

Collections Trust

Data protection guidance sheet

This guidance has been produced at the request of the Collections Trust to cover aspects of data protection law of particular relevance to museums and the collections information they hold.

It is not intended to cover all relevant data protection law and guidance. Before reading the guidance below, please familiarise yourself with the main concepts of the General Data Protection Regulation (GDPR) and Data Protection Act 2018, including:

- Definitions of key terms such as 'personal data', 'special category information', 'processing' and 'privacy notices'.
- The seven key principles of data protection.
- The six lawful bases for processing personal data.
- The eight rights for individuals relating to personal data about them.
- The exemption for processing personal data for archiving or historical research purposes.

The Information Commissioner's Office (ICO) has a useful introduction at:

<https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/>

1. Are there circumstances in which museums might claim the exemption for processing personal data for archiving or historical research purposes?

This exemption will apply if the museum can say that the processing of personal data is necessary for archiving purposes in the public interest or necessary for historical research purposes. The National Archives publish information about what counts as archiving in the public interest:

<http://www.nationalarchives.gov.uk/archives-sector/advice-and-guidance/managing-your-collection/archives-data-protection-law-uk/overview/>

There must be safeguards in place to protect the data subjects' rights (the rights of individuals whose personal data is being processed). In practice this means:

- Good security measures both in terms of physical security and IT security.
- Good policy and procedures.
- Only processing what the museum really needs (data minimisation).

IMPORTANT NOTE

The museum's use of personal data does not count as archiving in the public interest or historical research if:

- it is likely to cause substantial damage or substantial distress to the data subject*
- the information is used to take measures in respect of an individual or to make decisions about them

**The museum should carry out a data protection impact assessment to identify if there are any risks in the processing and to find ways to mitigate these risks.*

Where the museum's processing of personal data falls in the archiving or historical research categories, the data subjects' rights are reduced but only to the extent that allowing them to use their rights would prevent or seriously impair the achievement of the archiving or historical research purpose. The most practical and safe approach will be to respect the usual rights of the data subjects (right of access, rectification and so on) where the museum can but if this appears to be problematic in a particular case then legal advice should be sought to see whether it is possible to restrict the person's rights.

2. Is there anything museums need to do differently in future when they acquire new objects, or make new loans, etc?

- Make sure a GDPR privacy notice is given unless deemed impossible or disproportionate.
- Carry out data protection impact assessments regarding the information collected.

Collecting information about owners or depositors.

The museum must meet the requirement for privacy notices or justify why it cannot. This applies to all the museum's processing of personal data whether it counts as archiving/historical research or not.

There is a difference between personal data which the museum obtains directly from the data subject and personal data which the museum obtains indirectly via a third party (for example, when the person depositing an object with a museum is not the owner of the object).

Collecting personal data directly from the data subject

When collecting directly from the individual a privacy notice in the form dictated by article 13 of the GDPR should be given (covered by the ICO guidance referred to above). There is no way of avoiding that requirement. The museum should provide the privacy notice when the personal data is collected.

Collecting personal data indirectly from a third party

In the case of an owner whose details are collected from the depositor indirectly the safest position is to provide the owner with a privacy notice which complies with article 14 of the GDPR (again covered by the ICO guidance).

This should be provided within a reasonable period after the personal data is collected but at the latest within one month. Although this could be done by passing the information to the depositor to pass on, it would be safer to post or email it to the owner so that delivery is as far as possible ensured.

There is a possible 'get out' from the requirement to provide a privacy notice to a person whose information the museum is collecting indirectly. The GDPR acknowledges that this 'get out' is particularly likely to apply in relation to archiving or research purposes.

The 'get out' only works if the museum can claim that providing the privacy information would be 'impossible or require disproportionate effort'. This is more difficult to claim when the museum has the details of the owner in full. Although the museum could try to run arguments based on the cost and inconvenience of contacting the owners, this would appear to be unsafe as the ICO may not agree that this amounts to disproportionate effort. This is something which should be kept under review as any relevant cases or ICO guidance could change this judgement. However, see further below for the use of this 'get out' for personal data which forms part of the history of an item.

Collecting personal data about other people which is part of the history of the item

When the museum has indirectly obtained personal data relating to other individuals such as previous owners, people mentioned in letters, etc, then a good argument could be made that it would be 'impossible' or require 'disproportionate effort' to provide privacy notices. Reasons such as not having any up to date contact details for the individual can be taken into account. The museum should document the reasons for deciding that it would be impossible or involve disproportionate effort to give privacy notices.

Even where the museum decides that it cannot provide privacy notices, it would be good practice to make sure that the privacy notice type information is covered within the museum's documentation and is made publicly available for anyone who wants to know, e.g. by having a policy on the museum's website.

IMPORTANT NOTE

Data protection law only applies to living individuals. Once someone is dead they do not have the protections of data protection law. However, this does not mean that the museum should stop thinking about the information they have about people who are dead. It is possible for an action of breach of confidence to be taken against the museum by the personal representatives of a person who has died. Whilst this risk should not be overstated, it would be sensible for the museum to take further legal advice if it wishes to make any public use of potentially sensitive information about people who have died, particularly if they have died recently. It can only apply where a duty of confidence is owed by the museum so certainly won't cover all the information that a museum has about people who have died. The issue is also further complicated by the fact that a duty of confidence can be overridden by a strong public interest in disclosure.

3. *What about personal information intrinsic to archival documents such as photos, diaries, letters?*

See information about privacy notices above.

4. *Can historic data relating to collections be regarded as being processed under the legitimate interests purpose, since that is the raison d'être of a museum?*

'Legitimate interests' is a lawful basis for processing. As well as considering the lawful basis for processing it is important to consider whether the processing is fair to the individual as data protection principle 1 requires processing to be fair and lawful. In assessing what is fair, the museum can take into account the purpose of the processing.

For ordinary personal data not falling in the special category (i.e. the non-sensitive information) the museum will have to identify a lawful basis for processing in article 6 of the GDPR. This could be based on legitimate interests, but the museum must be able to identify the legitimate interest in question and must do a legitimate interests assessment to balance the legitimate interests of the museum against the legitimate interests of the data subjects.

For some of the data it may be more appropriate for the museum to use an alternative condition in article 6 – 'processing is necessary for the performance of a task carried out in the public interest'. This will work for genuine archive/research related processing but for anything outside that 'legitimate interests is more likely to be appropriate.'

At the moment ICO guidance is limited and the choice of lawful basis under article 6 should be kept under review.

Where the museum is processing personal data which is in the special category (the sensitive information), the museum must find a lawful basis under article 9 of the GDPR in addition to the lawful basis under article 6. Most of the time this will be 'processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with article 89(1) based on Union or Member State Law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.'

5. *Can such historic data be kept without having to go back and seek consent?*

Usually yes. Consent is just one way in which the processing of personal data can be justified. There are lots of other ways such as legitimate interest and public interest. This will have to be assessed by looking at what personal data is held and why and then finding an article 6 and where needed also an article 9 lawful basis. To be clear, keeping personal data is a form of 'processing'. There is no blanket answer but looking at the ICO guidance here will assist:

<https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/>

6. Can personal data in collections documentation be kept indefinitely?

Yes, as long as it genuinely is being processed for archiving or historical research purposes and there are appropriate measures to safeguard the rights and freedoms of the data subject (see question 1 above)

7. Can such information be shared with researchers?

Generally, yes, but be especially careful about any special category personal data. Is the use fair to the individual? Is the researcher's access proportionate to the aim pursued. What protections are in place for the data subject? The museum ought to have a policy about research access.

Again sharing with researchers is a form of processing so it is necessary to find a lawful basis in article 6 and article 9 of the GDPR to justify that sharing.

8. Is consent needed if the museum wants to make public use of such information (e.g. in an exhibition label)?

Normally no. The most important consideration is 'Is it fair to the individuals involved?' because data protection principle 1 requires all processing of personal data to be fair and lawful. It is only lawful if there is a lawful basis for processing. Consent is just one lawful basis for processing but there are others. The museum must identify an article 6 lawful basis. Where there is special category information it would be best not to display it unless you have express consent. This is because express consent is likely to be the only article 9 lawful basis which works. This conclusion has been reached on the basis that using the lawful basis of 'archiving' would be difficult because a) it is unlikely to be fair without consent, b) it would be hard to show that it was a proportionate action and (c) that such action could be considered a measure in respect of an individual which would take the use outside the archiving definition. Guidance from The National Archives suggests that display is still within the archiving purposes but this is by no means completely clear so caution is advised.

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11 September 2018

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