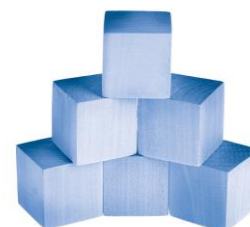


The General Data Protection Regulation and Children: The Information Commissioner's draft guidance



Owen O'Rorke and Rachel Holmes | 22 March 2018

In this latest General Data Protection Regulation (**GDPR**) [consultation](#), the Information Commissioner (**ICO**) has its sights set on organisations that handle the personal data of minors. It is not aimed specifically at schools, and – given the variety of organisations that deal with children in many sectors – producing one-size-fits-all guidance was never going to be an easy task. In our view the ICO has made a reasonably good fist of it, but schools should not expect to find too many specific answers in this document.

Who is a child for these purposes?

The Data Protection Act 1998 (and the European Directive that gave rise to it) said nothing specific about children: by contrast, the GDPR does. A "child" for these purposes is as per the UN Convention on the Rights of the Child¹, meaning anyone under the age of 18.

There has been some confusion around age of "data majority", because GDPR also allows Member States to set an age between 13 and 16 where children are deemed old enough to give a data consent in certain limited online contexts (see below). The UK has chosen 13, which is more or less in line with the existing ICO view (and fixed rule in Scotland) that 12 is the age at which a child of average maturity – while not legally of majority – begins to understand their own data privacy rights. However, it should be stressed that the application of the consent age of 13 is narrow, and the broad assumption about maturity at 12 is not changing for GDPR purposes.

This means, for example, that from around the age of 12 parents will still need the child's authority to exercise data subject rights on behalf of the child, including the new "Right to be forgotten" and the existing right of subject access. It is perhaps fair for schools to treat this as "secondary school age" (whilst making allowances for individual levels of maturity in the 11-13 bracket, for example with older prep school children or secondary school from age 11).

¹ Although this definition did not make the final draft of GDPR it is the relevant framework for EU institutions

There will still be occasions when children's data ought to be shared with parents (and others) in pursuance of lawful interests, even if consent cannot be obtained: that will be a case of what the parents' contractual rights are, and whether a lawful ground exists to share regardless of the child's wishes. However, this is an indication of the delicate and often very circumstantial balancing considerations that come into play around how to handle information about a child.

It is important not to let these overlapping and sometimes complex considerations around age detract from the basic principles underpinning GDPR and children. While data protection rights belong to the individual not the parent (and older children have a degree of self-determination in this regard), the new law recognises that children may be vulnerable and require particular protection *all the way up to 18*. This ranges from being fully informed about uses of their data at the outset, to the ability to change their mind later. It also has particular impact where schools are relying on legitimate interests, where GDPR expressly states that children's rights and interests should be given more weight in the necessary balancing test.

What does the new law say?

The Recitals to the GDPR (the introductory section, which sets out the principles underpinning the legislation) state:

"Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data."

The Recitals elaborate on this, noting (among other things) that:

- the principle of transparency requires data controllers to make all information easy to understand. This means that where the information is addressed to children, it must be set out in clear and plain language – often requiring a separate Privacy Notice;
- the right for individuals to withdraw consent is particularly relevant where the person concerned gave consent when they were a child;
- where organisations rely on "legitimate interests" rather than consent – a legal basis that must be balanced against the individual's rights and interests – that test must lend particular weight to the interests of a child;
- children should not be subject to automated decision-making processes (including profiling²), where these have a legal or similarly significant effect on them.

The GDPR has special rules applicable to data controllers who offer "*information society services*"³ to children. Only those aged 13 or over can consent to use of their personal data for these services. Where the child is younger, data controllers will need the consent of someone who has parental responsibility for the child and make reasonable efforts to ensure the adult who gives that consent genuinely does have parental responsibility.

² "Profiling" means "any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular to analyse or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, where it produces legal effects concerning him or her or similarly significantly affects him or her".

³ These are defined as services "normally provided for remuneration, at a distance, by electronic means...".

The substantive provisions of the GDPR reinforce the need for information addressed to children to be in an intelligible and easily accessible form, making this a legal requirement. Where such parental consent is relied on, the ICO's draft guidance still suggests it is "good practice" to have a separate Privacy Notice aimed at children and the responsible parent. In a schools context, whilst it may not be relying on parental "consent" in the strict sense, it would seem a proper approach to create such an age-appropriate, pupil-facing policy.

In other respects, children have the same rights as adults concerning their personal data. As above, for older children (and certainly teenagers) data controllers must therefore take care to ensure that those with parental responsibility only exercise these on the child's behalf with proper authority and in the child's best interests.

What the guidance contains

The guidance begins with a bullet point "At a glance" summary of the paper's themes. Following that is a checklist for organisations to use as a compliance tool. This covers various matters, including: general GDPR compliance; the legal bases for processing a child's personal data; marketing to children; and privacy notices.

There is an "About this guidance" section, which sets out the purpose of the paper. The next section describes what new obligations the GDPR imposes (and what won't change). After that, we are onto the meat of the guidance, which addresses specific issues:

- the general approach you should take to processing children's personal data;
- what to think about when choosing a legal basis for processing children's personal data;
- the rules about information society services and consent;
- marketing to children⁴;
- what to do if you want to profile children or make automated decisions about them;
- how the right to be informed about how personal data will be processed applies to children – including language and presentation;
- what rights children have over their personal data;
- how the right to have personal data erased applies to children.

Each of these sections unpacks the law and offers practical advice on the steps organisations should take to ensure they comply with it. As is usual for ICO guidance, the paper contains links to other guidance – and to the GDPR itself – for those wanting to dig deeper into particular subjects.

Is it accurate and helpful?

Because of the variety of organisations that deal with children's data, the guidance is set at a high level. Although it provides examples of how the law would apply in certain circumstances, the ICO is (understandably) more concerned with companies selling in-app extras to children than with schools getting pupil sign-ups to the intranet system or hoping to persuade leavers to sign up to their newsletters, and the examples reflect those priorities.

⁴ The heading in the draft actually says "What if I want to market Children?", which is the only startling error in the paper.

One area it has avoided, but which is considered in the ICO's draft consent guidance, is the question of re-consenting when a child hits a certain age and the data controller is relying on a prior parental consent. This is one of the areas of most practical impact on organisations, and so it is disappointing this is not run through in any detail.

Even so, the draft does a good job of explaining the law and offering practical suggestions on how to meet its requirements. The checklists towards the beginning of the paper should prove particularly useful, though it goes without saying that compliance should not be treated as a tick box exercise (in this case, a literal one).

Is anything missing?

Although the term "safeguard" appears a great deal in the draft guidance, this is in the context of how GDPR uses the term as a means to protect people's personal privacy rights (especially those of children). It does not directly engage "safeguarding" at all, in the wider child protection sense.

This is perhaps understandable since this is not in the ICO's remit, but there is considerable overlap in this area with data protection law and children: information sharing with authorities and other schools; internal reporting and record keeping (including access and security); retention of files; systems monitoring; and subject access rights and possible exemptions.

There is indeed a new definition of child abuse data in the current draft Data Protection Bill relating to subject access and requests from authorities, and an amendment that (if adopted) will create [a very helpful new ground](#) for processing sensitive personal data of children in safeguarding contexts. In addition, there are relevant amended rules around subject access in education (extending to independent schools a rule expressly preferring children's access rights to the privacy of teachers and other staff).

These important considerations do not form any part of this draft ICO guidance, but schools should look out for further news as the forthcoming UK Data Protection Act 2018 is finalised.

Implications for schools

The draft guidance is not aimed specifically at either independent schools or the education sector generally: indeed, neither the word "school" nor "education" appears once. Therefore it is not to be taken as any kind of primary text on the issues that specifically impact schools: use of images / photographs, safeguarding, monitoring, and the competing information rights of parents and pupils. The closest we currently have to that is the very thin, but quite helpful, [FAQs for the education sector](#) on the ICO website.

However, the guidance is a useful reminder of the rights accorded children generally, and does at least provide one clear and decisive steer for schools: that best practice will be to have a separate pupil privacy notice, as well as a parental one, in age-appropriate language. This does not mean tearing up your existing GDPR privacy notice drafts, but it is likely to mean supplementing them with at least a short pupil-friendly notice engaging the basics of what the school does with data – and perhaps linking this to the main version of the notice.

It is also worth remembering that the term "marketing" applies to the promotional and fundraising activities of schools, so the GDPR rules on marketing to children should not be overlooked if there is any risk of mailings being perceived to market to pupils.

Summary

The good news is that the GDPR doesn't represent a fundamental change in the law. Indeed, as the guidance points out, organisations currently adhering to best practice may already be meeting the new standards.

Even so, complacency would be foolhardy. To date, the ICO's GDPR guidance papers have not undergone radical changes between consultation and final publication, so – as with all areas of GDPR compliance – it will be worth taking a look at the draft guidance and checking that your school is ready for the changes, rather than waiting until the final version is published, which may give you only a little time to put any necessary systems in place. Furthermore, as the guidance says, this is a supplementary paper and should be read alongside the ICO's ever-expanding [main GDPR guidance](#).

Next steps

The consultation closed on 28 February. At the time of writing, the ICO has not given a date for publication of the final version. Given that the GDPR takes effect on 25 May, we would hope to see it before then. However, the ICO has managed expectations in this regard before now and it seems almost certain that at least some guidance will not be finalised until GDPR is already upon us.

Similarly, as above, there are specific provisions that will affect children (in particular around education and child abuse data) written into the current Data Protection Bill that also need to be in force by 25 May. There is no realistic prospect of having guidance around that in time when the text (which will become the Data Protection Act 2018) is not even yet finalised.

The ICO is preaching calm and stressing that good practice in this area should already be clear. Less reassuringly, however, in the same breath it has stressed that a lack of guidance will not therefore be a valid excuse for falling short in one's practices. In the meantime, if anything is unclear or you have any questions, please contact us for advice.

If you require further information on anything covered in this briefing note, please contact [Owen O'Rorke](#), [Rachel Holmes](#) or your usual contact at the firm on 020 3375 7000.

Further information can also be found on the [Schools](#) page on our website.

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March 2018