



THE OFFICE OF THE **DATA PROTECTION COMMISSIONER**

The Data Protection (Bailiwick of Guernsey) Law, 2017 ("the **Law**")

Consent

At a glance

- The Law sets a high standard for consent and it is important that you understand these new requirements. It is important to note that consent is one of a number of conditions (for guidance on these conditions click [here](#)) and it may be the case that another of those conditions is more appropriate for your particular processing.
- Consent means offering individuals genuine choice and control. Genuine consent puts individuals in charge, builds customer trust and engagement, and enhances your reputation.
- Check your consent practices and your existing consents. Update your consents if they do not meet the higher standard. For processing already underway prior to 25 May 2018 you will have a year in which to carry out this review and update process.
- Consent requires a positive opt-in. Do not use pre-ticked boxes or any other method of default consent.
- Explicit consent requires a very clear and specific statement of consent.
- Consent requests must be separate from other terms and conditions or other matters.
- Be specific and 'granular' so that you get separate consent for separate things. Vague or blanket consent is not enough.
- Be clear and concise.
- Name any third party controllers who will rely on the consent.
- Make it easy for people to withdraw consent and tell them how.
- Keep evidence of consent – who, when, how and what you told people.

- Keep consent under review and update it if anything changes.
- Avoid making consent to processing a precondition of a service.
- Public authorities and employers will need to take extra care to show that consent is freely given and should avoid over-reliance on consent.
- Consent will not be considered as freely given if the data subject has been deceived or misled by whomever is seeking the consent.
- Consent to the processing of criminal data is strictly controlled.

What's new?

The Law sets a high standard for consent and you need to understand what this means in practice for your consent mechanisms.

The Law is clearer that an indication of consent must be unambiguous and involve a clear affirmative action (an opt-in). It specifically bans pre-ticked opt-in boxes. It also requires individual ('granular') consent options for distinct processing operations. Consent should be separate from other terms and conditions and should not generally be a precondition of signing up to a service.

You must keep clear records to demonstrate consent.

The Law gives a specific right to withdraw consent. You need to tell people about their right to withdraw, and offer them easy ways to withdraw consent at any time.

Public authorities, employers and other organisations in a position of power (and where there may be an imbalance of that power in relation to the data subject) may find it more difficult to show valid freely given consent.

You need to review existing consents and your consent mechanisms to check they meet the new standard. If they do, there is no need to obtain fresh consent. If consent gathered prior to 25 May 2018 is relied upon for lawful processing you will have a year (until 25 May 2019) to obtain consent that meets the new higher standard or to determine an alternative, more appropriate lawful basis for processing.

Why is consent important?

Consent is one lawful basis for processing, and consent (or explicit consent) can also legitimise use of special category data, restricted processing, automated decision-making and overseas transfers of data.

Genuine consent will put individuals in control, build customer trust and engagement and enhance your reputation.

Relying on inappropriate or invalid consent could destroy trust and harm your reputation – and may leave you open to large fines.

When is consent appropriate?

Consent is one lawful basis for processing, but there are alternatives. Consent is not inherently better or more important than these alternatives. You should carefully consider which condition is most appropriate for you to rely on.

Consent is appropriate if you can offer people real choice and control over how you use their data and want to build their trust and engagement. But if you cannot offer a genuine choice, consent is not appropriate. If you would still process the personal data without consent, asking for consent is misleading and inherently unfair.

If you make consent a precondition of a service, it is unlikely to be the most appropriate lawful basis and could be deemed as not freely given.

Public authorities, employers and other organisations in a position of power over individuals should avoid relying on consent unless they are confident they can demonstrate it is freely given.

What is valid consent?

Consent must be freely given; this means giving people genuine ongoing choice and control over how you use their data.

The provision of consent should be obvious and require a positive action to opt in. Consent requests must be :-

- prominent,
- unbundled from other terms and conditions,
- concise and easy to understand,
- user-friendly and
- age appropriate.

Consent must specifically cover the controller's name, the purposes of the processing and the types of processing activity.

Explicit consent must be expressly confirmed in words, rather than by any other positive action.

There is no set time limit for consent. How long it lasts will depend on the context. You should review and refresh consent as appropriate.

How should you obtain, record and manage consent?

Make your consent request prominent, concise, separate from other terms and conditions, easy to understand and age appropriate. Include:-

- the name of your organisation;
- the name of any third party controllers who will rely on the consent;
- why you want the data;
- what you will do with it; and
- that individuals can withdraw consent at any time and how to do so.

You must ask people to actively opt in. Do not use pre-ticked boxes, opt-out boxes or other default settings. Wherever possible, give separate ('granular') options allowing data subjects to consent to different purposes and different types of processing as they wish.

Keep records to evidence consent – who consented, when, how and what they were told.

Make it easy for people to withdraw consent at any time they choose. Consider using preference-management tools.

Keep consents under review and refresh them if anything changes. Build regular consent reviews into your routine business processes.

Checklists

Asking for consent

- We have checked that consent is the most appropriate lawful basis for processing.
 - We have made the request for consent prominent and separate from our terms and conditions or other matters.
 - We ask people to positively opt in.
 - We do not use pre-ticked boxes or any other type of default consent.
 - We use clear, plain language that is easy to understand and appropriate for the data subject.
 - We are clear why we want the data and what we are going to do with it.
 - We give individual ('granular') options to consent separately to different purposes and types of processing.
 - We name our organisation and any third party controllers who will be relying on the consent.
 - We tell individuals they can withdraw their consent and explain how they can do it.
 - We ensure that individuals can refuse to consent without detriment.
 - We avoid making consent a precondition of a service.
 - If we offer online services directly to children, we only seek consent if we have age-verification measures (and parental-consent measures for children under 13 years of age) in place.
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Recording consent

- We keep a record of when and how we got consent from the individual.
 - We keep a record of exactly what they were told at the time.
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Managing consent

- We regularly review consents to check that the relationship, the processing and the purposes have not changed.
- We have processes in place to review and refresh consent at appropriate intervals.
- We consider using privacy dashboards or other preference-management tools as a matter of good practice.
- We make it easy for individuals to withdraw their consent at any time and publicise how to do so.
- We act promptly on requests to withdraw consent.
- We do not penalise individuals who wish to withdraw consent.