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Legal Services

Retention of Safeguarding Data

Legal Requirements and Data Subject Rights

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Background

In the UK, any person who has personal data collected or processed about them by an organisation has certain rights over that information. We refer to them as a 'data subject'.

As a data subject, they have a right to control over their data including the right to access such data and where it is permissible, to have this data deleted.

As we will see, these rights are not restricted by the age of the data subject. It is equally important to understand that the parents of a data subject who is under 18 does not have automatic rights to see the data held or to make any requests for deletion etc.

This paper will consider the rights of data subjects to have access to and request the deletion of data relating to child abuse data. We will examine these rights when the data subject is a child and also when data has been collected about a child who is now an adult.

We will not be considering the storage of safeguarding data and we will assume it is all held in a compliant and safe manner. This is simply an examination of the rights of the individual and any duties upon the organisation.

The advice and guidance in this paper will only apply to Wales.

Data Subject Rights

Under Article 12 of the General Data Protection Regulation (GDPR) data subjects – those about whom we store or process personal information – have certain rights over their information. The two principal rights we will consider for this paper will be the right of access to such information (Article 15) and the right to have their information deleted (Article 17).

Neither of these rights are absolute. There are many other factors to consider when responding to any request that has been made.

It is worthy of note that there is no differentiation between a child and an adult when it comes to the exercise of data subject's rights. If the individual making the request can comprehend the nature of what they are requesting, then they are deemed fit to make such a request. This is an often-misunderstood area of data protection practice. It is usual to consider anyone over the age of 12 to be able to make such a request. For those under the age of 12, it should be a matter of an objective test or determination of their ability to understand.

There are other considerations regarding the nature of the information and whether disclosure or deletion is in the interests of the data subject. It is especially important with regards to the request of a child that there is careful consideration about the release or withholding of data about abuse, especially where the child has no knowledge of this data. This consideration will also extend to the subject as an adult. Other considerations include the rights of third parties as well as some other legal restrictions. Any of the data that falls

under the classification of a 'health record' for example, cannot be released without a test of harm being conducted by a medical professional.

The rules, in principle, apply equally to data subjects regardless of their age. Much of the decision-making criteria should be about harm, the identification of third parties, and legal duties or obligations.

Secondary consideration should be given in the case of a deletion request, to the ability of the organisation to defend any legal claim should it be implicated in any way in the matters on record.

The Data Protection Act 2018 also makes some provisions for the processing of child abuse data and provides some exemptions from the requirements of the GDPR. We will look at these in more detail below.

Data Protection Law

The Data Protection Act 2018 (DPA2018) in Schedule 3 sets out exemptions from the GDPR for the processing of data concerned with child abuse. The provisions of the GDPR that are exempt are those that require the data subject to be informed of any processing, the rights of access, correction, deletion, the right to object and the right to portability. The principles of fairness and transparency are also removed.

In Section 21 of Schedule 3, we find the exemptions that specifically apply to child abuse data along with a useful statutory definition of what is meant by child abuse data. It is described as follows:

> "Child abuse data" is personal data consisting of information as to whether the data subject is or has been the subject of, or may be at risk of, child abuse.
>
> For this purpose, "child abuse" includes physical injury (other than accidental injury) to, and physical and emotional neglect, ill-treatment and sexual abuse of, an individual aged under 18.

The specific exemption in this section is the right of access. The legal position is further compounded by any involvement of a. local authority / social services. Any data which has become data processed by a local authority is further exempted from the provisions of the GDPR. All data in this classification must also be subjected to a serious harm test before it can be disclosed.

We need to also be mindful of another provision in the DPA2018. In Schedule 1 Section 18 there are provisions made for the processing of data about a data subject for the purposes of safeguarding children and individuals at risk. This provision allows for the processing of such data without any consent if it best serves the purpose of safeguarding.

It is a highly complex area to navigate, and we always urge organisations to err on the side of caution when dealing with any data subject rights request and to seek individual advice on a case-by-case basis.

Other statutory duties & considerations

There are some other areas of law that need to be considered when balancing the rights of the data subject.

There are no specific requirements in law for the reporting to a local authority of a child or other person at risk, however there is some direction in the Wales Safeguarding Procedures[1] that sets out a duty to refer a concern to either the police or local authority as appropriate. There are also some circumstances within the common law system that could render an organisation or an individual liable if they fail to act in the best interests of a child in the case of suspected or known abuse. It is important to remember that in this particular discussion we are not really considering the processing of data, but rather the rights of the individual to have access to such data or to have the data deleted.

Outside data protection law, there is very little requirement, apart for an official body such as a police force or local authority, to retain data or be obliged to process the data in the first instance.

There is, however, currently a legal requirement to retain data on child abuse under an ongoing inquiry. The Inquiries Act 2005 gives an official inquiry the power to order evidence to be put before them. They may also order certain types of evidence to be retained until the matters under their consideration are completed and the inquiry rescinds the preservation order.

We currently have a long running inquiry in the UK – The Independent Inquiry into Child Sexual Abuse (IICSA). The IICSA has requested the preservation of all records relating to the care of children. Given that the IICSA is actively looking into allegations in the sports sector, it is therefore incumbent on any sports organisation to preserve its safeguarding records. If any person deletes data that has been ordered preserved by the IICSA, they are committing an offence. The normal retention and destruction periods for data that falls under the inquiry must be suspended and the data retained.

Organisations should also consider whether the data would be required if a claim were brought against them. This would depend, in part, on the nature of the data and any role the organisation (or another organisation) played.

Again, deletion requests need to be carefully assessed and may well be complex to balance and arrive at a correct decision.

[1] https://www.safeguarding.wales/chi/c2/c2.p3.html

Summary

We need to disconnect the right to access of the data from the right to deletion of the data. They each have their own specific requirements and safeguards to meet before taking or refusing to take any definitive action.

Access to the information is almost always a complex issue and advice should be sought on a case-by-case basis. The overriding concerns with access are the possibility of harm to the data subject or another, and the identification of third parties.

In almost all cases in the sport sector, if the data is in any way connected with the abuse of a child, it will need to be preserved. An organisation should, when refusing to delete the data, cite the refusal as ‘a legal obligation under Section 21 of the Inquiries Act 2005 due to the ordered preservation of all safeguarding case data by an active inquiry’.