



NHS Streamlining Programme

Privacy Notices and Offer Letters

We have been asked to provide advice in respect of text to be included in offer letters and privacy notices regarding the streamlining programme so as to comply with the General Data Protection Regulation (GDPR).

Legal basis for processing personal data

An organisation processing personal data must be able to identify the lawful basis for the processing. In utilising the streamlining programme, NHS organisations will be processing personal data.

There are six legal bases under Article 6(1) of the GDPR:

- (a) **Consent:** the individual has given clear consent for you to process their personal data for a specific purpose
- (b) **Contract:** the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract
- (c) **Legal obligation:** the processing is necessary for you to comply with the law (not including contractual obligations)
- (d) **Vital interests:** the processing is necessary to protect someone's life
- (e) **Public task:** the processing is necessary for you to perform a task in the public interest or for your official functions, and the task or function has a clear basis in law
- (f) **Legitimate interests:** the processing is necessary for your legitimate interests or the legitimate interests of a third party unless there is a good reason to protect the individual's personal data which overrides those legitimate interests

Consent has historically been relied upon by employers as the legal basis for processing personal data. Most employment contracts contain a data protection clause under which employees provide blanket consent to their data being processed. However, there has been some debate about how appropriate it is to rely on consent in an employment context due to the unequal bargaining position which exists between most employees and their employers. Guidance from the Information Commissioner's Office (ICO) has suggested that an alternative basis should be relied on where possible.

It is, therefore, necessary to consider other legal bases for processing data. In the absence of a legal obligation to process data or the processing being necessary for a contract of employment, article 6(1)(e) and (f) need further consideration.

Legitimate interests under article 6(1)(f) can be an organisation's own interests or the interests of third parties. They can include commercial interests, individual interests or broader societal benefits. GDPR specifically identifies processing employee data as an example of employer's legitimate interests. A public authority can only rely on

'legitimate interests' if it is processing data for a legitimate reason **other** than performing its tasks as a public authority. Unhelpfully, the phrase 'performance of its tasks' is not defined and there has, as yet, been no further guidance issued on this point.

One approach to this issue is to take the view that an NHS organisation is carrying out a public task when it provides healthcare services and that employment matters fall outside its public task. This is certainly consistent with the approach we take with judicial review where employment matters are a private function of an NHS body and not a public function. It follows that public authorities should be able to take the view that processing matters related to employment fall under 'legitimate interests'.

Where 'legitimate interests' is relied upon, the employer must show that its interest is significant enough to override the individual rights of the employee. In the context of the streamlining programme, the interest is the efficiency savings which are made by the NHS in transferring data via an Inter Authority Transfer.

The alternative approach would be to view employing staff and streamlining as part and parcel of the exercise of the public body's functions, in which case the legitimising condition would be article 6(1)(e).

Article 6(1) of the GDPR sets out that processing shall be lawful only if and to the extent that at least one of the legal bases apply. Our view is that the reference to 'at least' means that it is possible to rely on more than one legal basis. In the case of public authorities and in the absence of guidance from the ICO on where employment matters sit, our advice is to rely on both article 6(1)(e) and 6(1)(f). Privacy notices should be live documents which are added to and amended as new processing methods are introduced. Where the ICO provide further guidance on public authorities' public tasks, privacy notices can be amended if necessary.

Given the term of the 2016 junior doctor contract which requires that information is transferred between NHS organisations, Trusts should also be aware that they can rely on Article 6(1)(b); that the processing is necessary for a contract with the doctor in training.

Privacy Notice

We suggest that the following is included in an NHS organisation's privacy notice:

"Electronic Staff Record

On commencement of employment with the Trust, your personal data will be uploaded to the Electronic Staff Record (ESR). ESR is a workforce solution for the NHS which is used by the Trust to effectively manage the workforce leading to improved efficiency and improved patient safety.

Streamlining

In accepting employment with the Trust, you accept that the following personal data will be transferred under the streamlining programme if your employment transfers to another NHS organisation:

[List data which is transferred for the purposes of streamlining]

Streamlining is the process by which certain personal data is transferred from one NHS organisation to another when your employment transfers. NHS organisations have a legitimate interest in processing your data in this way in establishing the employment of a suitable workforce. The streamlining programme is a data sharing arrangement which is aimed at improving efficiencies within the NHS both to make costs savings for Trusts but also to save you time when your employment transfers."

Offer Letters

It is not necessary for an offer letter to include a request that an individual consent to their data being transferred under streamlining. However, in the interests of transparency, which is a guiding principle of the GDPR, we suggest that the following is included:

"By accepting this offer, you accept that your personal data may be transferred from the Trust to another NHS organisation where your employment transfers within the NHS. This is in accordance with the streamlining programme which is aimed at improving efficiencies within the NHS both to make costs savings for NHS organisations but also to save you time when your employment transfers.

[Additional wording for use in DiT offer letters - Please also be aware that the Terms and Conditions of Service for doctors and dentists in training 2016 stipulate that where the doctor is required to rotate between employing organisations and/or host organisations, there is a requirement to transfer such personal and confidential information regarding the doctor's employment and training as is deemed necessary by the organisations for the completion of pre-employment checks and for the continuation of the doctor's training. It is, therefore, a condition of your employment that the transfer of such information occurs.]”

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