# Consultation Response

ICO Consultation on the draft biometric data guidance.

October 2023

## 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 Privacy Law sub-committee welcomes the opportunity to consider and respond to the Information Commissioner's Office Consultation on draft guidance for biometric data[1].

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

## Consultation Questions

### Question 1. How far do you agree that this guidance clearly sets out what data protection law defines as biometric data?

**☐ Strongly agree**

**☐ Agree**

**☐ Disagree**

**☐ Strongly disagree**

**☐ Unsure/don't know**

### Comments

[1] ICO consultation on the draft biometric data guidance | ICO

We think it might be helpful to include some specific examples of biometric data and the limits of when images, for example, are not biometric data. We have come across technology which uses fingerprint technology but where the manufacturer claims that it is not biometric data because it only uses part of the fingerprint – we are not convinced that this is correct, and we have come across instances where these claims have been relied upon in an employment context.

### Question 2. How far do you agree that this guidance sets out clearly the different tests for identifiability (i.e. whether data can be considered personal data) and unique identifiability (the test for biometric data?)

**☐ Strongly agree**

**☐ Agree**

**☐ Disagree**

**☐ Strongly disagree**

**☐ Unsure/don’t know**

### Comments

Please see our comments to question 1.

### Question 3. How far do you agree that the approach of using terms from industry standards (ie biometric recognition) assists in understanding how data protection law applies to biometrics.

**☐ Strongly agree**

**☐ Agree**

**☐ Disagree**

**☐ Strongly disagree**

**☐ Unsure/don’t know**

Please see the example in question 1, and how do data controllers know they can trust the manufacturer who may not use the terms after considering the nuances of data protection law?

## Question 3a Could this approach be adopted further in this guidance?

## Please provide examples in the comments section below, along with any further reflections you have on this question.

### Comments

We found the distinction between biometric data and when it is and is not special category data useful.

## Question 4. How far do you agree that the guidance clearly explains the legal status of biometric data when used for biometric recognition purposes (ie that a further condition for processing special category data is required?)

**☐ Strongly agree**

**☐ Agree [✓]**

**☐ Disagree**

**☐ Strongly disagree**

**☐ Unsure/don’t know**

### Comments

We found the references to actual processing conditions very helpful and would welcome more. In the legal sector we use biometric data and facial recognition technology for AML compliance and there is confusion about what condition can be used, and in particular whether it can ever be necessary.

We agree that the guidance on specific processing conditions is helpful, however we would welcome further guidance. The guidance sets out that explicit consent is likely to be most appropriate lawful basis for processing biometric data. We believe that some additional guidance or clarification around the restrictions of relying on consent would be helpful. The power imbalance scenario is quite clear. However, in terms of being able to withdraw consent/offer alternative options, we think that some additional guidance would be useful. For example, withdrawing consent where biometric data is used for ID&V could prove difficult to manage.

**Question 5. Are there other conditions for processing that you feel organisations could rely on to use biometric recognition, and would you be willing to be contacted to provide details for a potential case study?**

**☐ Yes, and willing to provide a case study**

**☐ Yes, but not willing to provide a case study**

**☐ No**

***if you have indicated you are willing to provide a case study, please contact biometrics@ico.org.uk***

**Question 6. How far do you agree that this guidance adequately describes the potential benefits and the possible risks of harm of deploying biometric recognition solutions?**

**☐ Strongly agree**

**☐ Agree**

**☐ Disagree**

**☐ Strongly disagree**

**☐ Unsure/don't know**

**Comments**

The guidance sets out circumstances where benefits can be inferred, and highlights recognition solutions use special category biometric data.  However, there is no detail on why it is classed as special category data and what the risks associated with its use are i.e. the risks of someone using it to steal an identity or the potential to create unintended barriers where consent is not given or where recognition solutions are not widely accessible.

### Question 7. How far do you agree that the case studies are clear, realistic examples of how biometric solutions could be deployed, and the relevant data protection considerations?

**☐ Strongly agree**

**☐ Agree**

**☐ [✓ Disagree]**

**☐ Strongly disagree**

**☐ Unsure/don’t know**

### Comments

Case studies are always the most useful part of any guidance and although these are good, and we think more case studies would beneficial.

### Question 8. How far do you agree that this guidance provides a clear explanation of all data protection obligations when using biometric data?

**☐ Strongly agree**

**☐ Agree**

**☐ [✓ Disagree]**

**☐ Strongly disagree**

**☐ Unsure/don’t know**

## Comments

There is no commentary on retention. If it used to identify someone, there should be thought about whether the biometric data requires to be kept or just a record of the individual being identified.

We also think that the issue of retention by processors should be highlighted. In our experience many are retaining the biometric data to train their systems and although they anonymise it and then retain, the anonymisation is processing and requires the processor to become a controller with all the obligations that go along with that. In our experience this is not often made clear to the controller who could be several steps away for a sub-sub processor.

## Question 9. Are there any areas of this guidance that you found unclear, or require further detail? Please provide as much detail as possible.

## Comments

We believe that controllers should be encouraged to consider local storage of the biometric data that is being used which means that it is more under its control and less likely to be subjected to further processing.

And to emphasise a point made above, we believe that the dangers of processing biometric data should be pointed out very clearly.

## Question 10. Do you have any observations about what further detail would improve this guidance?

Please see our comments to question 9.

## Impact Assessment Questions

### Question 11. To what extent do you agree that the impact assessment summary table adequately scopes the main affected groups and associated impacts?

**☐ Strongly agree**

**☐ Agree**

**☐ Disagree**

**☐ Strongly disagree**

**☐ Unsure/don’t know**

We have no comments.

### Question 12. Can you provide us with any further evidence for us to consider in our impact assessment?

**☐ Yes**

**☐ No**

We have no comments.

### If yes, please could you provide the impact evidence, or contact details where we can reach you to discuss further.

## Impacts on your organisation

### Question 13. Who in your organisation needs to read the guidance? (Please provide job titles or roles, not people's names).

We have no comments.

### Question 14. To what extent (if at all) do data protection issues affect strategic or business decisions within your organisation?

**a. Data protection is a major feature in most of our decision making**

**b. Data protection is a major feature but only in specific circumstances**

**c. Data protection is a relatively minor feature in decision making**

**d. Data protection does not feature in decision making**

**e. Unsure / don't know**

We have no comments.

### Question 15. Do you think the guidance set out in this document presents additional: (select one option)

**a. cost(s) or burden(s) to your organisation**

**b .benefit(s) to your organisation**

**c. Both**

**d. neither**

**e. Unsure / don't know**

We have no comments.

### IF ANSWER TO Q15 is a,b or c, then ask questions 16, 17 and 18.

### Question 16. Could you please describe the types of additional costs or benefits you might incur?

We have no comments.

### Question 17. Can you provide an estimate of the costs or benefits you are likely to incur and briefly how you have calculated these?

We have no comments.

### Question 18. Please provide any further comments or suggestions you may have about how the guidance might impact your organisation.

We have no comments.

## About you

### Question 19. Are you answering as: (tick all that apply)

A representative of a professional, industry or trade association

### Question 20. If you are representing an organisation, please specify the name of your organisation (optional):

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

**Question 21. How would you describe your organisation?**

**☐ 0 to 9 members of staff**

**☒ 10 to 249 members of staff**

**☐ 250 to 499 members of staff**

**☐ 500 or more members of staff**

**Question 22. What best describes your current position in relation to biometric technologies (tick all that apply)**

**☐ A developer of biometric recognition systems**

**☐ A developer of other biometric systems (not biometric recognition)**

**☐ A potential adopter of biometric technologies**

**☐ A current user of biometric technologies**

**☐ A representative of civil society/academia**

**☒ A regulator/local/regional/national government**

**☐ Other (please state below)**

**Question 23. What best describes your main area of interest for biometrics?**

**☐ Biometric verification: (use cases around access control/ time recording)**

**☐ Biometric identification (use cases around recognition)**

**☐ Other biometric use-cases (detection)**

**☐ Other biometric use-cases (categorisation/classification)**

**Other Please state**

**Question 24. We may want to contact you about our impact assessment and some**

**of the points you have raised. If you are happy for us to do this, please provide your email address:**

GavinDavies@lawscot.org.uk

**For further information, please contact:**
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