

Recruiting Staff and Volunteers: GDPR and Criminal Records Information

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This guidance is for any organisation that collects criminal records data when recruiting employees or volunteers. The aim of the guidance is to assist you in ensuring the safeguarding of your employees, volunteers and services users while also understanding the implications of the General Data Protection Regulation (GDPR) and the Data Protection Act (2018) on the way that you collect, process and store criminal records data as part of your recruitment and HR processes.

In collating this guidance we have drawn from publications produced by Unlock (unlock.org.uk) and Northern Ireland Council for Voluntary Action (NICVA).

Introduction:

Recent changes to the Data Protection laws (Data Protection Act 2018 and GDPR) now mean that there is a lot to consider if you are going to be requesting or checking criminal records data when recruiting staff, volunteers or sessional workers. Before you process any personal data you will need to understand the 'key principles' of the Data Protection Act and to identify the purpose and legal basis for each piece of data you are processing.

Article 5 of the GDPR sets out seven key principles for the processing of personal data. These are listed below, with key elements that help to explain what they mean.

1. Lawfulness, fairness and transparency

- Identify a 'lawful basis' (under Article 6) and a 'condition for processing' (under Article 10)
- Ensure you do not do anything with the data in breach of any other laws
- Use the data fairly, and in a way that is not unduly detrimental, unexpected or misleading
- Be clear, open and honest with people from the start about how you will use their data

2. Purpose limitation

- Be clear about the purpose of processing from the start
- Record the purpose/s of processing and specify in your privacy information
- Only use data for a different purpose if compatible with the original purpose, with explicit consent, or with a clear basis in law

3. Data minimisation - Ensure the data you are processing is:

- Adequate
- Relevant
- Limited to what is necessary

4. Accuracy

- Take reasonable steps to ensure data is not incorrect or misleading
- You may need to amend the data in light of new information
- Take reasonable steps to correct inaccurate or misleading data
- Carefully consider any challenges to the accuracy of personal data

5. Storage limitation

- Do not keep personal data for longer than needed

- Justify any retention period
- Periodically review data and anonymise or delete as appropriate
- Carefully consider challenges to retention of data
- Only retain data for longer periods for public interest archiving or research purposes

6. Integrity and confidentiality

- Ensure appropriate security is in place to protect data
- Take responsibility for what you do with data and how you comply with other principles
- Have appropriate measures and records in place to ensure compliance

7. Accountability

- Demonstrate compliance with the GDPR
- Have data protection policies in place
- Appoint a data protection officer
- Document processing and process breaches
- Carry out impact assessments for uses of personal data that are likely to result in high risk to individuals' interests

Can an employer request criminal convictions information?

Instead of taking a one size fits all approach to requesting information, it would be wiser to think specifically about each role you are recruiting for, as well as the context within which that role is based. Can you clearly articulate whether processing information relating to criminal convictions is necessary to that particular job role?

The Rehabilitation of Offenders Act 1974 (ROA) supports the reintegration of people with convictions by giving them legal protection from having to disclose their record after a legally determined period of living crime free. After this rehabilitation period criminal records can be considered 'spent'. Most convictions will become spent. Once spent, the person doesn't need to disclose it when applying for most paid or voluntary jobs and considering it would be illegal.

Where the criminal record is unspent, it is generally up to the discretion of the employer whether or not to employ the person.

Some roles are considered sensitive or risky that they are exempt from the ROA. For these roles you are entitled to consider both unspent and spent convictions and cautions, but are not allowed to take into account protected convictions and cautions (these are ones that would be filtered out by an enhanced DBS check and tend to be old and minor cautions and convictions). More information on which roles are exempt from the ROA can be found [here](#). This means that asking for self-disclosure of all spent and unspent convictions and cautions would be illegal at any point in recruitment.

If you have determined that the role will be exempt from the ROA and that you will be requesting a DBS check at any level, it would be best practice to be clear that you will be requiring this type of disclosure for those receiving a conditional job offer from the outset of the recruitment process. You should have a clear policy available on how you will respond to any disclosures and your approach to recruiting and/or working with ex-offenders. From the outset of the recruitment process, be clear that you will be requiring this type of disclosure for those receiving a conditional job offer. The Disclosure and Barring Service have developed a sample policy on the recruitment of ex-offenders which can be found [here](#).

Ensuring Compliance:

From the outset of the recruitment process, you will be asking individuals to share personal data – their name, address, contact details etc. Under GDPR you must consider what information is necessary at each stage of the recruitment process. To demonstrate compliance you will need to:

- Define the [purpose](#) of collecting criminal records data. The point at which you are collecting the data will affect whether it is necessary at that stage. If the processing is not necessary, it is not lawful
- Identify a [lawful basis](#) and a condition for processing

You will also need to have an appropriate privacy policy in place and ensure applicants and employees are made aware of the above, clearly and rationally linking the purpose of collecting the data to the lawful basis. You should also ensure that they are made aware of their rights over the personal information you collect. If you collect criminal records data as part of the recruitment process, you will need a specific privacy policy covering this.

Asking at job offer stage:

If you are certain that you need to ask applicants about criminal records at job offer stage you will need to formulate and share a policy with applicants. Also bear in mind that written information, whether official or provided by an individual, can be difficult to put into context. If appropriate, give applicants the opportunity explain the surrounding circumstances to address any concerns you might have, consider what the applicant has done since the offence and encourage them to discuss their rehabilitation and the positive steps they've subsequently taken.

How do I ask the question about criminal records data?

When asking about criminal records data there are, generally, two types of roles: those covered by the ROA (for which you can ask about unspent criminal convictions) and those exempt from the ROA (for which you can ask about unspent and most spent convictions). The question to ask will depend upon the specific role in question.

Suggested question for roles covered by the ROA:

Do you have any offences which are currently unspent under the Rehabilitation of Offenders Act 1974 [You do not need to disclose anything that is deemed 'spent']?

Suggested question for roles exempt from the ROA:

Do you have any convictions, cautions, reprimands or final warnings that are not "protected" as defined by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended in 2013)?

For some type two roles, there may be a need for a further question. If the role is classed as '[regulated activity](#)' and therefore requires an enhanced plus barring check, you should make sure that the individual is not on the Children's or Adult's Barred List (depending on the role). You can do this by asking the applicant at the application stage whether they are barred from working with the relevant group, and this can be checked as part of the DBS check later in the recruitment process.

This role involves regulated activity with children. Are you on the Children's Barred List? Yes/No
and/or

This role involves regulated activity with adults. Are you on the Adult's Barred List? Yes/No

Retention of criminal records data

As with all other personal information, it is essential that candidates are given information about how and for how long you will retain their data about prior criminal offences. The general principle remains that you must not keep personal data for longer than you need it so you will need to think about – and be able to justify – how long you keep it. Wherever possible you should have a policy setting standard retention periods.

You should also periodically review the criminal offences data you hold, and erase or anonymise it when you no longer need it.

Key points:

- **Employers are responsible for looking after confidential personal data and ensuring legal responsibilities are met. Criminal records data is considered ‘sensitive’ under the GDPR.**
- **You should consider whether you require criminal records information every time you recruit for a role rather than taking a blanket approach. Always ask ‘why do we do this?’**
- **You can still ask for applicants to disclose unspent criminal conviction information during the recruitment process but you must be able to make sure that it is really necessary and consider when would be the most appropriate time to request it**
- **Collecting criminal records information at application stage is unlikely to be compliant with data protection laws. Equally requesting self-disclosure of all criminal offence data including that which would be filtered out of an enhanced DBS check is unlikely to be compliant.**
- **The exception to this is for roles that include [regulated activity](#), when you are required to check that the post holder is not on the Children’s or Adult’s Barred List (depending on the role). You can do this by asking the applicant at the application stage whether they are barred from working with the relevant group, and this can be checked as part of the DBS check later in the recruitment process.**
- **Applicants should be informed where criminal records data is to be requested or checked and provided with clear privacy information**
- **It is important to consider how you will store and retain the information once it has been obtained**
- **You should outline your recruitment process and demonstrate how it complies with the data protection principles**

Annex A: Checklist

This checklist summarises the key things that you should make sure you have in place before processing criminal records data.

Have you:

- a. Identified the purpose of collecting criminal records data?**
- b. Identified a lawful basis for collecting criminal records data?**
- c. Identified a condition for processing criminal records data?**
- d. Set out why the processing is necessary to fulfil the purpose?**
- e. Developed a privacy policy which specifically references criminal records data?**
- f. Provided information to applicants on their rights under GDPR which specifically references the processing of criminal records data?**
- g. Determined the most appropriate and compliant stage of the recruitment process at which to ask about criminal records data?**