

Consultation Response

Employment practices and
data protection: keeping
employment records

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the ICO consultation: *Employment practices and data protection: keeping employment records*.¹

It is worthwhile noting that the Employment Law sub-committee does not have designated data specialists and our focus relates to employment law practices and policy-based implications based on the experience of the Committee and our likely experience of using the guidance.

The sub-committee has the following comments to put forward for consideration.

Consultation questions

Q1 How far do you agree or disagree that the draft guidance is clear and easy to understand?

- 1 – Strongly agree
- 2 – Agree
- 3 – Disagree
- 4 – Strongly disagree
- 5 – Unsure/don't know

Please give reasons for your choice:

The draft guidance is useful and the interactive guidance tool is a user-friendly tool which helps to identify which lawful basis employers may be relying on. However the guide lacks practical examples compared to the guidance on recruitment and selection. More examples would help better understanding of the guide.

Q2 How far do you agree or disagree that the draft guidance adequately covers the key issues involved in keeping employment records, and the data protection implications of these?

- 1 – Strongly agree
- 2 – Agree
- 3 – Disagree

¹ [ICO consultation on draft employment practices – keeping employment records | ICO](#)



- 4 – Strongly disagree
- 5 – Unsure/don't know

The guidance broadly covers what we would expect. However it would be useful if it also covered:

- *Virtual data rooms* – these are typically used during acquisition, merger or business reorganisation processes so would be a useful example following pages 25 and 26. In particular, guidance regarding security and controls of using virtual data rooms would be useful.
- *Intra-group data sharing agreements*- which might exist in larger organisations. These more complex arrangements will give rise to controller and processor considerations as well as establishing security and controls over record retention.
- *Gender* – there is nothing specific on record keeping for employees who have transitioned from one gender to another. It would be useful to make employers aware that specific processes would need to be put in place with regard to records of employees transitioning. This includes but won't be limited to not holding data on an employee's transition for longer than required, and deleting, amending or holding records in a locked down location in respect of name changes and/or newly acquired genders. This could also need to deal with the right to rectification and erasure.
- *Video or audio recordings* – it may also be useful to include a brief section on considerations of recording meetings and telephone calls, even for training events, given their prominence since the covid pandemic.
- *Police* – whilst the guide refers to requests from HMRC, it could also outline the considerations applicable to any request from the police or another third-party solicitor.

Q3 How far do you agree or disagree that the draft guidance contains the right level of detail?

- 1 – Strongly agree
- 2 – Agree
- 3 – Disagree
- 4 – Strongly disagree
- 5 – Unsure/don't know

The guide strikes a good balance between detail whilst not being overly complex or technical in terminology. However, more practical examples would be helpful across the guide, and specifically in relation to:

- How long employers can hold data. The guidance puts a lot of onus on the employer to determine this using established data principles but it would be helpful if the guidance could provide more clarity on information which the ICO considers should ordinarily be held throughout employment and for a specified period thereafter (whilst balancing the need to defend any legal claims), versus information which should usually be deleted after a specified period (e.g. unsuccessful job applicant data).



- Media articles and social media posts. Whilst there is an example on page 18, it would be useful to explore this further on page 22

Furthermore, whilst we appreciate that there is separate guidance on health information, it does appear to be an omission in this guide to not have, even a concise, overview of the main principles with “further reading” in another ICO guide.

Q4 How easy or difficult is it to find information in the draft guidance?

- 1 – Very easy
- 2 – Easy
- 3 – Difficult
- 4 – Very difficult
- 5 – Unsure/don't know

The user experience has not been tested by us to comment.

Q5 Please provide details of any cases, examples, scenarios or online resources involving keeping employment records that would be useful for us to include in the guidance.

Please see our comments above for topics that could be included in the guide.

It would also be useful to clarify whether the term ‘worker’ or ‘former worker’ ought to include ‘job applicant’, bearing in mind the potential for internal recruitment (i.e. during an employment lifecycle with one employer). If not, then it might be worthwhile cross-referring to the new guidance on recruitment and selection, albeit that does not have a designated section on this topic.

Q6 Please provide any other suggestions for the draft guidance on keeping employment records:

Other suggestions for change are:

- The example on page 11 is too narrow and could give the impression that disability information can only be held for reasonable adjustment reasons. It omits potentially other reasons for retaining disability information such as risk assessments or defending claims. It is also not clear whether recording the fact of not having a disability would amount to health information and how this is to be treated by employers.
- The TUPE guidance on page 27 should refer to the correct name of the legislation, that being the Transfer of Undertakings (Protection of Employment) Regulations 2006 to prevent confusion. Furthermore, it would be useful if guidance could be given to early requests for information (i.e. before the statutory 28 days prior threshold) in addition to “more information” that might be sought.

Q7 Are you responding to this consultation on behalf of an organisation?

- Yes
- No



Q8 Who in your organisation would you expect to read the guidance? (Please provide job titles or roles and how many people in those roles would be expected to read it, not people's names)

Not applicable

Q9 To what extent (if at all) do data protection issues affect strategic or business decisions within your organisation?

Not applicable

Q10 Do you think the draft guidance on keeping employment records would result in additional costs or benefits to your organisation? (These could be financial or non-financial and might include staff time)

Not applicable

Q11 Please describe the types of additional costs or benefits you might incur?

Not applicable

Q12 If possible, please provide a rough estimate of the costs or benefits you are likely to incur and briefly outline how you have calculated these?

Not applicable

Q13 Please provide any additional evidence or information you would like us to consider on the potential impact of the guidance on you, your organisation or wider society in the box below. This could include a description, links to other sources, or contact details where we can reach you to discuss further.

Not applicable

Q14 How did you find out about this consultation?

- ICO website
- ICO Twitter account
- ICO Facebook account
- ICO LinkedIn account
- ICO staff member
- ICO newsletter
- Colleague from your organisation
- Person outside of your organisation
- Other

If other please specify:

Q15 Who are you responding as? (please tick all that apply)

- an organisation or person employing workers
- a recruitment agency



- a representative of a professional, industry or trade association
 - an organisation representing the interests of employees, workers, self-employed (eg charity, employment advocacy organisation)
 - an employment rights professional body or advice service
 - a trade union
 - an academic
 - a supplier of employment technology solutions (eg monitoring software or HR systems)
 - an individual acting in a private capacity (eg someone providing their views as a member of the public)
 - an ICO employee
 - other
- If other please specify:

Q16 Please provide the name of your organisation:

Law Society of Scotland

Q17 What is the size of your organisation?

- Micro-organisation (less than 10 members of staff)
 - Small or medium organisation (10-249 members of staff)
 - Large organisation (250 members of staff or above)
- Not applicable or not sure

Q18 Finally, we may want to contact you about our employment practices guidance and some of the points you have raised. If you are happy for us to do this, please provide an email address:

policy@lawscot.org.uk



For further information, please contact:

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