

**Data Protection**  
**Consent in the School Context: Issues to Plan For**

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*Published by the National Centre for Guidance in Education (NCGE) as  
an article for the School Guidance Handbook*

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## **Summary**

The Irish and EU Data Protection legislation is designed to protect the privacy and personal data of any individual, regardless of age. Children are considered to be Data Subjects, equally protected by the legislation.

A key requirement is that any processing of their personal data would be fair, which is a very subjective criterion.

In this document, I hope to outline the basis for this requirement, as well as to provide some advice for schools and youth organisations who are regularly processing the personal data of those under-18 years of age – the generally accepted cut-off point which differentiates children from adults.

Throughout, I will try to offer pragmatic suggestions to enable schools and organisations to manage personal data in a compliant manner, while meeting their administrative objectives.

## **Keywords**

Data Protection, the Irish Data Protection Acts, Compliance, Data Controller, Data Processor, Data Subject, Consent, Fair Processing, Sensitive Personal Data.

## Introduction

This document proposes to provide a brief outline of the Irish Data Protection legislation, with particular reference to Rules 1 and 2, which contain the key considerations around seeking and gaining appropriate consent for processing personal data.

## The Irish Data Protection Legislation

There are two Acts in Irish legislation which specifically cover the obligations regarding the protection of personal data:

- The 1988 Data Protection Act (the Principal Act) and
- The 2003 Data Protection (Amendment) Act.

The legislation protects personal data held electronically (automated data) or in paper form (manual data), as long as it is held in an organised, indexed format (a relevant filing system).

## Responsibility for compliance

The primary responsibility for compliance rests with the Data Controller, in this context the school, college or institution processing the data, and then by extension to Data Processors, i.e. any third-party organisation providing professional data management services to the Data Controller. This latter group involves IT support organisations, school nurses, etc.

## Definitions

### *Personal Data*

Personal data is data by which a living individual can be identified, either directly (name and address, etc.) or indirectly (student id. number, passport number, reference number, etc.). Personal data can include school administration records, aptitude and psychometric test results, video and CCTV footage, guidance notes, extended family information, special needs requirements, third-party references, exam results, photographs, etc.

### *Age of Majority*

There is no minimum or maximum age at which this legislation applies. The only defining criterion is that the personal data must relate to a 'living individual'. The protection of the Irish legislation applies to people of all ages, including children, teens and young adults, as long as their personal data is processed within the jurisdiction of the Republic of Ireland.

**Recommendation:** Where a school is processing the data of under-age children (typically understood as anyone under-18 years of age), it is recommended to inform the child's parents or guardians of such processing.

Where a school is processing the data of students who are over 18 years of age, such students should be treated as adults and the processing of their personal data should be explained to them directly.

## The Data Protection Rules

As the Data Controller, the school management and its entire staff must comply with eight data protection rules set out in the legislation. Rules 1 and 2, set out below, relate to consent in a particular way.

**Rule 1:** The data must be **obtained fairly**, where possible with the consent and awareness of the Data Subject, and where relevant, their parents or guardians.

**Recommendation:** Where the school does not already have one, we recommend that the school drafts a Data Protection Policy outlining the school's commitment to acquiring, holding, processing and storing the personal data in compliance with the legislation.

**Recommendation:** Since the majority of students whose personal data the school processes are under 18 years of age, the school should communicate with their parents or guardians at the start of each school year, explaining the fact that the students' data will be acquired and processed for a number of purposes, consistent with the school's activities (the processing narrative mentioned above).

**Rule 2:** The data can only be obtained for a **specific purpose or purposes** – the Data Controller must be able to justify acquiring, storing, processing and using the data.

**Recommendation:** Consider the various purposes for which the school requires student data, and the minimum set of data required to fulfil these purposes. The school should then limit acquisition of personal data to this data set. School staff should resist the temptation to gather additional personal data – mobile numbers, e-mail addresses, etc., unless the data is specifically required in a particular situation (e.g. for a school trip, a once-off project, etc.).

The legislation offers organisations a set of options, called the Lawful Processing Conditions, from which to select one or more reasons for their processing of the personal data. Consent is only one of these options. Others include contractual or legal obligation, processing in the vital interests of the individual, or for the performance of a Ministerial function (e.g. fulfilment of Dept. of Education and Skills policy).

This is very important, and often overlooked: Whilst having consent for the intended processing of the data is both desirable and valuable, consent is not always necessary, particularly where the school can reference another Condition which justifies the processing of the students' personal data.

## Consent

The general criteria for consent include a requirement that the consent should be:

- clear
- informed,
- specific and
- should involve an active indication of approval on the part of the individual whose data is being, or will be, processed.

The Irish DP legislation provides that:

*“ where a person, by reason of his or her physical or mental incapacity or age, is or is likely to be unable to appreciate the nature and effect of giving consent, such consent may be given by a parent or guardian, ... provided that the giving of such consent is not prohibited by law.” (Section 2A(1))*

Where a person is under the age of 18, the Acts require the school to make a judgement on whether the young person can appreciate the implications of giving consent.

In the context of education, the rights of parents and guardians are called out, both in the Constitution and in DP and Education-related legislation. The Office of the DP Commissioner therefore advises that it would be worthwhile for a school to get the consent of a student’s parents or guardians prior to the processing of their personal data.

**Recommendation:** The school management should prepare a short narrative explaining their purposes for gathering and processing a student’s personal data. This could include reference to:

- identify the school as the Data Controller,
- the range of data that they will require,
- any other organisations likely to be involved in the processing,
- the processing that they are likely to carry out, and
- any other information which will make the processing fair.

The Data Protection legislation does not provide a template for such a narrative, but there is an outline in the appendix to this article which offers some suggestions regarding clauses to include in the contract.

## **The Evaluation of Consent**

Where a student provides consent to process his/her personal information, that consent must be informed and clearly given. To assess whether a child is able to give informed consent to data processing, the following considerations should be taken into account:

- Have you explained the proposed processing of his/her personal data in a way that is appropriate for his/her age, language and understanding?
- Does the student clearly understand what he/she is being asked to consent to, e.g. the processing of his/her personal data in a particular way, the sharing of his/her data with another organisation, etc?
- Does the student have a reasonable understanding of the range of personal data that will be processed or shared, the main reasons for processing it and the implications of passing the information on to others?
- Was the student informed about, and able to appreciate and compare the alternative courses of action open to him/her?
- In providing an indication of his/her consent, is the student able to express a clear personal view, which is reasonably consistent, on the issue?

If a child is unable to consent then, where appropriate, consent should be sought and obtained from a person with parental responsibility for the child.

Schools and other organisations are helped in the task of deciding whether a student is 'old enough' to give consent, by referring to the Gillick Competency Criteria. These criteria stem from a court case in Norwich in the mid 1980's, in which a 16-year-old girl was shown to be mature enough to understand the implications of particular medical advice, and therefore, that her parents' consent was not required in order for her to give consent for such treatment.

Therefore, a young person aged 18 or over, or a young person under 18 who has the capacity to understand and make their own decisions, would be regarded as "Gillick Competent." As a general rule, it is very unlikely that a child under the age of 13 would be considered to be "Gillick Competent", so that an evaluation of the Gillick criteria tends to occur where students are aged between 14 and 18, unless particular circumstances apply.

Also, the school would need to remember that competence in young people can be impaired by circumstances like exam stress, ill health or special needs, so that there may be times when the personal data of a student up to the age of 18 years will only be permitted with parental consent

## **Conclusion**

The Irish Data Protection legislation should be seen as an enabler of, rather than a hindrance to, good school and office administration.

By seeking the consent of students for the processing of their data in appropriate circumstances, the school respects both the rights of the individual, and their ability to think for themselves and understand the implications and consequences of their decisions.

In turn, where the school determines that the individual is not competent to give consent, based on the criteria set out above, the school has the option to seek consent from a parent or guardian, or to justify the processing of the personal data with reference to other Conditions provided in the legislation.

## **Further Information**

A practical interpretation of the Irish Data Protection legislation can be viewed on the web-site of the Office of the Irish Data Protection Commissioner at [www.DataProtection.ie](http://www.DataProtection.ie).

The Office of the DP Commissioner can be contacted at: **1890 252 231**.

## **Biography**

Hugh Jones is a certified Data Protection specialist, and a founder and director of Sytorus ( [www.sytorus.com](http://www.sytorus.com) ), a leading Irish data management consultancy.

Sytorus offers training, provides professional advisory services and conducts assessments of data protection compliance for a wide range of organisations and industry sectors.

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## **Appendix I - Guidelines for a Data Protection Policy**

While the Irish Data Protection legislation offers no prescriptive set of criteria for a formal Policy, it is possible to infer that an organisation's Policy should contain the following (in no particular order of priority):

- Clear identification of the Organisation itself, including its registered address
- An outline of the category or categories of personal data which the organisation requires for its day-to-day operations
- The purpose or purposes for which the organisation requires such data
- An outline of circumstances where the organisation may engage a third-party service provider in order to process personal data on its behalf
- Reassurance that the organisation is aware of its obligations under the Data Protection legislation, and is committed to comply with such obligations
- Contact details through which a Data Subject can register any data management concerns with the organisation