

General Data Protection Regulation (GDPR) update

This update covers:

- advice from the Information Commissioners Office (ICO) about provider communications to applicants and relying on a 'soft opt-in' to avoid the need to seek additional consent
- collecting data about criminal convictions in Apply
- international agents and privacy information

In January, we shared our guidance about the General Data Protection Regulation (GDPR), and how it might impact on the admissions services we provide (UCAS Correspondents' bulletin 458).

This guidance focused on UCAS' legal basis for processing personal data, the information UCAS provides to applicants about uses of personal data, and things providers might want to consider when looking at their own compliance.

It also referred to our ongoing discussion with the Information Commissioner's Office (ICO) about the questions UCAS asks about criminal convictions in our admissions schemes, and providers' communications with applicants. It also addresses a further query raised by some providers.

This update refers to specific provisions of the GDPR and other privacy legislation. We would therefore recommend that you share it with your legal department and/or colleagues responsible for data protection.

Provider communications to applicants

Our earlier guidance referred to providers who had shared advice from the ICO, to the effect that communications not directly necessary to make or support an admissions decision would be considered 'direct marketing'. Examples could include information about accommodation, and post-offer open day invitations. The ICO advice suggested it would be necessary for providers to obtain separate consent to issue communications of this nature.

UCAS agreed to approach the ICO on behalf of the sector, to stress the importance of these communications to student decision-making. In our conversations with them, the ICO were sympathetic that certain communications classed as direct marketing, such as accommodation and post-offer open day invitations, would be very important to a student's decision, and they would expect to receive them.

The ICO's guidance on this is summarised below:

- These communications will fall under the definition of direct marketing as defined in the Data Protection Act 1998 and Data Protection Bill ('the communication (by whatever means) of advertising or marketing material which is directed to particular individuals').
- As these communications are classed as direct marketing, the Privacy and Electronic Communication Regulations 2003 (PECR) will also apply.
- However, under PECR, organisations can use a 'soft opt-in' (e.g. not specific opt-in consent) in certain circumstances, which is set out in paragraph 131 of the ICO's direct marketing guidance, which states:

'Although organisations can generally only send marketing texts or emails with specific consent, there is an exception to this rule for existing customers, known as the 'soft opt-in'. This means organisations can send marketing texts or emails if:

- they have obtained the contact details in the course of a sale (or negotiations for a sale) of a product or service to that person;
- they are only marketing their own similar products and services; and
- they gave the person a simple opportunity to refuse or opt out of the marketing, both when first collecting the details, and in every message after that.'

The ICO recognises that communications such as accommodation and open day services are 'similar enough', given that the applicant has expressed an interest in studying at that university. If this approach is adopted, in practice this would mean that specific additional consent would not be required.

The ICO has recommended that a decision to rely on the 'soft opt-in' should be documented by providers, and 'there is a clear and simple opt-out opportunity given to applicants when details are first collected, as well as in every subsequent message, as this is vital for the soft opt-in to apply'.

It will be for individual providers to decide the exact types of communications covered by the above advice, how to apply this guidance from the ICO, and to ensure any decisions are documented. However, the ICO seems to favour a pragmatic approach on these types of communications.

The advice given by the ICO does **not** apply to communications directly necessary to support an admissions decision, such as sending an interview invitation, or seeking further information from an applicant, as these communications do not amount to direct marketing.

Criminal convictions

The consultation with the ICO regarding the questions UCAS asks applicants about their criminal convictions has almost concluded. Our agreed position will be shared with providers before the Admissions Conference, in a separate communication.

International agents

Some providers have raised questions about the 'right to be informed' under GDPR, which requires organisations to provide notice about the purposes for which personal data is used.

A question has been raised about agents submitting UCAS applications, typically on behalf of international applicants, where the agent submits their own contact details, rather than the applicant's. This makes it virtually impossible for providers to be certain that information they provide about uses of personal data has been provided to the applicant. UCAS' position on this is below.

Article 14 of the GDPR contains provisions that will normally require providers to notify applicants about uses of personal data ('privacy information'), where the personal data is obtained from a third party, such as UCAS.

Where international applicants use an agent to submit and manage their application, that agent is responsible for providing necessary legal information to their client, including privacy information. Where agents only provide their contact details, ensuring that communications don't go directly to the applicant, Article 14 5 (b) of the GDPR states that the provisions of Article 14 will not apply where:

'The provision of such information proves impossible or would involve disproportionate effort [...] in such cases, the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available.'

In cases where an agent provides their own contact details, a provider could not be certain any privacy information had been shared, and therefore, these provisions are likely to apply. In addition, UCAS is also taking the following actions to further reduce this risk:

- The current applicant declaration, which individuals are required to accept before they apply, will be amended, to make it clear that if the person submitting the application is doing so on behalf of an applicant, they must have notified them of the privacy information.
- We have written to agents to make sure they are aware of their responsibilities to notify applicants about uses of their personal data, and to ensure they enter the applicant's contact details in the application. We

discourage agents from entering their own details in the applications, if we identify any who are doing this.

What next?

In addition to the GDPR sessions at the Admissions Conference, we will continue to review guidance produced by the ICO and share anything of relevance to the services we provide.

It should be stressed, it is for providers to decide how to comply with the GDPR, and this guidance should not be treated as formal legal advice. However, if there are further GDPR-related questions you think are relevant to the services we provide, and have not been considered, please contact us at datagovernance@ucas.ac.uk.