



PROSPECTING FOR GOLD LTD.

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Prospect Research, Wealth Screening and Data Protection

You may have seen some recent press coverage around data protection and fundraising in the not for profit sector. This has created confusion and concern amongst many. To help understand the issues and what you may need to do, we've set out some practical advice and approaches.

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 Data Protection Act so you can lawfully undertake these activities.

How did we get here?

Uncertainty has hit fundraising since the Information Commissioner's Office (ICO) fined two national charities for data protection breaches in December. Both charities paid the fines while publicly disagreeing with the ICO's assessments. On 31st January, the ICO announced that it is taking action against eleven more charities, noting that these were the last charities being investigated as part of this current operation. Full details are yet to be released.

On 21st February, the ICO, the Fundraising Regulator and the Charity Commission held a joint conference for the charity sector on Fundraising and Regulatory Compliance. At this conference, the three regulators set out their views on the issues of concern while sector representatives had the opportunity to put questions and points of clarification to the regulators.

The laws surrounding the protection of personal data **have not changed**. The way charities handle their supporter's 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 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 24th March 2016 takes the view that the Data Protection Act applies to the *promotional, campaigning and fundraising activities* of not-for-profit organisations.

For most charities, there are two grounds that you can use for fairly and lawfully processing personal data (in accordance with Schedule 2 of the Data Protection Act):

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.

These are described more fully below.

Privacy notices

Keeping supporters informed about how their data is being used is a key principle of the Data Protection Act. 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. 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.

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.

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. The Fundraising Regulator released its Guidance on Consent on 21st February. It is available on their website. There are some further changes to consent requirements due to become law from May 2018. See the section entitled **The future** for 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.

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 reiterated this point a number of times at their conference on 21st February. Press reports that implied this are incorrect. 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

The ICO judgements do **not** prohibit the use of third parties. Their judgement was specifically about *selling* data to other organisations.

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. At the 21st February Conference, representatives from the Regulators suggested that this may 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, 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

The future

The **General Data Protection Regulation** (GDPR) comes into effect from 25th May 2018. The UK Government have confirmed that the decision to leave the EU will not affect the commencement of the GDPR. Its aims are to strengthen and unify data protection for individuals within the EU.

Some important changes are (but are not limited to):

- An **accountability** principle. The GDPR requires you to show **how** you comply with the principles – for example by documenting the decisions you take about a processing activity. This includes documenting the legal basis you have for carrying out various types of data processing.
- The **information you supply** about the processing of personal data must be concise, transparent, intelligible and easily accessible, written in clear and plain language and free of charge.
- **Consent** under the GDPR requires some form of clear affirmative action and must be verifiable. This means that some form of record must be kept of how and when consent was given.
- **Data processors** have direct obligations for the first time.

Legitimate interest and the provision of fair processing information will remain valid.

Prospecting for Gold recommends that you undertake a **Privacy 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. 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).
3. Ensure that the way you process personal information is legal. **Document** the reasons why.
4. 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.
5. Undertake a **Privacy Impact Assessment** to consider the wider impact of your systems and processes. Take into account forthcoming legal changes in your responses.
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.

We are expecting the ICO to issue further guidance on GDPR in March. We will keep you updated as more information comes to hand.

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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