "I understand", or "I acknowledge", if you feel it appropriate to gain an individual's confirmation of understanding. Remember though, this is still not consent.

You can describe your work in positive ways, such as:

"We are required to provide XYZ service. It's the highest priority to us that we work proactively with children and families to get the best outcomes for everyone. We want to make sure that the families and young people are fully engaged with our service and understand what we offer and how we can best help."

Or

"We will assess your situation and make referrals to the A, B or C teams. We have a duty to provide you with support and we want to make sure that you understand your options."