

Submitted to Consultation - Recognised legitimate interest

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About you

1 Are you answering:

On behalf of an organisation

About your organisation

2 What is the name of your organisation?

Name of your organisation:

Shoosmiths LLP

3 Which of the following sectors best describes your organisation?

Private sector

Other (please specify):

4 Approximately how many employees does your organisation have?

500+

Your use of personal information

5 Have you ever handled people's information for any of the following purposes? (please select all that apply)

To prevent or detect crime, To safeguard people, To respond to an emergency event or situation

6 Did you face any data protection challenges when handling people's information for these purposes?

No

Please tell us what these challenges were:

Questions about the draft guidance

7 Was it easy to find the information you need in the guidance?

Yes

Do you have any suggestions for improving the structure?:

The structure is generally clear and well-organised. However, we suggest including a checklist at the beginning of each condition to assess its applicability.

8 Do you think the guidance is clear?

Yes

Do you have any suggestions to make it clearer?:

We suggest that it could be amended to provide further clarification on the following:

- Further examples

On page 13, provide a practical example of “If you can’t show what you want to do actually helps meet the recognised legitimate interest condition, you

won’t be able to use this lawful basis.”

On page 11, provide examples of “subject to other data protection considerations as normal.” and “You must also comply with all the other requirements

of the law.” We also recommend including the corresponding link to further ICO guidelines.

- Overlapping conditions

There appears to be contradictory information on whether organisations may rely on multiple conditions (page 15: “But it is possible that more than one

might apply to a particular situation or activity... whichever condition or combination of conditions you choose”) or whether only one condition should be

selected (page 30: “... the purpose of this condition might overlap... If this happens, you should choose the condition that provides the best overall fit in

the circumstances for your use of personal information.). Therefore, it would be helpful if the ICO clarified whether multiple conditions can be relied upon

simultaneously, or whether organisations must choose one.

- Data sharing

The guidance appears to present contradictory recommendations regarding data sharing under recognised legitimate interest. For example, under the

section “Can we use recognised legitimate interest to share people’s information?” it mentions: “...you can only use the public task disclosure request

condition for data sharing.” While later it provides examples of data sharing under the crime and safeguarding conditions. This creates confusion.

Therefore, we recommend clarifying whether data sharing is permitted under all five RLI conditions.

Rewording the sentence above to “...you can use the public task disclosure request condition only for data sharing” might resolve one ambiguity.

9 Does the guidance contain the right level of detail to help you understand when each of the five recognised legitimate interest conditions may apply? (we will publish a brief version of this guidance and separate assistance for small businesses in due course)

Yes

Do you have any suggestions how we can improve the level of detail?:

The guidance on public task disclosure request condition appears contradictory regarding the responsibilities of the organisation receiving the request. It

states that the requester must say they need the data for public tasks laid down in law, but also says they don't need to specify what those tasks are or

the legal basis. At the same time, the organisation receiving the request must be accountable, assess necessity and proportionality and verify authenticity.

It's unclear who is responsible for ensuring compliance with Article 6(3). Clearer guidance is needed on the extent of due diligence and documentation required from organisations.

Another consideration is understanding when a requester is undertaking “processing described in 6(1)(e)”. Controllers will wish to understand clearly

when a requester is within this description: particularly as some requesters may be undertaking processing “described in 6(1)(e)” but not undertaken in

reliance on 6(1)(e): for example, requests from the police who are presumably processing under Part 3 of the DPA 2018, not the UK GDPR. Guidance

would be welcome.

Another difficulty is understanding whether requests from the private sector will come within the description. Controllers have a duty to understand the

underlying lawfulness of the request and will need to understand when requests from a private sector entity such as a bank which is arguably carrying

out public tasks might come within the public task disclosure request condition. The guidance says: “Sometimes it might be an organisation that's not a

public authority but can point to their official authority or tasks in the public interest and where in law this is laid down.” Expansion of this and some

examples would be helpful for, particularly with a clarification of whether this applies to the private sector undertaking public interest tasks under

contract, or only to entities more clearly carrying out a task such as a utilities company.

10 Did you find the guidance sufficiently clear on the differences and similarities between recognised legitimate interest and the separate legitimate interests lawful basis?

Yes

Do you have any suggestions how we can make it clearer?:

- No need to change to RLI

The guidance is clear on the distinction between RLI and legitimate interests. However, we found some of the information provided to be confusing and contradictory.

It is mentioned that if organisations are currently using legitimate interests as a lawful basis for a purpose that meets an RLI condition, there is no need to change it. Nevertheless, it is also mentioned that organisations must use the most appropriate lawful basis for their processing activities (reiterated in “a guide to lawful basis”). If RLI is now considered more appropriate for a given purpose, it is unclear why there would be no need to switch from legitimate interests to RLI.

Therefore, it would be helpful if the ICO clarified whether there is a preference or expectation to adopt RLI where it is clearly the better fit, and under what circumstances it is acceptable to retain the original lawful basis.

11 One of the recognised legitimate interest conditions is called "Disclosure for purposes of processing described in Article 6(1)(e)". This is a complicated name so instead the guidance calls it the 'public task disclosure request condition'. Do you think this name is better?

Yes

Do you have any suggestions for an alternative shorthand name for this condition?:

We agree that the shorthand phrase 'public task disclosure request condition' is to be preferred.

Another major area of confusion is the name “recognised legitimate interest” for condition 6(1)(ea) itself. This is not a matter for the ICO and too late to

change but should in our view have been called “recognised public interest” or similar, to link it more firmly with 6(1)(e) and to avoid the obvious

confusion with Article 6(1)(f). The name also entails confusion with the newly codified conditions in Article 6(11). The guidance goes some way to address

this, but any further clarification, particularly in introductory paragraphs, of the clear distinction between Articles 6(1)(ea) and 6(1)(f) would be helpful, as

we continue to see confusion from controllers. One helpful approach would be to make the link between 6(1)(e) and 6(1)(ea) more explicit – as the two

conditions cover, broadly, public and private sector activities in the public interest. The guidance could also acknowledge that the phrase can be

misleading.

12 How confident do you feel about using recognised legitimate interest after reading this guidance?

More confident

13 Do you have any additional examples of real-life situations when recognised legitimate interest may be appropriate that you would like the guidance to include?

No

Please give details of your examples:

Costs and benefits

14 Do you think following this guidance presents additional:

Both

15 What, if any, are the benefits you expect to get from using this guidance? (please select all that apply)

Better understanding of what my organisation must, should and could do to comply with the legislation, Increased confidence that we're providing a

compliant service or product, Save us time or money, or both, Better able to advise our customers, Opportunity for training and upskilling

Benefits from using this guidance:

16 What, if any, are the costs of using this guidance? (please select all that apply)

Time taken to read and understand the guidance, Wider familiarisation costs linked to the guidance, Changes to business processes

Costs of using this guidance:

17 Can you provide an estimate of the costs and benefits your organisation is likely to incur as a result of using this guidance and briefly how you calculated them?

Estimate of costs and benefits, plus calculation method:

Final comments

18 Before submitting your response to this survey, do you have any final comments you've not made elsewhere? (please remember that the

ICO can't change the law)

Yes

Please provide any further comments:

- Necessity test

It is unclear how organisations are expected to demonstrate that they have satisfied the necessity test. It would be helpful to provide further guidance on what documentation is expected to evidence the necessity assessment.

- Data subjects' rights

Under section "What else do we need to consider?", it is mentioned that the right to data portability does not apply and that the right to object does apply.

However, the rest of the data subjects' rights are not mentioned. We recommend clarifying that all the other rights do apply to RLI.

- Distinction between the applicability of RLI and other lawful bases

For clarity, we recommend giving examples that demonstrate when controllers should rely on a RLI condition rather than another potentially overlapping

lawful basis under Article 6, such as: (i) disclosure for purposes of processing described in Article 6(1)(e) RLI condition versus Article 6(1)(e) lawful basis; (ii)

emergency RLI condition versus Article 6(1)(c) lawful basis; and (iii) national security, public security, and defence RLI condition versus Article 6(1)(c) lawful

basis.

- Children's information

As done under special category data, we suggest also mentioning that a DPIA might be needed when processing children's information as it may represent greater risks and include the link to the DPIA guidelines.