

# Explanatory Framework for Adequacy Discussions

## **Section E2: Criminal Convictions Data**

[Section 10, and Part 3 of Schedule 1]

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### **Overview**

This annex lists the conditions for processing criminal convictions data as set out in Schedule 1 to the DPA 2018.

## Section E2: Criminal Convictions Data

Processing of personal data about criminal convictions may need to be done for a variety of purposes. Section 10 of, and Part 3 of Schedule 1 to, the DPA 2018 set out processing conditions for this.

These are listed below, along with explanations for why they were enacted, and what limitations and safeguards apply. It is worth highlighting the existence of the Rehabilitation of Offenders Act 1974. This removes requirements on individuals to disclose spent convictions, with limited exceptions. As such, it may also constitute a safeguard for several of the below provisions, depending on the circumstances.

### Paragraph 5, Section 10: Replication of Schedule 1 Part 1 legal bases for sensitive data

Section 10(5) authorises the processing of criminal convictions data if it meets one of the four conditions in Part 1 of Schedule 1 for sensitive processing under Article 9 of both the UK and EU GDPR.

These four conditions are around legal obligations and rights in the fields of employment and social protection: health and social care; public health; and certain fields of research carried out in the public interest.

All four conditions may involve the processing of criminal convictions data. For example:

- Many employers may hold information about their employees' criminal offences;
- Hospitals treating injured patients may keep records about alleged offences that may have caused the injuries;
- Academic research may involve drawing conclusions about patterns of criminal offences or their relationship with various social factors.

All four conditions are recognised legal bases for processing sensitive data under Article 9 of both the UK and EU GDPR.

Section 10(5) therefore permits processing of criminal convictions' data under those four conditions, providing it meets the same tests and requirements as processing of sensitive data must. Each condition has its own specific **limitations and safeguards**, which are set out in the E1 annex provided on sensitive data.

### Paragraph 29 of Part 3: Consent

Individuals must have the option to consent freely to having their criminal convictions' data processed, for instance when voluntarily choosing to disclose this to an advice service.

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Accordingly, this provision permits processing of criminal convictions data under consent.

The **limitations and safeguards** include the below points:

- The conditions for consent's validity set out in Article 7 of the UK GDPR must apply.
- As with the other provisions, the other UK GDPR safeguards also apply, including the obligation to hire a Data Protection Officer (DPO) and conduct a privacy impact assessment in certain circumstances. One such circumstance is when the processing of criminal convictions data is on a large scale.

### Paragraph 30: Vital interest

Where necessary to protect the vital interests of an individual, it may be necessary to be able to process criminal convictions data, e.g. to establish the nature of a suspected drug overdose.

Accordingly, this provision applies the same conditions to criminal convictions data that are applicable to sensitive data processing under the UK GDPR. It reflects Article 9(2)(c) of both the UK and EU GDPR.

The **limitations and safeguards** include the below points:

- This legal base is narrowly scoped, it may only be used if it is necessary to protect the vital interest of an individual.
- There is also a consent test, the legal base can only be used if the data subject is physically or legally incapable of consent.

### Paragraph 31: Not-for-profit-bodies

Not-for-profit bodies may need to be able to process criminal convictions data in relation to their members. For example, there are a wide range of civil society organisations in the UK that aim to help those with criminal convictions back into work.

Subject to limitations and safeguards, this provision therefore permits processing of criminal convictions for those purposes. It reflects Article 9(2)(d) of both the UK and EU GDPR.

**The limitations and safeguards include:**

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- The legal base is narrowly construed: it may only be used if the processing is carried out in the course of the body's legitimate activities.
- The processing is also strictly limited to data relating to the body's members, former members, or those who have regular connection with its purposes.
- The controller is also forbidden from disclosing the personal data outside the body without the consent of the data subject(s). In addition, the controller must apply appropriate safeguards for the processing.

### Paragraph 32: Manifestly made public data

This legal base is necessary to allow the processing of criminal convictions data if it has already been made manifestly public by the data subject.

For example, where a data subject chooses to make previous criminal convictions public, a controller should be able to use that information to decide whether or not to do business with that person.

This provision reflects Article 9(2)(e) of both the UK and EU GDPR. As with the other provisions, the other UK GDPR **safeguards** also apply, including the obligation to have a DPO in place and conduct a privacy impact assessment if the processing of criminal convictions data carries a high risk to the rights and freedoms of data subjects.

### Paragraph 33: Legal claims

Those involved with legal proceedings, such as legal professionals, need to be able to process criminal convictions data in order to properly represent their client.

This provision reflects Article 9(2)(f) of both the UK and EU GDPR. Subject to limitations and conditions, it allows the processing of criminal convictions when necessary for legal claims and proceedings, including obtaining legal advice.

- This legal base can only be used if the processing is necessary for a narrow range of purposes. These are restricted to processing in connection with legal proceedings, obtaining legal advice, and establishing, exercising, or defending legal rights.
- In addition, disclosure in legal proceedings is highly regulated in order to ensure that the rights of all parties (including witnesses) are balanced against the need to ensure a just outcome.
- For example, under the Criminal Procedure and Investigations Act 1996, previous convictions of prosecution witnesses only have to be disclosed to the defence if they

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satisfy the test of being reasonably capable of undermining the case for the prosecution against the accused, or assisting the case for the accused.

### Paragraph 34: Courts and tribunals

Courts and tribunals need to be able to process criminal convictions data when acting in their judicial capacity.

This legal base therefore allows the processing of criminal convictions when necessary for courts and tribunals acting in this capacity. It reflects the basis for processing sensitive data under Article 9(2)(f) of both the UK and EU GDPR.

The **limitations and safeguards** include the below points:

- This legal base can only be used when a court or tribunal is acting in its judicial capacity, and when the processing is necessary for this purpose.
- As noted above, disclosure in legal proceedings is highly regulated in order to ensure that the rights of all parties (including witnesses) are balanced against the need to ensure a just outcome.
- For example, under the Criminal Procedure and Investigations Act 1996, previous convictions of prosecution witnesses only have to be disclosed to the defence if they satisfy the test of being reasonably capable of undermining the case for the prosecution against the accused, or assisting the case for the accused.

### Paragraph 35: Administration of accounts used in commission of indecency offences involving children

In the fight against child abuse, it may be necessary to administer or cancel a bank account that was used to fund the commission of an indecency offence involving children.

This provision therefore allows the processing of criminal conviction data where it is necessary for this purpose, subject to limitations and safeguards.

The **limitations and safeguards** include the below points:

- The condition can only be used for the purpose of administering an account relating to a payment card used in the commission of the offence or in cancelling that card.
- In addition, the convictions data must fall under the type of offence listed in paragraph 35(2).

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- The controller must also have an appropriate policy document in place and must maintain an augmented record of processing.

### Paragraph 36: Extending Part 2 conditions for processing

Part 2 of Schedule 1 sets out provisions for processing **sensitive data** for certain purposes. In the event that it may be necessary to process criminal convictions data **for those same purposes**, paragraph 36 extends the majority of those provisions to this data.

It does not extend those provisions in Part 2 that are limited to specified categories of data. For example, Paragraph 9 only covers personal data that reveals racial or ethnic origin and is thus not relevant here.

The processing must still meet the **tests of those individual exemptions and their specific requirements for safeguards**, e.g. having an appropriate policy document and an augmented record of processing. However, the purpose does not need to be in the substantial public interest. This is because there is no requirement under Article 10 of either the UK or EU GDPR for criminal convictions processing to be in the substantial public interest.

### Paragraph 37: Extending the insurance condition for processing of criminal convictions data

Insurers will sometimes need to be able to process criminal convictions data, e.g. motoring convictions to enable them to provide a quote for motoring insurance. Since the insurance provision in paragraph 20 only covers limited categories of sensitive data, paragraph 36 does not apply to it.

This separate provision therefore is needed to enable criminal convictions data to be processed for insurance purposes. The processing must comply with the limitations and safeguards set out in paragraph 20, except the test for the purpose being in the substantial public interest, for the reason outlined earlier.

The **limitations and safeguards** include the below points:

- The exemption is subject to a necessity test: the processing must be necessary for an insurance purpose. Insurers must also have an appropriate policy document in place and maintain an augmented record processing.
- Insurers are also subject to various requirements under insurance law. Insurance is regulated by both the Prudential Regulatory Authority and the Financial Conduct Authority (FCA). For example, [under FCA rules](#), the fair treatment of customers should be central to the corporate culture. Consumers should be provided with clear

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information and are kept appropriately informed before, during, and after the point of sale.

- The meaning of “insurance purpose” has been defined. It means:
  - Advising on, arranging, underwriting or administering an insurance contract;
  - Administering a claim under an insurance contract; or
  - Exercising a right, or complying with an obligation, arising in connection with an insurance contract, including a right or obligation arising under an enactment or rule of law.
  
- There is also a consent test to offer special protection when the insurer does not have a direct relationship with the data subject. For instance, the data subject may be a family member acting on behalf of the policy holder or a witness to an event. The insurer can only process their data if it cannot reasonably be expected to obtain the data subject’s consent, **and** if the insurer is not aware of the data subject withholding their consent.