

ILM FACTSHEET

GDPR and Legacy Administration



THE INSTITUTE
OF LEGACY
MANAGEMENT

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This factsheet is intended to remind members of their obligations in respect of collecting and retaining data and to encourage them to introduce practical and appropriate policies for their charities.



GDPR and Legacy Administration

Background

The UK's current data protection regime came into force in May 2018 with the introduction of the EU's General Data Protection Regulation (GDPR) and the Data Protection Act 2018, which supplements the GDPR. Post-Brexit the GDPR has been implemented into UK law as the UK GDPR. The legislation seeks to protect individual's data from misuse by placing greater responsibilities on Data Controllers and Data Processors.

Whilst there was considerable discussion about the impact on charities and legacy teams when the legislation came into force, many charities haven't yet implemented suitable policies covering their processing of data obtained whilst administering legacies. In fact, the move towards electronic file storage has probably led to charities retaining more data than they previously did, and being more non-compliant than they were when the legislation was introduced.

This fact sheet is intended to remind members of their obligations in respect of collecting and retaining data and to encourage them to introduce practical and appropriate policies for their charities.

We believe that each charity should have its own policies and procedures in respect of data processed in administering legacies. We are therefore not advocating for specific retention periods or specific approaches as there is no one correct approach, but we hope to provide the structure for you to make those decisions.

Key considerations

Data relating to the legator

Data relating to a deceased individual is not covered by data protection legislation. To some degree this means it can be processed freely and retained indefinitely although there may still be general duties of confidentiality that apply. However, we would urge you to be conscious that those close to the deceased may have expectations about how you use this data and that not respecting those expectations could have reputational consequences. Where you are publicly sharing stories about the deceased it is advisable to discuss with the executor or family beforehand.

Data relating to legators and their gifts is very useful and will be vital for forecasting and assessing the success of your legacy programme. We strongly urge you to retain information such as key dates (Will, notification, probate, closing etc), amounts received, asset splits and details about the nature of the gift.

Data relating to living individuals

Intermingled with the deceased data is data relating to living individuals including beneficiaries, personal representative and others. This data is covered by GDPR.

In respect of this data you will need to consider a number of questions in relation to your processing and retention of it. Much of this data will be in case correspondence and free text boxes as well as in the contacts section of your legacy database. Crucially you will need to be able to delete this data whilst retaining the legator data you need.

In respect of your data on living individuals, you need to address the five areas below. We suggest you work with your organisation's Data Protection Officer or Data Governance team to address these.

1. What are you using the data you collect for?

In advance of collecting and using data you need to identify why you are processing it. What are you going to do with it? It is worth noting that storing data comes under the definition of processing even if you don't use it.

The most obvious purpose for processing data in respect of legacy administration is to help your organisation optimise the value received from estates where the charity is entitled to a gift in a supporter's wills. You may however want to identify other purposes beyond this which you think will benefit the charity.

Having identified your purposes it is vital that you document this and only use the data in the way that you originally identified. If, for example, you state you only collect executor data for the purpose of obtaining payment of a legacy, it is illegal to then use their data to invite them to an unconnected event unless you identified that at the outset.

2. What is your legal basis for processing the data?

There are six legal bases for processing data:

- (i) consent
- (ii) performance of a contract
- (iii) a legitimate interest
- (iv) a vital interest
- (v) a legal requirement
- (vi) a public interest

Your charity needs to identify the legal basis for processing the data. The choice of legal basis will depend on what purposes you have identified.

Currently, most charities seem to be relying on 'legitimate interest' to process data in respect of legacy administration. This is likely to be acceptable but there may be a case for considering 'legal requirement' as your legal basis. This is an option in respect of the executor data which you will process to comply with the trustee's duties to collect and charitable funds and use them in furtherance of the charity's objects. Consent might also be an option where the executor makes first contact and voluntarily provides the data and it may be required where the identified purpose includes marketing to executors, family and friends.

3. How long will you retain the data for?

As stated above, data relating to the deceased can be kept indefinitely as it is not covered by GDPR.

However, in respect of all other personal data you will need to decide how long you retain it and how you will delete it.

The ICO guidance clearly states that *“it is up to you to justify your retention period, based on your purposes for processing. You are in the best position to judge how long you need it ... you can keep it, as long as one of those purposes still applies, but you should not keep data indefinitely ‘just in case’, or if there is only a small possibility that you will use it.”*

Factors to consider are your auditor’s requirements, the need to retain tax information and the need to keep copies of legal agreements. It is worth considering that legacies are rarely reopened more than a few years after they are closed, and, where they are, it is as a result of receiving correspondence that provides all the information you need. This may point to a shorter retention period.

Where there are specific documents that need to be retained for long periods after receipt of the funds you should strongly consider whether you are able to delete data on the file that is no longer required.

We understand that many charities are opting to retain all data on files for six years after the file is closed and deleting all non-legator data at that stage. This kind of approach makes sense from a practical perspective, but you should consider that the legislation does potentially indicate that retention periods should be set for individual categories of data and it does not necessarily anticipate a legacy file with a range of data all being treated the same way. It may therefore be appropriate to consider deleting particularly sensitive or risky data that is not needed sooner than the rest of the file despite the impracticality.

4. How will you inform people that you are processing their data?

Your organisation will have publicly available privacy information on your website. You should flag with your Data Officer or Data Governance team that this should include reference to data processed whilst administering legacies.

It is however not sufficient to simply have your privacy information on your charity's website. All individuals have the right to be actively informed when their personal data is being processed within a month of obtaining the data unless one of the limited list of exceptions* apply. It is not a defence that this data is publicly available.

We know that many members are not routinely informing individuals that their data is being processed. If that is the case you should start including a privacy statement in your correspondence stating how you will use their data, what your legal basis is and how long you will retain it or linking to the privacy information where this is set out.

The issue for legacy teams is that in many instances we obtain data that we have no intention of using, such as beneficiary data in wills, details of the in active executor, details about individuals relating to a claim. We understand that actively contacting these individuals to tell them you have their data is impractical and would in most cases not be welcomed by the individuals concerned. In other instances, we may conclude that it is preferable to wait longer than a month before contacting the individual whose data you have obtained.

It is not easy to identify which exception to rely on for not actively providing the privacy information. We believe that there is some scope to rely on disproportionate effort, although the ICO state that this should not be relied upon routinely.

*For exemptions, see <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/the-right-to-be-informed/are-there-any-exceptions>

An alternative is to use the final exception – *“Providing the information to the individual would render impossible or seriously impair the achievement of the objectives of the processing”*.

This probably has some merit as the purpose of processing the data is to maximise legacy income and there is a good case that contacting all the individuals concerned would be unwelcome and therefore detrimental to your objectives. This feels proportionate as long as you keep the data safe and do not use it.

5. How will you delete data at the end of the retention period?

You need to be able to delete data in such a way that you retain the legator information that we have discussed but remove all the data relating to other individuals. Much of this, such as wills, Smee & Fords will be in the case correspondence or free text boxes or your contacts list.

The process of deletion will obviously depend on the database you use. We have had discussions with Clear Software, who produce First Class, and believe that they have developed the system so users can retain all the key legator information, which will be stored in specific fields, but delete any unneeded personal data which is found in the contacts section.

Developing efficient process for deleting data will be crucial. We think it is probably acceptable to delete data periodically so that data is deleted at the first session following the end of the retention period.

Conclusion

Failing to comply with GDPR places your organisation at risk so it is really important that you ensure that you go through the five steps above with whoever is responsible for data governance at your charity.

If you are unsure on anything, then there is extensive information on the excellent ICO website: <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources>

Alternatively, you may like to seek advice from one or our legal corporate partners or another suitably qualified advisor, or you may wish to reach out to other organisations to see what approach they have taken.