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t: 020 7637 1865
e: nalc@nalc.gov.uk
w: www.nalc.gov.uk
a: 109 Great Russell Street, London WC1B 3LD

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L08-17 | PRIVACY NOTICES AND THE LEGAL BASIS FOR PROCESSING PERSONAL DATA

Introduction

Legal Briefings L04-17 and L05-17 explained that the present rules regarding the content and communication of privacy notices (currently contained in the Data Protection Act 1998) will become stricter under the General Data Protection Regulation ("GDPR"), which comes into force on 25 May 2018. This briefing explains the requirements of articles 12, 13 and 14 of the GDPR in relation to the content and communication of privacy notices in the context of parish meetings, parish councils, and in Wales, community councils.

The preparation of privacy notices requires identifying the legal grounds for processing of personal data. This is summarised in the Annex.

Background

A privacy notice (sometimes known as a fair processing notice) is a reference to particular set of information which a data controller is required to provide to an individual ("the data subject") when it is processing his personal data. The use of privacy notices implements one of 6 data protection principles contained in GDPR which requires personal data to be processed fairly, lawfully and in a transparent manner in relation to the data subject.

A parish meeting, parish council, and in Wales, a community council are data controllers because they collect and use personal data. This includes, for example, information about current, former and prospective staff, local residents, suppliers and service providers, enquirers, complainants, individuals captured by CCTV images, allotment garden tenants and councillors for a variety of corporate functions, some of which originate from the performance of statutory, contractual or other legal obligations. These include the following:

- maintaining and managing accounts and records;
- recruiting and managing staff;
- promotion or provision of council services;
- making contracts for supply of goods and services;
- managing premises (such as allotment gardens, village halls, sports facilities or markets);
- administering grants;

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- crime prevention via the use of CCTV;
- corporate/office administration;
- parking regulations administration and
- resident surveys.

The above list is for illustrative purposes and is not exhaustive.

Content of privacy notices

Under GDPR, the content of a council's (or parish meeting's) privacy notice will depend on whether or not the personal data has been collected from the data subject.

1. The below rules apply when personal data relating to a subject data is collected from that data subject.

a) The data controller shall, at the time when personal data is obtained, provide the data subject with following information:

- the identity and the contact details of the controller and, where applicable, of the controller's representative (meaning the data processor);
- the contact details of the data protection officer;
- the purposes of the processing (e.g to promote council services, to maintain accounts and records, to recruit and manage staff, to undertake research, manage property, crime prevention) and the legal basis for the processing*;
- the recipients or categories of recipients of the personal data, if any (e.g credit reference agencies, the Disclosure and Barring Service, providers of goods and services, HMRC, current, past and prospective employers, professional advisors, other local authorities, charities and voluntary bodies) and
- where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the appropriate safeguards.

*See Annex for an explanation of the legal grounds for processing (i) personal data and (ii) sensitive personal data.

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b) In addition, the data controller is required to provide the below information.

- the period for which the personal data will be stored, or if not possible, the criteria used to determine that period (e.g. for unsuccessful job applicants, personal data may be retained for a further 6 months in the event of new council job opportunity);
- the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;
- where the processing is based on the data subject's consent to the processing of personal data or explicit consent to the processing of sensitive personal data, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
- the right to lodge a complaint with the Information Commissioner;
- whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data and
- the existence of automated decision making, including profiling and information about how decisions are made, the significance and the consequences of such processing for the data subject.

Where a data controller wants to process the personal data for a purpose other than that for which the personal data was collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with relevant further information described in paragraph (b) above.

The above requirements shall not apply if the data subject already has the information. For example, a council's job advertisement and standard application form/recruitment pack may have already provided the requisite information to job applicants.

A council or parish meeting may have one comprehensive privacy statement which deals with the various categories of people whose personal data it processes. However, it could have privacy statements for different categories of individuals. For example, a council may have one privacy notice in respect of enquirers/ complainants and local residents and a separate one in respect of personal data collected from (allotment) tenants. It may also have a separate privacy statement for the personal data collected from staff.

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2. The below rules apply where personal data has not been obtained from the data subject (e.g. planning applications sent to a council by the planning authority, electoral roll).

a) The data controller shall provide the data subject with the following information:

- the identity and the contact details of the controller and, if any, of the controller's representative (meaning the data processor);
- the contact details of the data protection officer;
- the purposes of the processing for and the legal basis for the processing*;
- the categories of personal data concerned;
- the recipients or categories of recipients of the personal data, where applicable and
- where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation and the appropriate safeguards.

*See Annex for an explanation of the legal grounds for processing (i) personal data and (ii) sensitive personal data.

b) In addition, the data controller shall provide the data subject with the following information.

- the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;
- the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing; concerning the data subject and to object to processing as well as the right to data portability;
- where the processing is based on the data subject‘s consent to the processing of personal data or explicit consent to the processing of sensitive personal data, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
- the right to lodge a complaint with the Information Commissioner;
- from which source the personal data originates, and if applicable, whether it came from publicly accessible sources and

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- the existence of automated decision making, including profiling and information about how decisions are made, the significance and the consequences of such processing for the data subject.

The controller must provide the information in (a) and (b) above:

- within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;
- if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or
- if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.

Where the controller wants to further process the personal data for a purpose other than that for which the personal data were obtained, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information described in paragraph (b).

The above requirements shall not apply if the data controller has already provided the information to the data subject.

Communication of information in a privacy notice

The information in a privacy notice shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.

The information communicated in a privacy notice must be in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. Data controllers processing children's data will need to take account of the level of comprehension of the age groups involved and tailor their notices accordingly.

Where/how to communicate a privacy notice

The GDPR does not prescribe the means of delivering a privacy notice. It is common for organisations to have a comprehensive privacy notice on their website and display them in their offices. A layered approach to the delivery of information in a privacy notice should also be considered. This allows a data

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controller to provide key information immediately and have the other information readily available / clearly communicated elsewhere. For example , signage under a CCTV may include key information in paragraph 1(a) above and the remaining information in paragraph 1(b) above may be communicated on the council's website and on noticeboards in the council's premises at which the CCTV has been installed. Relevant guidance from the Information Commissioner's website is set out below.

"You can provide privacy notices through a variety of media:

Orally - face to face or when you speak to someone on the telephone (it's a good idea to document this).

In writing - printed media; printed adverts; forms, such as financial applications or job application forms.

Through signage - for example an information poster in a public area.

Electronically - in text messages; on websites; in emails; in mobile apps.

It is good practice to use the same medium you use to collect personal information to deliver privacy notices.

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You should not necessarily restrict your privacy notice to a single document or page on your website. The term 'privacy notice' is often used as a shorthand term, but rather than seeing the task as delivering a single notice it is better to think of it as providing privacy information in a range of ways. All of the information you are giving people about how you are processing their data, taken together, constitutes the privacy information.

It is good practice to try to put yourself in the position of the people you're collecting information about. You need to understand the level of knowledge your intended audience has about how their data is collected and what is done with it. This will help you decide when to give them privacy information. If an individual would not reasonably expect what you will do with their information you need to actively provide privacy information, rather than simply making it available for them to look for themselves, for example on your website."

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Next steps

With only six months to go before the introduction of GDPR, councils and parish meetings are recommended to review and update the privacy notices they already have and to put new privacy notices in place by 25 May 2018.

Further guidance

Guidance about privacy notices is available from the ICO's website via https://ico.org.uk/for-organisations/guide-to-data-protection/privacy-notices-transparency-and-control/privacy-notices-under-the-eu-general-data-protection-regulation/

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Annex

An explanation of the legal grounds for processing (i) personal data and (ii) sensitive/special categories of personal data.Article 6 of GDPR provides that it will be lawful to process personal data if at least one the following conditions apply.

- The data subject has given consent to the processing of his personal data for specific purpose(s);
- Necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract (in other words, processing is a contractual necessity);
- Processing is necessary for compliance with the data controller's legal obligation(s) - this would include legal obligations which are not contractual and would cover the performance of a council's or a parish meeting's statutory obligations.
- Processing is necessary in order to protect the data subject or another individual's vital interests (e.g. in a medical emergency) or
- Processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller - this may sometimes apply to councils or parish meetings.

There are different rules for the processing of sensitive/special categories of personal data, defined as data about an individual's racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying an individual, data concerning health or data concerning an individual's sex life or sexual orientation.

Article 9 of GDPR provides that it is lawful to process sensitive personal data if one the following conditions apply.

- The data subject has given explicit consent to the processing for specified purpose(s);
- Processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law;
- Processing is necessary to protect the data subject or another individual's vital interests where the data subject is physically or legally incapable of giving consent;

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- Processing is carried out by a not-for-profit body with a political, philosophical, religious or trade union aim provided the processing relates only to members or former members (or those who have regular contact with it in connection with those purposes) and provided there is no disclosure to a third party without consent;
- Processing relates to personal data manifestly made public by the data subject (e.g. information shared by the data subject on his Twitter account or in article he has written in a newspaper or a blog);
- Processing is necessary for the establishment, exercise or defence of legal claims or where courts are acting in their judicial capacity;
- Processing is necessary for reasons of substantial public interest which is proportionate to the aim pursued and which contains appropriate safeguards;
- Processing is necessary for the purposes of preventative or occupational medicine, for assessing the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or management of health or social care systems and services or a contract with a health professional;
- Processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of healthcare and of medicinal products or medical devices or
- Processing is necessary for archiving purposes in the public interest, or scientific and historical research purposes or statistical purposes which is subject to appropriate safeguards.