

## DATA PROTECTION

The Data Protection Act 1998 came into force on 1 March 2000 (becoming fully effective 23 October 2007). It replaces the previous Act of 1984. It was drawn up to comply with the EC Data Protection Directive which was adopted in 1995.

The new legislation extends previous data protection legislation and covers certain manual records. Potentially, all data held about staff or pupils can be inspected and must be processed fairly. Anyone who processes personal data, whether this is held on a computer or in paper files, has to comply with the legislation.

### Definitions

The legislation contains a number of key definitions.

Data means information which:

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose
- (b) is recorded with the intention that it should be processed by means of such equipment
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraphs (a), (b) or (c) but forms part of an accessible record (see below).

Data controller means, a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or will be, processed.

Data processor, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller.

Data subject means an individual who is the subject of personal data.

Personal data means data which relates to a living individual who can be identified:

- (a) from the data, or
- (b) from the data and other information which is or is likely to be in the possession of the data controller and includes any expression of opinion about the individual and any indication of the intentions of the data controller or of any other person in respect of the individual.

Processing, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including —

- (a) organisation, adaptation or alteration of the information or data
- (b) retrieval, consultation or use of the information or data
- (c) disclosure of the information or data, or
- (d) alignment, combination, blocking, erasure or destruction of the information or data.

Relevant filing system means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible. The Data Protection Register in its booklet, *The Data Protection Act 1998: an Introduction* advises, "In deciding whether or not it is readily accessible a suggested approach is to assume that a set (or sets) of manual information which is referenced to individuals, or criteria relating to individuals, and which is specific to an individual is caught by the Act if it is, as a matter of fact, generally accessible at anytime to one or more people within the data controller's organisation in connection with the day-to-day operation of that organisation".

Sensitive personal data means personal data consisting of information as to:

- (a) the racial or ethnic origin of the data subject
- (b) his or her political opinions, religious beliefs or other beliefs of a similar nature
- (c) whether he or she is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation Act 1992)
- (d) his or her physical or mental health or condition and sexual life,
- (e) the commission or alleged commission by him or her of any offence, or

- (f) any proceedings for any offence committed or alleged to have been committed by him or her, the disposal of such proceedings or the sentence of any court in such proceedings.

Accessible records include educational records and cover any record of information which is processed by or on behalf of the governing body, or a teacher at any school in England and Wales which is maintained by an LEA. They also cover those which relate to any person who is or has been a pupil at the school which originated from or were supplied by an employee of the LEA which maintains that school or, in the case of a voluntary aided foundation or a foundation special school, or a special school which is not maintained by local authority, originated from a teacher or other employee of the school or from a pupil to whom that record relates or from the parent of that pupil. Such records exclude information processed by a teacher for his or her own use.

### **The Data Protection Principles**

As processing is very widely defined, most activities connected with computerised or manual records will be subject to the legislation. Anyone who processes personal data must comply with the eight data protection principles. These are:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless one or more of a specified number of conditions are met in relation to data and sensitive personal data. For personal data these conditions are,
  - (a) the data subject has given consent — which may not be inferred from a non-response to a communication. For the processing of sensitive data in particular, the consent must be explicit (see below)
  - (b) the processing is necessary for the performance of a contract to which the data subject is a party or for the taking of steps at the request of a data subject with a view to entry into a contract
  - (c) if the processing is necessary
    - to comply with a legal obligation
    - to protect the vital interest of the data subject
    - for the administration of justice, the exercise of any functions conferred on a person by under any enactment, the exercise of any functions of the crown or the exercise of functions of a public nature exercised in the public interest
    - for the purposes of legitimate interests pursued by the data controller.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data shall be accurate and kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer that is necessary.
6. Personal data shall be processed in accordance with the rights of data subjects under the Act (see below).
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the EU unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

### **Sensitive Data**

Sensitive personal data can only be processed where the data subject has given his or her explicit consent or in other limited circumstances. Of relevance in the education sector this includes where

- it is necessary to protect the vital interests of the data subject
- the information has been made public as result of steps taken by the data subject
- processing is necessary in connection with legal proceedings, to obtain legal advice or for the administration of justice.

## **Rights Of Data Subjects**

Data subjects also have a number of rights and these are described within the statement of procedures concerning the Freedom of Information Act.

Data subjects also have rights:

- to prevent processing which is damaging or distressing to themselves or others
- to prevent processing for direct marketing
- in relation to automated decision making by which they can ensure that no decision significantly affecting them may be based solely on the processing, by automatic means, of data relating to them, eg assessing their performance at work
- to compensation if they suffer damage and distress as a result of a data controller's contravention of the Act unless he or she can prove that reasonable care had been taken to comply with the Act
- to rectify, block, erase or destroy inaccurate data on application to the court
- to request assessments whereby the Data Protection Commissioner may be asked to assess whether or not the processing of personal data is being carried out in accordance with the Act.

## **Exemptions**

Exemptions to the Act, of which there are many, include those which are explained below.

### References

Data subjects are not entitled to access references given by an employer (though they can see former employer's references), or personal data processed for the purposes of management planning. This is likely to extend to data processed in connection with matters such as pay review or promotion opportunities.

### Examinations

Personal data consisting of information recorded by candidates during an examination are exempt from subject access. The right to access is modified in relation to examination marks so that candidates are not entitled to see their marks until the results have been released.

### Health, education and social work records

There is provision in the Act for regulations to be introduced which will exempt from the subject information provisions personal data:

- about the physical or mental health of the data subject
- about present or past pupils of a school of which the data controller is the proprietor, governing body or Head
- processed by government departments, LEAs or voluntary organisations for social work in relation to the data subject or others.

## **Data Protection Registration**

The guidance issued in relation to the old legislation, Data Protection Act 1984, advised that registration is necessary for the following:

1. The compilation of school admission and attendance registers. These are under the control of the governing body who would need to register if computers were used.
2. The keeping of pupils' curricular records. The governing body would need to register if computers are used to meet its responsibility to ensure that a curricular record is kept for each pupil at the school.
3. Making annual returns to the LEA in relation to pupils excepted from the National Curriculum. If the details of such pupils are computerised the governing body, whose responsibility it is to make such returns, would need to register.
4. The storing of assessment data under the assessment arrangements of the National Curriculum. This would require the Head to be registered if they contained personal data.
5. Making reports to parents on the achievements of their children. This is the Head's responsibility and where such information is stored on computer, he or she will need to register.

6. Keeping records in connection with the governing body's duty to secure that pupils are entered for prescribed public examinations. This will require registration by the governors if personal data are included.
7. The keeping of staff records. Computerised records of staff personal details will require registration by the governing body. The Head will need to register if appraisal statements are kept on computer.
8. Keeping pupil disciplinary records. Computerised records of this nature would require the Head to register.
9. Keeping records of contractors and suppliers. Any personal data kept in this connection would require registration by the governing body if they related to the spending of the school's own funds.

The DfE also warns that the use of personal information for teaching purposes through the use of computers may bring into play the provisions of the Act. It advises that administrative and teaching systems should be kept separate.

### **Summary of Action to be Taken**

The first step is to identify the information held about staff and pupils. Staff may have their own files about their pupils. If these are solely for their own use this will not form an accessible record but may still be personal data and could be caught by the legislation.

Having identified what records are kept it is necessary to consider their purpose as the data protection principles require data to be processed for a specific and lawful purpose. While manual data is currently exempt, controls need to be put in place over how the data is kept up to date and how long it is kept. This is to ensure it is accurate, adequate and relevant.

To ensure that personal data can be processed it must fall within one of the conditions specified in Principle One. This includes processing being necessary for a legitimate function of the data controller which should cover a large amount of school related functions. However, best practice is to get consent to processing. Steps should be taken to acquire this from staff and pupils.

Finally a system should be created to ensure that subject access requests can be readily granted.

### **Specific issues concerning Data Protection**

#### Attendance Registers

Attendance registers may be kept manually or on computer. If computers are used, the attendance register must be printed at least once a month. Sheets must be bound at the end of each school year and, like manual registers, kept for at least three years. The governing body must register with the Data Protection Registrar under the Data Protection Act 1998. In registers kept manually or on computer the original entry and any subsequent correction must be clearly distinguishable. Both the original entry and the correction should be preserved so that the entries appear in chronological order.

#### Pupils Changing Schools

The regulations require Heads to send information about pupils who transfer from their school to another school (not necessarily a maintained school) within 15 days of them ceasing to be registered at the school. A Head is not required to send information where it has not been "reasonably practicable" for him or her to ascertain a pupil's new school. However, if a request for information is received from a school at which a former pupil is registered, a Head is obliged to respond within 15 days of receiving the request. The information must be contained in a "Common Transfer Form", published by the DfE and may be sent in electronic or paper form. There is a specific form for each of the key stages.

#### Information to the LEA

Where the LEA requests from a school that it maintains the information about an individual pupil specified in the Education (Information About Individual Pupils) (England) Regulations 2000 (SI 2000 No. 3370), the governing body is obliged to supply the information within 14 days of receiving the request. The information specified includes:

- personal information about a pupil's name, gender, date of birth, date of admission to the school, postcode of his or her home, ethnic group, first language and the unique reference number allocated to him or her by the DfE
- whether entitled to free meals
- if relevant, where he or she is placed on the stages of the scale of special educational needs (SEN) to which reference is made in the SEN Code of Practice.

For a pupil over 16 on 31 August preceding the date when the request for information was received, the following is included:

- the number of GCSE, GCE 'A' and 'AS' and any post-advanced level course being studied
- the level being studied of any GNVQ or NVQ
- whether studying any other course.

For a pupil permanently excluded from a school and whose exclusion was in the year 31 August preceding the date of the request, the governing body would need to state personal information similar to that given above, the date of the exclusion and, if he or she has SEN, the stage on the scale to which reference is made above.

### Annual School Census

The Education Act 1996 requires governing bodies and proprietors of independent schools to provide such information about pupils as may be prescribed to the Secretary of State and other "relevant persons". Accordingly, maintained schools, Academies, City Technology Colleges and non-maintained special schools are required each year to complete the Pupil Level Annual School Census (PLASC). The information required includes information relating to the Connexions service and the ethnic groups of pupils and the numbers of pupils:

- with special educational needs (SEN) together with the types of SEN
- eligible for free school meals
- whose first language is not English
- in care.

The data will be used by the Qualifications and Curriculum Authority (QCA) for pupil test registration purposes.