



## PROSPECTING FOR GOLD LTD.

### Prospect Research, Wealth Screening and Data Protection

With wealth screening once again in the news, we want to help you understand the issues and what you may need to do.

Wealth screening is not and never has been illegal. Nor is prospect research. The key is to make sure you meet the requirements of the current Data Protection Act and new General Data Protection Regulation so you can lawfully undertake these activities.

### How did we get here?

Uncertainty has hit fundraising since the Information Commissioner's Office (ICO) fined thirteen national charities for data protection breaches. Alongside these fines, confusion has emerged as organisations struggle to find their way through the requirements of the General Data Protection Regulation which comes into force in May 2018.

The way charities handle their supporters' personal data is a key factor in public confidence in the sector. Our first advice is to ask you not to rely on your "usual practices" and assume that they are compliant. Read through the Data Protection Act, the General Data Protection Regulation (GDPR) and the guidance relating to it on the ICO's website to understand where you may need to modify your practices.

The ICO Direct Marketing guidance, issued on 24<sup>th</sup> March 2016 takes the view that the Data Protection Act applies to the *promotional, campaigning and fundraising activities* of not-for-profit organisations.

### Grounds for lawfully processing data

The law sets out a number of grounds for lawfully processing personal data:

- Consent
- Contract
- Legal Obligation
- Vital Interests
- Public Task
- Legitimate Interest

The various bases for processing are not ranked, one is not better than the other. They can apply at different times.

For most charities, there are two grounds that you can use for ***fairly and lawfully processing personal data for prospect research purposes***:

1. The processing is necessary for the purposes of a ***Legitimate Interest*** pursued by the charity. This legitimate interest must be balanced against the rights of the individual and is normally combined with the provision of *fair processing* information (usually included in a ***Privacy Notice***); or
2. The data subject has given their ***Consent*** to the processing.

The ICO says in its Guidance on Consent:

“As a general rule, whenever you have difficulty meeting the standard for consent, this is a warning sign that consent may not be the most appropriate basis for your processing. So we recommend you look for another basis.”

Legitimate interests: you can process personal data without consent if you have a genuine and legitimate reason (including commercial benefit), unless this is outweighed by harm to the individual’s rights and interests.”

These are described more fully below.

## Legitimate interest

You can process personal information where you have a **Legitimate Interest** to do so for particular purposes. That processing must be legal, and you **must** balance your charity’s interest with the impact on your supporters who are affected. Your assessment of this balance must be clearly documented. You must consider the reasonable expectations of the individuals whose data you are processing based on their relationship with your organisation.

The Data Protection Network has published some very helpful guidance which includes a framework for a three stage balancing test. You can download it [here](#).

The combination of a **Privacy Notice** and **Legitimate Interest** case is often referred to as *fair processing*. This can form the legal basis for processing data without explicit consent.

## Consent

You may also need to review the **Consent** that you have from existing supporters or that you gather from new supporters. This consent can be written or verbal but must be a positive action freely given. You need to be able to prove that you do have consent.

## Privacy notices

Keeping supporters informed about how their data is being used is a key principle of both the Data Protection Act and GDPR. Recent ICO penalty notices have referred to the inadequate provision of this information. You can do this in your **Privacy Notice**.

So, what might you need to include? It is useful to explain why you are using the information in a particular way so your supporters understand why it is important. Be as detailed as you can, but ensure the final statement is clear and easy to understand. The type of information that you need to cover in your Privacy Notice includes:

- Details of the data controller (and data protection officer)
- Purposes for which the data will be processed and the legal basis for processing
- Explanation of the organisation’s legitimate interest
- Categories of personal data
- Who it will be shared with
- Countries where it may be transferred
- How long will it be kept
- Data subjects rights including to withdraw consent to processing and right to opt out
- Sources of personal data
- Any automated decision making or profiling (different to prospect research)

Specifically when thinking about prospect research, you will also want to be sure you describe:

- Why do the research
- Types of research – wealth screening, financial analysis
- What data sources – publically accessible information
- Uses of third parties

More examples of the types of information you may need to include in your **Privacy Notice** are explained under **Wealth screening, Using third parties** and **Desk research** below.

Review your Notice and ask someone disconnected with your cause to explain what it means to them. Does their response suggest that it is clear? Make improvements wherever possible. We suggest that you look at the ICO guidance on **Privacy Notices** to see some good and bad examples.

## Our position

At Prospecting for Gold, over recent months we have rigorously reviewed and, where appropriate, updated our procedures. We have undertaken a **Privacy Impact Assessment** and assessed our compliance against the Data Protection Act and GDPR.

We have taken specialist legal advice and been advised that our operations meet the regulatory requirements for data protection and that we have robust policies and procedures in place.

## Wealth screening

To be totally clear, wealth screening is **not** and **never has been** illegal. The ICO and the Fundraising Regulator have both reiterated this point on many occasions. The ICO judgement in this area was about adequate fair processing information not being given rather than the absence of consent.

Your **Privacy Notice** must clearly state that you use personal data in this way; in this context that will be for fundraising and related research, which in turn may include wealth screening or analysis.

Where **Consent** is not evident, you may rely on your **Legitimate Interest**, providing that this has been clearly documented and you have considered the impact on your supporters of processing their data in this way. That impact may differ by types of supporter, for example an active current supporter compared to one that has infrequent or more historic contact with your organisation.

## Using third parties

Charities can still work with third parties and must ensure that a data contract exists between them – one that specifies that the third party will **only** use the data for the purpose they are engaged for, that the data will be held securely and won't be sold on.

The type of data processing that the third party undertakes for you needs to be specified in your **Privacy Notice**.

## Desk research

Researching new potential donors and wealth screening **can** continue. We believe research will continue to be a cornerstone of major donor fundraising. Individuals of this calibre are busy people and will expect you to have done your homework. Not having done so will reflect poorly on you and your organisation.

A great deal has been said about the use of **publicly accessible information** and its use for research purposes. Our received advice is that this can be used, but you must take into account how such sources may have been compiled; in other words, which are most accurate and up to date, and which may include subjective information which may be misleading or even inaccurate? By way of an example, an entry in a trade directory which is self-disclosed would be regarded as more reliable than an article in newsprint or online.

Remember, your **Privacy Notice** should make it clear that you may engage in this activity. Include the fact that you may review publicly available information about an individual to help you gain a better understanding about your supporters.

When you identify a new prospect through research, you will need to provide them relevant information from your Privacy Notice at an appropriate time. This is most likely to be at the point when you first make contact with the individual.

In summary, you currently do **not need** explicit **Consent** to undertake the fundraising research related activities. The combination of provision of **Fair Processing Information** (usually via a **Privacy Notice**) and your **Legitimate Interest** in undertaking the analysis and using the data should provide the legal basis for the processing.

## Other considerations

Apart from the Data Protection Act 1998 and the GDPR, you should **also** consider the impact of:

- The Privacy and Electronic Communications (EC Directive) Regulations 2003
- The Freedom of Information Act 2000 (or the Freedom of Information (Scotland) Act 2002 in Scotland)
- European Convention on Human Rights (ECHR) – in particular, Article 8
- The Charities Act 2016

Prospecting for Gold recommends that you undertake a **Data Protection Impact Assessment** to ensure that you are not only compliant with the law as it stands now, but also with the position due to be in force in 2018 following implementation of GDPR. If completed thoroughly, this will clearly identify any areas where you may not be compliant now or in the future and help you understand how to amend your practices to achieve compliance. Prospecting for Gold's consultants can assist you in preparing your Privacy Impact Assessment.

## Things you should do now

1. **Carry on fundraising!** You may feel emotionally bruised and battered with what is happening at the moment, but don't lose sight of the great work that you and your organisation are doing. Giving should be a fantastic and joyous experience for all concerned.
2. Undertake a **Privacy Impact Assessment** to consider the wider impact of your systems and processes. Take into account forthcoming legal changes in your responses.
3. Document your **Legitimate Interest** to process data in a certain way; include your assessment of how your supporters are impacted by your actions and document this in a clear statement.
4. Ensure that the way you process personal information is legal. **Document** the reasons why.
5. Review your **Privacy Notice** so that it accurately reflects how you process personal information (this may include personal data other than that relating to your supporters).
6. Consider what **Consent** you need to capture and ensure you have a robust system for recording consent that is given.
7. Adopt a **Privacy by Design** approach to ensure that privacy and data protection are considered in the early stages of any future project within your organisation. See the ICO website for further information; there are specific requirements due to come into force with the GDPR.

8. **Review** your practices regularly and consider how the legal framework and current guidance may impact upon them.
9. You may also wish to seek legal advice from a relevant trustee or legal advisers.

Prospecting for Gold are very experienced in managing day to day compliance with the Data Protection Act and other fundraising regulation. We are well-positioned to assist you with the challenges that you face in this area, including whether you should seek advice from a Data Protection legal specialist.

So please do contact us and we will do our very best to help you with practical advice and guidance.

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