Planning and GDPR

An update to “Planning and the GDPR – interim guidance for practitioners”

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This document

This document is an evolution of the *Planner's Guide to GDPR*, published by the Planning Advisory Service (PAS) in 2018. It replaces the PARSOL guide *Planning and Building Control Information Online: Guidance for Practitioners*, which was withdrawn in 2018 and must not be relied on. We are grateful for the assistance of a sector-led working group and the advice of partner organisations.

The document sets out advice for planning authorities seeking to understand their obligations under data protection legislation (the UK General Data Protection Regulation, or UK GDPR, and the Data Protection Act 2018, or DPA) and the importance of balancing these obligations with their duties and requirements under planning rules and legislation in the context of the everyday work of a planning department. It is not a general introduction to the principles of GDPR and is not the right place to start to gain a working knowledge of the subject.

Set out in this document are some basic principles to encourage a consistent approach to processing and publishing personal data. It is important that each planning department fits into their council-wide data management strategy, and with the help of this document they can make considered choices about whether to follow our suggestions or do their own thing. Over time, your ICT and planning tools will reduce the burden of safeguarding data – for example, by setting timetables for unpublishing documents – but clever technology is only there to implement your policy decisions.

The advice contained in this document is provided for planners working in England. Although many of the principles will apply equally in other parts of the UK, some of the detail of regulations will be different.

Other sources of help

Readers are strongly advised to get a thorough understanding of the general principles of data protection before tackling this planning-specific guide. The Information Commissioner provides an excellent general guide to the GDPR that sets out its underpinning principles.

The Local Government Ombudsman has published a guide for planners recording and documenting planning decisions. They also provide a series of useful fact sheets aimed at members of the public. The Ministry of Housing, Communities and Local Government published a plain English guide to open and accountable local government in 2014 which explains how councils should evidence some of the decisions they take.

Useful information and a guide to how the GDPR applies to the work of elected members is provided by the LGA.

Our knowledge and understanding of the GDPR and how it applies in practice continue to evolve. Questions and advice on particular circumstances may require specific legal advice, or you can ask your peers in the GDPR knowledge hub and specific forum for planning-related GDPR questions. Registration for this KHub is required.

Context: GDPR and planning

The introduction of the General Data Protection Regulation (GDPR) has required councils to review the way they manage data in the course of their work providing the functions of a local planning authority (LPA). Unlike many tasks carried out by councils where data is generated by council officers, planning involves the receipt of personal data from third parties which is then shared more widely during the course of decision-making.

The requirement on planning authorities to consult widely and to operate in a democratic and accountable way needs to be balanced against the need to manage data properly. Some councils have not previously given much thought to how long data should be kept, and others have adopted a position of making everything available online to promote a self-service culture.

The large fine imposed on a planning authority in 2017 has brought into sharp focus the need to take stock and ensure that data management is being done legally and properly.

The planning community has made enormous progress over the last 15 years becoming more open, transparent and available online. It is vital that our response to the GDPR, and the threat of fines for getting it wrong, does not undo this progress. Those proposing development – and those impacted by it – have a long-established expectation of participating meaningfully in the decision-making process. LPAs must not over-react to the GDPR by reducing public involvement or being seen to 'hide' important documents and data, or return to a paper-based approach where the only way to access documents is to visit a local planning department in person.

It is important to maintain a sense of proportion. Protecting personal data takes precedent, but it doesn't have to be a barrier. As the Information Commissioner's Office (ICO), the regulator in charge of data protection, says: '*Data protection law doesn't set many absolute rules. Instead it takes a risk-based approach, based on some key principles. This means it's flexible and can be applied to a huge range of organisations and situations, and it doesn't act as a barrier to doing new things in new ways. However, this flexibility does mean that you need to think about – and take responsibility for – the specific ways you use personal data*.'

While all LPAs do similar things, they vary from one another in scale, scope and attitude to risk. There are no one-size-fits-all answers. LPAs should be careful when establishing their operating principles so that they match the systems, processes and resources available locally.

GDPR and the planning system: principles

The GDPR sets out a legal framework for processing data. It is in part a response to our increasingly digital world and a lack of certainty over who can access and use our personal data.

LPAs use personal data to make planning decisions. Every LPA needs to be responsible for the way it uses that data. It cannot avoid this responsibility by asking people to sign a waiver or asking that consultees flag data that deserves special care. Instead, it must embed compliance with the GDPR in the way it operates and demonstrate compliance by documenting its processes and decisions.

What kind of data?

The GDPR is concerned with **personal data** – the information you hold about applicants, owners, neighbours and other people identifiable from data you hold.

A separate category of data is called **special category data**. This type of data is personal data which the GDPR says is more sensitive, and so needs more protection. Examples include information about an individual's religion, health and ethnicity. *As such, special category data poses the most risk for the data controller.*

Both types of data could be provided in support of or in response to a planning application. Information about businesses, viability or environmental conditions is not personal data and so does not fall within the ambit of the GDPR.

Data controllers, processing and publishing

Almost all planning departments are part of a local authority, and in these circumstances it is the local authority (not the planning department) that is the data controller. As a controller[1] the local authority has responsibility for complying with data protection regulations and ensuring there are appropriate policies and procedures in place. Planning departments will need to ensure that the decisions they take about managing data are in line with the council's policies, and should liaise with their corporate experts (in particular Data Protection Officers) on any points of detail.

[1] The ICO has a helpful checklist for controllers https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/controllers-and-processors/

Because the local authority is the data controller it can choose to use the information collected as part of the planning process in other departments (e.g. legal and building control) without the need for data-sharing agreements. However, it is important that this is done thoughtfully and for purposes that are compatible. See the mini case study “Can we ask Council Tax about second homes?” later in this document.

There is a distinction to be drawn between processing data for making planning decisions and publishing it online. There will be some situations where LPAs might establish a lawful basis for processing personal data but not for publishing it - each step requires thoughtful justification.

The legal bases for data processing

There may be several different purposes for processing information as part of the planning process: e.g. consultation on plans, making decisions on planning applications, sharing the information with the Planning Inspectorate ("the Inspectorate") for appeals. **Data controllers need to identify a lawful basis to process personal data for each purpose**.

In our everyday lives, 'consent' is the basis we are most used to seeing, but it is just one of six lawful bases for processing data. There are six lawful bases available and each one is appropriate to different circumstances. They are listed in Article 6 of the GDPR:

The lawful bases for data processing

The lawful bases for processing personal data as set out in Article 6 of the GDPR are:

(1) **Consent:** the individual has given clear consent for you to process their personal data for a specific purpose

(2) **Contract:** the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.

(3) **Legal obligation:** the processing is necessary for you to comply with the law (not including contractual obligations).

(4) **Vital interests:** the processing is necessary to protect someone's life.

(5) **Public task:** the processing is necessary for you to perform a task in the public interest or for your official functions, and the task or function has a clear basis in law.

(6) **Legitimate interests:** the processing is necessary for your legitimate interests or the legitimate interests of a third party, unless there is a good reason to protect the individual's personal data which overrides those legitimate interests. (This cannot apply if you are a public authority processing data to perform your official tasks.)

See: ICO Guide to Data Protection and GDPR Article 6

Processing personal data

The basis under which LPAs collect or publish personal data in relation to planning applications would likely be public task. This is used when the task or function has a clear basis in law. It covers processing data that is *necessary* to process for a specific purpose (i.e. you couldn't reasonably perform your task in a less intrusive way).

For example, the publication on an LPA's website of individuals' *names* and *addresses* in connection with planning applications is required by article 40[2] of the Development Management Procedure Order (for more details see Appendix 2); in contrast, the publication of their *email addresses*, *signatures* and *telephone numbers* is likely to be excessive to the task.

Whilst consent is unlikely to be an appropriate basis for processing personal data in relation to planning applications, there may be certain purposes for which LPAs process data using consent as the lawful basis. For example, an LPA might maintain several mailing lists eg of local agents to invite them to a planning and development forum, or of landowners and others who wish to be part of planning policy consultation.

It is important that the lawful basis is established at the outset and doesn't 'drift', allowing data to be used for purposes that would not have been clear at the beginning. You can choose more than one lawful basis, but you cannot change it later.

Processing special category data (SCD)

If you are processing special category data, you need to identify both a lawful basis for general processing and an additional condition to ensure it is strictly necessary to process this type of data. In December 2019 the ICO published additional detailed guidance on special category data.

The most likely condition to apply for processing SCD is that the processing is necessary for reason of *substantial public interest*. The ICO has published a list of the relevant conditions for establishing 'substantial public interest' (which are the 23 conditions set out in paragraphs 6–28 of Schedule 1 of the DPA 2018). For planning purposes, the 'statutory and government purposes' condition will apply (paragraph 6). This condition requires an appropriate policy document. This is unlikely to be a planning-specific document – you can see an example from RBK&C here.

[2] More accurately Article 40 requires names and addresses only for certificates of lawfulness. The decision to publish names and addresses on the statutory register of planning applications is for the Council to take.

SCD can appear in the planning process in a variety of ways:

- As evidence of a medical condition to support a planning application
- As evidence of disability to support a discounted fee or to support a planning application
- As part of the consultation process provided either directly by people about themselves or in relation to third parties

Special category data is by nature highly sensitive and should not be published[3] other than by exception. This extends to sharing data with other participants or data processors in the planning process – for example the Planning Inspectorate. Rather than providing identifiable data LPAs might consider providing a summary or narrative of the situation so that individuals are not identifiable but the substance of the representation or situation is clear.

Inappropriate disclosure of SCD could have an impact on vulnerable people and in these circumstances will be taken very seriously by the ICO.

Checklist for identifying a lawful basis for processing data

☐ We have reviewed the purposes of our processing activities and selected the most appropriate lawful basis (or bases) for each activity.

☐ We have checked that the processing is necessary for the relevant purpose and are satisfied that there is no other reasonable and less-intrusive way to achieve that purpose.

☐ We have documented our decision on which lawful basis applies to help us demonstrate compliance.

☐ We have included information about both the purposes of the processing and the lawful basis for the processing in our privacy notice.

☐ Where we process special category data, we have also identified a condition for processing special category data and have documented this.

Source: Adapted from ICO guide to data protection

[3] Note the distinction between "processing" and "publishing"

Publishing data

Publishing data is not the same as processing data. Even data that LPAs will have established a fair and lawful basis to process may not be appropriate to publish. In the absence of a regulatory requirement it is for LPAs to assess whether publication is "more than just useful, and more than just standard practice. It must be a **targeted and proportionate way of achieving a specific purpose.** The lawful basis will not apply if you can reasonably achieve the purpose by some other less intrusive means, or by processing less data" (ICO guide to GDPR).

In a planning department there will be several different people involved in processing consultation responses and other comments on planning applications and policies. The only way to deliver consistent and compliant results is to have processes and procedures that cover redaction and publicity.

Document redaction

Redaction should be considered as one way to safeguard personal and special category data. It allows LPAs to publish documents with sensitive parts removed.

Redaction is used to achieve two routine aims:

- To publish data in line with GDPR requirements
- To reduce the risk of fraud and identity theft

LPAs also need to be open to exceptional circumstances which might mean an individual's personal data should not be published.

Document redaction has come a long way from applying a black marker pen. Software helps the task of maintaining a complete document for the working case and an altered one for the planning register or website. Where documents have been redacted it may be appropriate for the redaction box to carry a description of what has been redacted such as 'signature' or 'email address'.

Some LPAs have put in place a process that identifies personal data (and/or special category data) at the beginning of the planning process (usually as part of validation) and redacting it so that it is not visible to anyone from that stage on. This is wrong. In most situations, the internal case file should be complete and unredacted to allow the decision maker to see personal data and, where necessary, use it to give appropriate weight to consultees' input. For an example of how to manage this type of information see "Smelly Farm goes to planning committee".

How much to redact?

Some of the field work that went into the making of this guide made it clear that practitioners were really keen to have a definitive list of rules of what to redact and when.

"*We are continually being challenged in relation to factual information i.e. stating that someone is being liberal with the truth for their own gains, we currently redact as much as we can but then are challenged by those making representations that we are not being open and transparent*" – An exasperated user in the GDPR KHub

While it is simple to be definitive at either end of the data protection spectrum there is a big grey area in the middle that requires care and thoughtful application of the principles of the UK GDPR. Remember too that there is a broader corporate approach across the council that needs to be reflected in the way the planning department acts. Some councils have a culture, as above, of redacting as much as possible for fear of a data protection failure. Other councils would rather redact as little as possible to assure people they are transparent and open.

Some people have suggested a staircase is a useful metaphor for thinking about the redaction of personal details. On the lowest step are people happy in the public domain who want to be found – they are authors, professionals, advocates and representatives of groups who are happy to be in the public domain. On the same step are officers, councillors and other public servants. The next rung up are private people who are involved in the planning system because they have to be. The final rung are vulnerable people or those who may want to keep their involvement in the planning process to an absolute minimum. It should be clear what the reasonable expectations of each group are with regards to privacy.

Some of the burden of redaction can be reduced by setting some ground rules with frequent respondents. Parish clerks can provide a collective view on behalf of the group, and statutory consultation (which is sometimes carried out between people with friendly relationships) should separate social catch-up emails and consultation on planning applications.

Transparency, privacy and the right to be informed

Under the GDPR individuals have the right to be informed about the collection and use of their personal data. This is done by providing a privacy notice which must contain certain information such as your purposes for processing their personal data, your lawful basis for processing it and who it will be shared with.

It is often most effective to provide privacy information to people using a combination of different techniques at different levels, known as a 'layered approach'.

Further details about what must be included in privacy notices and the different techniques for providing privacy information can be found in the ICO's guide on the right to be informed.

Each local authority will have an overarching privacy notice under which more detailed service-level information should be provided. This means that LPAs should provide their own privacy notice for planning so that individuals can see clearly how their data is used and retained as part of the work of a planning department.

There is a sample privacy notice included in this guide (see Appendix 1 – Sample privacy notice). It is essential that this is localised properly so that it genuinely reflects how things are done. We think it is good practice to tell people their data may be shared with the Planning Inspectorate both "up front" in the council's privacy notice but also when an appeal is received.

Making sure you provide the required information to individuals can help you to comply with other aspects of the GDPR and build trust with people as it is an opportunity to manage their expectations and explain how you will use their data.

Many problems and complaints can be avoided if you clearly set out your process in the privacy notice and then follow your own rules in practice.

Information about third parties and Article 14

When people provide their data directly to you by submitting a planning application or a comment on a neighbour's application you can inform them to how you will use their data (usually by sending them a link to your privacy notice as part of a receipt). They are the "data subject" and the Council is the "data controller".

However in some situations you receive personal data about people not **from the data subjects themselves but from a third party**. Examples of this scenario include certificates of ownership ('Certificate B'), and where applications in which applicants declare a relationship to a local authority member or employee.

When data is provided about a third party Article 14 of GDPR becomes relevant, meaning those individuals have the right to be informed about the processing of their data (again, you would most likely do this by sending them a link to your privacy notice). This must be done within a reasonable period and no later than one month.

This information[4] includes

- the identity and contact details of the data controller
- the categories, purposes and legal basis for processing the data
- the recipients of the personal data
- the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period
- the existence of the right to request access to, rectification or erasure of personal data or restriction of processing concerning the data subject and the right to object to processing and lodge a complaint with a supervisory authority (in this case, the ICO)

This is an important step and allows these data subjects the right to object to the use of their data, especially if it could result in harm/detriment to them. See the section on data on third parties (in section 2 "receipt of application") for more on this.

[4] A well-designed privacy notice should cover all these requirements

Putting the principles of GDPR into practice

The GDPR sets out a number of principles for processing and publishing personal data that LPAs need to bear in mind. When making decisions on how to respond to particular situations it is important to remember the underpinning data protection principles, and perhaps create a short note demonstrating how you have applied them.

GDPR principles relating to processing and publishing personal data

- Lawfulness, fairness, transparency
- Purpose limitation (collected for specified, explicit and legitimate purposes)
- Data minimisation (limited to what is necessary)
- Accuracy
- Storage limitation (kept for no longer than is necessary)
- Integrity and confidentiality
- Accountability

Source: GDPR Article 5

These principles are useful prompts when thinking about whether it is necessary to publish data. LPAs should definitely not blanket publish all the data given to them without any consideration or care. Equally concerning would be an LPA who refused to publish anything citing "data protection issues".

For example if an LPA concluded that openness and transparency warranted publishing comments[5] on planning applications they could probably justify publishing

- Name
- Address (or part therof)

It would be far more difficult to justify as necessary the publication of

- Email addresses
- Phone numbers
- Signatures

Read more: ICO Guide to Data Protection, GDPR principles

[5] Note our views on this later in the document.

Embedding GDPR compliance

Every LPA needs to embed compliance with the GDPR in the way it operates and be able to prove that this is the case by documenting its processes and decisions.

You should have appropriate procedures in place to manage the data you process, particularly when you are publishing any information online. This should include:

- Reviewing planning applications (and objections) for personal and special category data
- Where it is considered necessary to publish personal and special category data, making sure that you document those decisions and the lawful basis for doing so
- Where it isn't necessary to publish personal and special category data, making sure there are processes in place for removing or redacting it – for example, a checking process before uploading to the website.

Every member of the team who needs to process personal data should receive training (topped up at suitable intervals) that covers:

- Implementing the measures and procedures outlined in your privacy notice
- Data protection principles
- The importance of identifying special category data
- Applications that may involve national security[6]
- Who to ask if unsure
- How to escalate, report and deal with a problem

Importantly, data protection should not be considered solely an administrator's problem. New data can be generated at several stages and the ever-tighter integration of websites and back-offices means that everyone should be clear on the requirements of your privacy notice.

Changing or updating your planning software represents a particular point of risk, and enormous care should be taken if implementing automatic document destruction, or automatic publication.

[6] Dealing with security-sensitive information is legally a separate issue from GDPR and set out in Ministry of Housing, Communities & Local Government guidance, but in practice the issues are best considered alongside each other.

"Can we share data with council tax to prevent fraud?"

A concerned parish council has approached you with what they say is evidence of someone claiming self-build relief from CIL payments but using the dwelling as a second home[7]. Can you check with your council tax colleagues?

You could, of course, ask the applicant for their council tax bill in which case there wouldn't need to be any data sharing. But what if they refused? Or what if you worried it had been doctored somehow?

From a data sharing perspective this is starts with the purpose limitation principle. You can only use the information collected if it is **for compatible purposes**. For example you can't collect information for planning purposes and then give it to another department to use for marketing purposes. But in this case it appears to be a compatible purpose – that of ensuring that a resident pays (or doesn't pay) the correct amount of money. And the lawful basis remains public task.

Then, to summarise the guidance it is a process of

- Having a policy and privacy notice[8] that explains what you do
- Training your staff
- Documenting your process

[7] For readers unused to the CIL regulations this constitutes fraud

[8] Most Local Authority privacy notices allow for data processed to be used for law enforcement, safeguarding and fraud prevention

Planning applications

Planning applications form the bulk of the work for most LPAs. This section of the guide goes step by step through the different stages of the development management process, discussing the implications of GDPR in line with the principles and procedures discussed in the previous section.

1. Pre-application advice

While the formal planning process starts with an application, pre-application engagement is encouraged, especially for situations where the application of planning policies might not be straightforward. This early engagement is also an opportunity to ensure applicants understand what will happen to their data.

Records of pre-application discussions are not required to be held on the planning register, but LPAs may wish to make them public alongside their other planning records. If the records are published, the rules on personal data and document retention will apply just as at any other stage of the planning process. If records are not routinely published, each LPA will want to come to a position on disclosure under the Environmental Information Regulations before any requests from the public to see these records are received.

Historically many LPAs have used an exception of confidentiality to avoid disclosing pre-application advice, and this position has previously been accepted by the ICO[9]. However prompted by public mistrust the direction of travel has been towards more transparency on pre-application advice alongside viability appraisals and other previously confidential or heavily redacted documents.

[9] See for example https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173203/fer0696769.pdf

2. Receipt of application

Applicants need to understand at the outset how their data will be used by the LPA. A privacy notice should explain what information will be published, where it will be published and for how long (see Appendix 1 – Sample privacy notice).

At this first step, LPAs should:

1. Share their privacy notice with the applicant (and agent)
2. Decide how to respond to any third parties involved
3. Be clear whether there are any special circumstances relating to the application that require standard procedures to be altered.

Third parties and planning applications

Ownership certificates

The planning system allows any person to make a planning application on any land, including land they do not own. If the applicant is not the owner of the land, they must serve notice of their application in accordance with the requirements of Article 13 of the DMPO This includes serving notice on a person who is the owner (meaning a person owning the freehold or a leasehold interest with an unexpired term of not less than 7 years) or a tenant of an agricultural holding. If the applicant knows the name and address of those interested parties, they must include it on their application form (Certificate B). The planning application cannot "be entertained" (ie is invalid) if the applicant fails to provide the name (and address) of each person who has been served a notice by them (s66 TCPA 1990).

Relationships to applicants

Councillors and officers may themselves make planning applications, as well as close members of their families. These relationships to officers and members of the council are declared on the planning application form. In this way the decisions can be open and transparent by, for example, requiring all planning applications made by councillors to go to planning committee in the public eye.

To publish or not to publish?

While the processing of third parties' data is likely to be "public task" there is no requirement in law to publish it. The consideration, then, is whether the publication is necessary for the specific purpose.

It has been argued that publication of data relating to ownership and relationships is necessary to reduce fraud and to assure the public of fairness and transparency. Set

against that is the complexity of land ownership and the impossibility of the LPA seeking to transfer the job of fraud detection to the public at large.

It is the view of the ICO that the balance is tilted against automatically publishing data about third parties – even if they are notified. If, for a particular case, the LPA can justify the publication of third parties data, it will then need to comply with its duties under Article 14 of UK GDPR.

Validation

The receipt of a planning application instigates its 'validation', where it is checked over to ensure it is a valid and complete planning application.

Article 7 of the DMPO sets out the general requirements for applications for planning permission. Article 11 of DMPO sets out further general provisions relating to applications.

Local planning authorities may also require additional information set out in their local list.

Once the application is accepted as ready to process, it is placed on the Planning Register Part 1 (see _____

Appendix 2 – The planning register). This step includes some critical tasks:

- Scan the document (if necessary)
- Redact signatures and personal details (in line with your privacy notice)
- Change the names of the documents to improve accessibility (following a naming convention)
- Tag the documents to distinguish those that should be public from those that shouldn't.

The planning register

The register of applications is an important source of publicly available information and is the information that the public would expect to be able to review when they have been notified or consulted on an application for planning permission.

- Section 69 of the TCPA sets down the requirement for certain information to be kept as part of the planning register.
- Article 40 of DMPO specifies what information is to be kept on which part of the register. The legal requirements are the minimum requirements.

The register must also include an index (which in electronic terms probably means having a search function). In addition, LPAs must publicise prescribed information about applications for development on their website (Article 15(7) DMPO and Regulation 20 EIA Regulations 2017). Most LPAs meet this requirement by directing users to the register.

There is no statutory requirement to maintain the register electronically, but where the register is kept using electronic storage the LPA may make the register available for inspection on a website maintained by the authority for this purpose (Article 40(14) DMPO). Almost all LPAs now maintain a web-based planning register.

Over the last decade or so some LPAs have turned their planning register into an online filing cabinet. These can contain significant numbers of documents including email chains of correspondence which may have little or no bearing on the consideration of the application. Perhaps this was done to reduce the burden of responding to FOI requests, but a better approach is to implement appropriate document retention policies.

Help! Someone is scraping my planning data!

Some LPAs worry that the information they provide on their websites (most commonly in the planning register) is "scraped" for re-use by third parties in a process known as web-scraping. Web monitoring tools are quite sophisticated, and it is possible to identify and block people scraping your website. But should you?

There might be several reasons that third parties act in this way:

- Proptech companies want access to data about planning applications to repackage and add value to it to sell on
- Direct marketers might want to know who is interested in extending their kitchen to find ways to sell kitchen-related goods and services to them

Proptech companies might argue that they can target their data harvesting to avoid collecting personal data (or data that might in combination become personal data). Direct marketers might argue that people might welcome targeted and relevant adverts for products likely to be useful to them.

This is an area with lots of potential and it is likely that some of the practice will change, but a run through some of the data protection principles is instructive

- Applicants have given their data to a data controller (the Local Authority) under a lawful basis (likely 'public task')
- The fact that their data is made public via a register does not stop it being personal data. It is not available for re-use.
- To collect it under one purpose (and expectation) but to re-use it under another – eg to shift from "public task" to "consent" or "legitimate interest" is likely unlawful.

So, some third parties may be scraping data observing data minimisation principles and avoiding harvesting personal data. Others may be conducting direct marketing in an unlawful way. How can an LPA distinguish between them?

Policing data abuse seems like a potentially difficult area for LPAs, and there is already a regulator (the ICO) whose job this is. To make things clear planning registers (or the privacy notice) could spell out the basis on which the data was collected and prohibiting any re-use of the personal data by third parties. If complaints from the public are received about direct marketing stemming from LPA registers they can be referred to the ICO who will take appropriate action.

3. Consultation

Consultation is central to the planning process. In particular, consultation with statutory bodies and engagement with near neighbours is essential to maintain fairness and rigour.

In GDPR terms, consultation also represents a risk to LPAs because some people, in making their representations on the planning application, may disclose personal and/or special category data. It would be unfair to refuse to accept these representations on principle, unless the disclosure of SCD is arbitrary and unrelated to the case.

Therefore, **those LPAs that decide to publish comments will need to introduce a process of review** before allowing comments to go live. It is a risk to have a system that allows respondents' comments to appear automatically as soon as they are made because the LPA is liable for them.

Publishing comments on planning applications

The Openness of Local Government Bodies Regulations 2014 are designed to promote the transparency and accountability of local authorities to their local communities. They require that when a decision to grant planning permission is made by an officer rather than a planning committee, the LPA must make available for public inspection the written record of the decision and background papers[10] for public inspection (at their offices, on a website if they have one and by such other means as the authority considers appropriate). The written record must be retained for 6 years and the background papers for 4 years.

Some LPAs cite these regulations as the reason they "must" publish the names and addresses of those making representations on planning applications. However, the regulations are clear that they **do not require** the LPA to disclose to the public confidential information (i.e. information the disclosure of which is prohibited under an enactment, such as data protection legislation).

Moreover in a very clear and helpful judgement[11] the ICO has confirmed that councils do not have to provide personal data on a representation, even if it is requested via FOI or EIR.

[10] 'Background papers' means documents other than published works that relate to the subject matter of the decision or part of the decision (that falls under paragraph 7(2)) and in the opinion of the proper officer, disclose any facts or matters on which the decision or part of the decision is based and were relied on to a material extent in making the decision.

[11] See the Torfaen decision here https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617221/fer0866979.pdf but note that Torfaen were also acting in accordance with their privacy notice.

Councillors' access to data

Councillors can occupy several different roles as they relate to the work of a planning department, and it is important that everyone (including the councillor) is clear in what capacity they are acting at any time.

Those Councillors who sit on the planning committee are acting as decision-makers. They will require access to the full details of the application, including personal data and relevant special category data, to understand how much weight to give representations. Planning committees are public arenas, so thought will have to be given about how to prevent inadvertent publication or sharing of data (especially special category data).

There are other situations where Councillors provide governance, oversight and scrutiny and in doing so may require access to personal or special category data. This can include reviewing complaints and in a 'call-over' meeting to decide whether an application should be taken under delegated powers.

In these situations where councillors receive full access to data that is otherwise redacted or kept confidential, they are under the same obligation as officers to safeguard it.

Councillors (including those on the planning committee) are also ward councillors, and are part of the public consultation process. In these circumstances they get the same access to information as members of the public. This applies in the same way when using councillor enquiry processes or complaints.

Planners may need to 'top up' the corporate training Councillors will receive on GDPR as it relates to planning.

So, there is no requirement to publish consultation responses[12], and the decision to publish or not is the LPA's to take. However, best practice in this area can be summed up as:

- All information that enables the public to participate effectively in the decision-making process should be published online – where that is consistent with the GDPR
- Information should be organised and presented in a way that makes it easy for the public to find what they need
- The need for access to information changes once decisions are made, or the opportunity for appeal has lapsed, and in the long term the public will only need to see the statutory register

There is clearly a balance to be struck. The more that the consultation process is carried out in plain view, the more resource it will require to ensure that risks around data protection are managed. In our view, this means that only consultation responses that are likely to have significant impact on a rational decision-making process **should** be published. This will include those from statutory consultees and

[12] However there is a requirement to make them available at an appeal

possibly amenity groups and recognised residents' associations[13]. In some situations it could also include individual responses depending on the case and the issues.

Some LPAs publish all consultation responses, taking the view that this proves to respondents themselves that their comment has been received. This is a legitimate approach, although responses *should not be published without review* and bulk responses (many copies of the same templated comment) should not be allowed to obscure or frustrate access to the rest of the information.

Any online comments platform should refer users to the privacy notice, noting that any information given may ultimately be shared with the Planning Inspectorate.

[13] We hear concerns at the roadshows that publishing a commend from Tenant's Association A but not from new Residents Group B would be perceived to attach less importance to group B. In particularly fraught situations it might be best to publish neither (remembering that publication is distinct from "consider").

The planning application for Smelly Farm goes to planning committee

To illustrate how consultation and good data handling work together consider the case of Smelly Farm. An application is received from the operator of Smelly Farm, looking to increase capacity and vehicle movements at the site.

The application provokes a strong mix of responses – some people welcome the additional economic activity and jobs created, others allege that the development will make existing odour problems worse and that the application does not mitigate this risk properly.

The LPA has made the decision that it does not routinely publish comments from members of the public on planning applications. The case officer notes that almost all the households near to the farm raise the odour problem, and that the comments about rural vitality come from a much broader area – some of them from other towns and cities altogether.

The officer's report to committee makes note of the general distribution of respondents and is published in the lead-in to committee as normal. Attached to it as a confidential appendix is a more detailed list and map showing exactly where the respondents are based. The planning committee is live streamed but they can review the appendix without suspending the public video. The appendix is referenced as an input into the decision-making process but is never published.

In this way the planning committee can understand the impact of the development on specific people without the need to publish their names and addresses.

Inappropriate responses

Many people responding to a planning application will be engaging with the planning system for the first time. They won't necessarily have grasped the finer points of what is (and is not) a material planning consideration, and their responses shouldn't be returned simply for not making valid points.

However, a small number of people are defamatory, inappropriate or just rude in their responses to planning applications. LPAs need not spend their time redacting or summarising this type of comment and should instead refuse to publish or even accept them[14]

[14] Staff training in this area should cover the Local Authorities responsibilities to respond and report hate crime when it occurs in very rare cases.

4. Reports and decision letters

Officers' and committee reports are not required to be held in the register. There are separate requirements for officers' decisions and committee papers to be published.

Documents published in part 1 of the register only need to be retained until the application has been disposed of (the point at which a final decision is made), sometimes following an appeal.

There may be personal data contained within documents that while necessary for publication (and therefore not redacted) during the consultation phase, may not need to be retained after the formal consultation has ended.

LPAs may wish to consider redacting these documents *before* a final decision is made, particularly where there could be a significant time lag before a decision is issued.

Once the decision is issued, the application moves from part 1 to part 2 of the planning register, the latter being the permanent record of the application (see _____

Appendix 2 – The planning register for a summary of what it contains).

Documents published in part 2 must be retained indefinitely, but this need not be online.

Given that LPAs are not required to publish their register on a website and, given the principle that the processing of personal and special category data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed, LPAs should consider for how long and by what means it is necessary to publish and retain personal or special category data in both parts of the register. These decisions are what drive the retention schedule process.

5. Planning application appeals

Applicants, in most circumstances, have a statutory right of appeal to the Planning Inspectorate. This means that the LPA will have to share the details of the case with the Inspectorate, including personal data and possibly special category data, along with all the representations made about the application. LPAs must ensure their privacy notice sets out this possibility.

On receipt of an appeal, LPAs should:

- Review the personal data held on the case, paying particular attention to any special category data.
- Decide whether any personal data is critical to the decision-making process. It is the Inspectorate's view that SCD should only be shared with them in exceptional circumstances
- Notify people of the appeal, directing them to the appeals casework privacy notice

Remember that the Inspectorate cannot work in confidence and regulations require that they and the appellant have the same set of documents. LPAs will therefore be unable to provide unredacted documents to the Inspectorate and redacted ones to the appellant. Usually this predicament is solved by summarising the existence and impact of factors that would otherwise be SCD.

See the latest Procedural Guide to Planning Appeals from the Inspectorate.

Working with the Inspectorate on planning appeals

The appeal questionnaire statutorily requires LPAs to provide the Inspectorate and the appellant with information relevant to their processing of the case. For planning appeals, this includes any interested party representations received at the application stage. LPAs should also note that the appeal procedure rules include explicit obligations on them to make appeal information available for inspection to any party.

As the address of the person making a representation may provide additional context (particularly in respect of overshadowing, privacy or noise arguments), this information should normally be included with the interested party representations that LPAs are required to provide to the Inspectorate and appellant. If an LPA chooses to redact this information then they should do so from both the Inspectorate and appellant versions and in awareness that the interested party correspondence may be given less weight as a result. LPAs should therefore consider the impact of the appeal procedure rules before agreeing to protect the identities of interested parties.

If an interested party asks the Inspectorate to withhold their identity, this will be redacted from the representation that the Inspectorate provides to the appellant,

the LPA and the Inspector. Again, this may affect the weight that the Inspector is able to give to the representation, and this is confirmed in the Inspectorate's privacy notice.

The enforcement questionnaire does not require LPAs to provide correspondence or the personal details of any party who may have notified them of the potential breach of planning control.

6. Document retention

Document retention is a corporate issue and the LPA will need to be mindful of the overarching approach and policy of the council.

Establishing a document retention policy is important because it also acts as a document destruction policy. Document destruction is essential – but its irreversibility means that extra care is required.

Our suggested approach is to organise documents into four categories:

	Category	Example	Policy
1	Temporary documents used to make a decision	Neighbour consultation responses	Remove when finally disposed of
2	Supporting documents for developments that are finished, without s106 negotiations, enforcement or similar activity	Officer reports for Householder and Minor developments	Remove from website and destroy after 4 years for delegated decisions 6 years for committee decisions[15]
3	Supporting documents for significant developments that are finished	Statutory consultee responses to major developments, infrastructure	Remove from website and public registers Keep in case of fire, accident or similar investigation
4	Documents required for the statutory registers	Approved plans, enforcement notices, decision notices (and planning conditions contained within them) by the LPA, the effect of any decision made following appeal	Keep for ever

[15] The periods of 4 and 6 years for retention are taken from Section 21 of the The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

Planning historical archives

The requirement to process data properly is not a new duty that only applies to data received from this point forwards. All the data made available by LPAs must comply, including historical planning registers that may have been scanned from previous decades or are still available in other formats.

The most obvious point of risk is that the online registers contain special category data, without there being any lawful basis for publishing it. **LPAs should develop a plan to review their public registers**, which should be cleaned of special category data as a priority[16].

[16]Remembering that the fine the ICO gave to Basildon was for special category data held in a public register

Enforcement

Enforcement relates primarily to land, and it may not be immediately obvious that personal data (and therefore the GDPR) is involved. However, personal data is any information that identifies individuals directly or makes them indirectly identifiable in combination with other information. A person's name associated with a matter at a particular address constitutes personal data.

As such, enforcement notices and the enforcement register include third parties' personal data and therefore require a lawful basis for processing. In line with almost every other part of the work of a planning department, the legal basis is likely to be public task.

Enforcement can become a very contested arena with allegation and counter-allegation sometimes followed up with EIR and SAR requests. The ICO provide a guide on "Access to information held in complaint files" that provides a helpful primer and it is required reading.

Allegations and investigations

Allegations of breaches against a particular property or person should not be made public without any investigation, and perhaps only on completion of the investigation. Allegations of unlawful development end up in many cases to a conclusion that no breach has occurred and the matter is closed. It is important that there isn't a "weekly list" of new allegations circulated, as this could be seen as some indication of wrongdoing and even prompt members of the public to undertake their own investigations.

Most LPAs maintain a list of cases where a breach has been identified but the matter is under further investigation or negotiation to bring about some kind of remedy. This list might be reported to a planning committee or some other oversight or scrutiny panel in a public or semi-public context, and to involve councillors in what are sometimes finely-balanced decisions. Even if the list avoids using names and just references cases by site, it could still contain personal data and so would still fall within the ambit of the GDPR.

LPAs again have a judgement to make. Often there is enormous pressure to respond quickly to a situation, especially where it is high profile and potentially high impact. Set against that is the duty to safeguard the data of people some of whom may be vulnerable or have protected characteristics.

Given the circumstances and the risks around mismanagement of SCD it is likely that a sound policy approach is to separate out the detail of the breach and the

procedure itself. The LPA can, by making information available about the stage of the process, assure the public at large that it is responding properly without making available any personal data. Any consideration of live enforcement cases can then be done as a closed session.

Enforcement appeals

In some circumstances people have the right to appeal against an enforcement notice. This will involve sharing data with the Planning Inspectorate in line with the advice in the section above on _____

5. Planning application appeals.

The enforcement register

LPAs are required to maintain an enforcement register and make it available for public inspection. While the regulations do not specify that it should be published online, it is good practice to do so to reduce the need to visit a paper register. This is especially true as the register (and more usefully its index) must ultimately be made available under the Environmental Information Regulations.

The enforcement register is an important document, and can prevent people buying land without knowing there is a pre-existing "stop notice" on it. LPAs can refuse to entertain planning applications on sites with enforcement notices, some of which might date back many years. In this way problems can be prevented before they become an issue.

What is an enforcement register and what should it contain?

Section 188 of the TCPA requires LPAs to maintain an enforcement register and Article 43 of the DMPO requires each authority to maintain a register that contains and index and copies of every:

- Enforcement order
- Enforcement notice
- Stop notice
- Breach of condition notice

Any notice that is rescinded or quashed should be removed, along with any expiring enforcement orders.

Each enforcement register will contain orders and notices that contain personal data. These are an important record and should not be redacted.

Local plans

LPAs have a duty to prepare a local plan and to consult on it. They need to notify and invite representations from residents or other persons carrying on business within the area as well as from a range of specific and general consultation bodies that may have an interest.

LPAs process personal data at various stages in the process of making local plans, most obviously:

- Calling for sites: landowners, agents and other promoters will put forward their suggestions along with their personal details
- Consulting on draft policies at Regulation 18 and 19 stages: members of the public, landowners and other stakeholders
- Preparing for a local plan examination
- Consulting on other types of development plan document, site briefs or other guidance documents.

The steps needed to ensure compliance with GDPR are largely the same as for planning applications. The lawful basis for processing personal data remains public task, although the legislative background is different: the processing planning applications comes under the DMPO, while local plans are the TCPA.

How you use the data should be captured on your privacy notice: the example in Appendix 1 – Sample privacy notice covers all the functions of the planning department in a single notice.

Examining local plans

The examination of the local plan is a big task, usually coordinated by a programme officer. Often the programme officer is an employee of the council, so there is no "data sharing" with them[17]. They will need the personal data to arrange and coordinate sessions throughout the examination.

The Planning Inspectorate have updated their procedural guide to reflect UK GDPR practice and will enter into a data sharing agreement that covers the examination. Their guide reminds LPAs that they need to be aware of complying with their data protection responsibilities.

As made clear in previous sections the risk factor for LPAs is around SCD. Some plans arouse strong emotions, and it is not unknown for people to cite actual and potential harm to physical and mental health in response to a consultation.

Councils are obliged to "make available" representations made on local plans, but they will first want to reflect on their legal basis, and for SCD undertake the second "substantial public interest" test too. The decision on where the balance is to be struck between protecting someone's data and allowing them to be heard as part of a plan examination is not a simple one. Luckily this is an edge case and relevant only to a small number of responses.

LPAs may feel conflicted – on the one hand they have a duty to allow people to engage fully with the examination process and to have their representations made available. On the other they will feel the need to protect SCD and to try and avoid putting it into the public domain.

It might be worth reflecting on the principles of data protection and having a clear approach for these situations. To have a policy, to train people what it is, and to apply it. For example:

1. In general we publish full names, addresses and unredacted responses as part of the plan examination.
2. We check each one for SCD. We apply the secondary test of "substantial public interest", to satisfy ourselves that the disclosure is not for trivial reasons or an attempt to frustrate the examination process.
3. In those situations where the secondary test has been satisfied we go back to the consultee and explain about SCD, and ask them to confirm in writing that they want their original response published or whether they would like to change it[18].
4. We hold a record of this process and keep it for a reasonable time afterwards

[17] Those professional programme officers who contract to LPAs will need to enter into a DSA.

[18] For clarity this is not asking them for consent – this is inviting them to exercise their right to restrict processing

Appendix 1 – Sample privacy notice

Who we are

We are the planning department for [_____] council. This privacy notice explains how we use information in the course of our work as a local planning authority. This work includes

- Making decisions and providing advice on planning applications
- Making planning policies and local plans
- Working with neighbourhoods on their plans
- Working with neighbouring authorities on strategic policies
- Responding to allegations of unlawful development
- Monitoring development
- Entering legal agreements, serving notices and promoting the best use of land

If you have questions about data or privacy contact our data protection officer, [_____].

How we get your information

We get applicant information in two ways – it is supplied to us directly (or via a planning agent on their behalf) or we receive it from a third-party website that provides a transaction service. These include:

- The Planning Portal
- iApply

We also receive comments, representations, allegations and questions via email, letter, and through our platform(s) XXX.

What we do with your information

To allow us to make decisions on their applications, individuals must provide us with some personal data (e.g. name, address, contact details). In a small number of circumstances individuals will provide us with 'special category data' in support of their application (e.g. evidence of medical history).

We use the information provided to us to make decisions about the use of land in the public interest. The lawful basis for this is known as a 'public task' and is why we do not need your explicit consent for your information to be used.

Some information provided to us we are legally obliged to make available on planning registers. This is a permanent record of our planning decisions that form part of the planning history of a site, along with other facts that form part of the 'land search'.

How we share your information

We do not sell your information to other organisations. We do not move your information beyond the UK. We do not use your information for automated decision making.

We make details of planning applications we receive available online so that other people can contribute their comments. Please note:

- We do publish the name of the person applying for planning permission along with the address
- We don't publish their signature, contact details
- We do/ do not publish comments received on planning applications by members of the public. We redact some details of the comments ….
- We do/ do not publish comments received on planning applications by town and parish councils / amenity groups / statutory consultees

We send some planning applications to our statutory consultees for their advice on safety, infrastructure and other matters. We will sometimes need to share the information we have with other parts of the council – for example, to establish how long a building has been used as a dwelling.

In circumstances where a planning application is appealed, we are required to share data from a planning application with the Planning Inspectorate, which includes any comments made by statutory consultees and members of the public. . We also share information with the Planning Inspectorate when they examine our local plan. This includes the names of site promoters and people submitting representations on the plan.

We also send out a follow-up 'how did we do?' survey to a sample of people using our service (eg by submitting or commenting on a planning application) to see how we can improve it.

Redaction ('blanking things out')

We operate a policy where we routinely redact the following details before making forms and documents available online:

- Personal contact details for the applicant, e.g. telephone numbers, email addresses
- Signatures
- Special Category Data – e.g. supporting statements that include information about health conditions or ethnic origin
- Information agreed to be confidential

Sometimes we might decide it is necessary, justified and lawful to disclose data that appears in the list above. In these circumstances we will let you know of our intention before we publish anything.

If you are submitting supporting information which you would like to be treated confidentially or wish to be specifically withheld from the public register, please let us know as soon as you can – ideally in advance of submitting the application. The best way to contact us about this issue is [_____].

Retention ('how long we keep your information for')

We process many different types of information according to our retention policy. A brief summary of long we keep things before they are usually destroyed:

- Statutory registers (e.g. planning decisions, approved plans): for ever
- Supporting documents, reports: 6 years for committee decisions, 4 years for officer decisions
- Representations, letters, general correspondence: 4 years

Some supporting documents relating to major or otherwise significant developments may not be destroyed but instead removed from public registers.

Complaints and problems

Making decisions on planning matters is a public task and you do not have the right to withdraw consent for your data to be processed. However, if you think we have got something wrong or there is a reason you would prefer for something to not be disclosed, please ask us by [_____].

If you need to make a complaint specifically about the way we have processed your data, you should in the first instance use our corporate complaints policy [_____]. If we fail to respond properly you can direct your concerns to the Information Commissioners Office.

Appendix 2 – The planning register

Part 1 of the planning register (Article 40(3)) is the 'live' part and must contain for any application for planning permission 'not finally disposed of' certain documents, including:

- a copy of the application, and any plans or drawings,
- a design and access statement, where relevant
- details of any planning obligations and
- modifications

In the case of applications for EIA development and subsequent applications Part 1 of the register must also include a copy of any relevant—

a) screening opinion
b) screening direction
c) scoping opinion
d) scoping direction
e) notification given under regulation 11(2), 12(5), 13(5) or 14(6)
f) direction under regulation 63
g) environmental statement, including any further information and any other information; and
h) statement of reasons accompanying any of the above (Regulation 28(1) EIA Regulations 2017)

Part 2 of the planning register (Article 40(4))holds the permanent record of the application for planning permission, once 'finally disposed of', which in addition to the requirements in relation to Part 1 include

- any directions
- decision of the local authority, including details of any conditions
- reference number and effect19 of any appeal (including any conditions attached to the appeal)
- date of subsequent approval following reserved matters
- particulars of any modifications

There are additional requirements for publishing on the register documentation relating to applications for EIA development and documentation relating to decisions on EIA applications.

[19] Note that it is the effect of the appeal, not necessarily the decision letter/notice itself. This distinction is important when the appeal notice might contain special category personal data and the LPA cannot establish a lawful basis to publish.