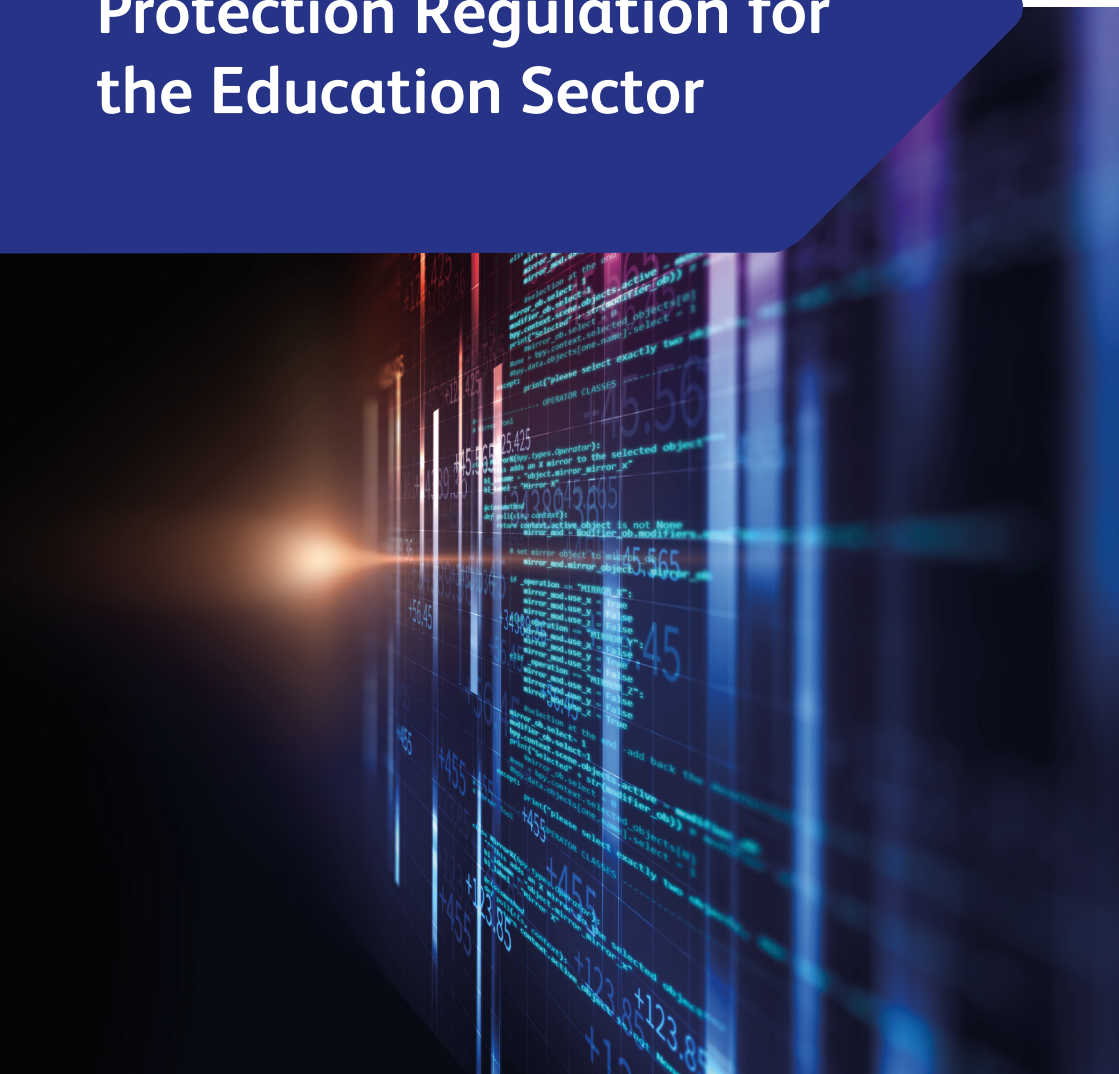
Brachers
With you all the way

GDPR: The General Data Protection Regulation for the Education Sector



Introduction

On 25 May 2018 the General Data Protection Regulation (GDPR) came into effect across the European Union, marking the biggest change in data protection laws for 20 years. The Data Protection Act 2018 brought the GDPR into the UK statute book and replaced the Data Protection Act 1998.

In 1998 the world was, in technological terms, a very different place. The internet was still in its formative years, online banking and shopping services were taking their first tentative steps and the global social media platforms we now rely on were barely dreamed of.

As the years have gone by and the technology has moved forward, ever greater numbers of people are active online in both personal and professional capacities. Increasing amounts of data and personal information are shared and, at the same time, cyber security threats and the risk of data breaches has grown.

The need for an updated piece of legislation dealing with these modern-day issues became increasingly obvious throughout society. The sensitive nature of much of the personal data held by organisations within the education sector in respect of their learners, parents, staff and other third parties, means that the sector is among the most affected by both the developments in technology and the changes to the law.

The education sector is among the most affected by developments in technology and the changes to law brought by the GDPR.

Contents

01 Introduction
03 The changes to data protection laws
04 International element
05 Individuals' rights
06 Data processors & controllers
07 Consent
08 Procedures
09 Enforcement
10 Data breaches
10 Implementation
11 10 point action plan
12 Contact our expert legal team

The changes to data protection laws

The European Union recognised the need for an update in data protection law and the General Data Protection Regulation 2016 ("GDPR") came into force across the European Union on 25 May 2018.

The Data Protection Act 2018 has brought the GDPR into the UK statute book. Even after the UK leaves the European Union, the legislation will therefore remain part of domestic law for the foreseeable future.

But what does this all mean for businesses, employers and public bodies? Brachers' team of data protection specialists can provide expert advice to help you take a proactive approach to these far-reaching changes.

! Action

Lookout for our handy action points highlighted throughout the booklet

The laws apply to all businesses and organisations.

Even once the UK has left the European Union, the provisions set out in the GDPR will remain part of domestic law.

The international element

The GDPR has a wide territorial scope, meaning that organisations far beyond the EU could have to comply with it.

It applies to organisations that are based within the EU but also to those based outside the EU if:

- they offer goods or services to individuals who are based in the EU; or
- if they monitor activities carried out by individuals inside the EU (e.g. spending habits).

The GDPR also allows data transfers to take place to non-EU countries only in certain circumstances including if the European Commission has made an "adequacy decision" in respect of the levels of safeguarding of data within that country.

Only a handful of countries currently benefit from this recognition and the UK will want to ensure that on leaving the EU it too is deemed "adequate" and continues to be able to receive data from the EU without problems.

Given all of the above, even in the longer-term, it is likely that much of the rules derived from the GDPR will remain a part of UK law.

This will meet the dual purpose of safeguarding individuals' rights and allowing UK organisations to continue to operate freely with the EU from a data protection perspective.

Many UK businesses will therefore need to be compliant with the GDPR (as well as our domestic legislation) even after Brexit – and could face stiff penalties if they are not.

Individuals' rights

The GDPR strengthens the rights and protections of individuals. Given the much wider scale upon which data is processed today, the increased risk of cybercrime and the increased awareness individuals have of potential privacy issues, this increased protection is a key focus of the GDPR.

Among the rights which can be found in the GDPR are:

The right to be forgotten

Allows individuals to ask data controllers to erase their personal data in certain circumstances.

The right to restrict processing or object to processing

The GDPR gives individuals enhanced rights to restrict the processing of their personal data.

The right to be informed

This is one of the biggest new areas requiring extensive information to be given to individuals ("data subjects"). This includes, amongst other things:

- the reason data is being processed;
- any recipients of the data;
- how long the data will be retained for; and
- the rights the individual has.

Where data is not received directly from the data subject, the data subject needs to be told about what information is held, where it has come from and how the organisation intends to use it.

The right to data portability

Allows personal data to be transferred in a "commonly used and machine readable form" to allow individuals to use their personal data across various services, e.g. to give to a different company or service provider.

The right to receive information about automated decisions

The GDPR gives individuals enhanced rights to receive explanations of how their data is used to make automated decisions about them, e.g. whether or not to approve them for a service, whether to contact them about a certain offer, etc.

Action

Review and update your policies and procedures to ensure that they reflect the individuals' rights that the GDPR confers.

Action

Ensure that the format in which you store personal data is workable and allows you to access and extract data both quickly and thoroughly in the event that you are called to do so.

Data controllers & processors

Beyond the rights individuals have under the GDPR, greater obligations are placed on data controllers and data processors in terms of their transparency and accountability.

In many ways, it is this aspect of the GDPR that will require the most thought, consideration and work on the part of those dealing with personal data.

The Data Protection Officer

Public bodies and organisations monitoring individuals or processing sensitive data on a large scale have to appoint a Data Protection Officer ("DPO").

What is meant by "large scale" is yet to be fully explained, but factors are likely to include the number of data subjects, the range and volume of data, the permanence of processing and the geographical scope.

That individual needs to be suitably qualified and an expert in data protection law, although there are no specific qualifications they are required to have.

The DPO is responsible for data protection and privacy within the organisation.

The DPO must act independently and not have duties which conflict with the role (for example, senior management, HR or marketing positions) and must report to the highest level of management within the organisation.

Even where an organisation is not required to appoint a DPO, having someone who has overall responsibility for data protection is advisable and should help to improve overall compliance.

Action

Assess and if necessary appoint a DPO or other individual whose responsibility it is to oversee data protection within your organisation.

Action

Ensure that your DPO has received all necessary training to allow them to undertake the role and that a sufficient budget is set aside to access any additional support they will need.

Consent

Prior to the GDPR much of the personal data that was processed both in a commercial and employment context was processed legitimately on the grounds that the subject consented to the processing. Such consent may not necessarily have expressively been given.

The GDPR continues to recognise consent as a legitimate basis for processing data but imposes a much more onerous obligation to obtain express consent. Such consent must be a "clear affirmative action" and be "freely given, specific, informed and unambiguous."

> "freely given, specific, informed and unambiguous

Consent should no longer be assumed (for example, via pre-ticked boxes on websites) nor should it be contained within wider written agreements such as contracts of employment or terms and conditions.

Any request for consent should also include details of how to withdraw that consent, and the process for withdrawing it should be just as easy as giving it.

Where data is being processed for different purposes and consent is relied upon as the reason for processing, the subject's consent is required for each separate purpose and an audit trail needs to be kept of who consented, how and when they consented and what exactly the scope of their consent was.

Valid examples of processing reasons include the need to comply with contractual obligations towards the data subject, the need to comply with a legal obligation or the need to preserve or develop legitimate interests weighed against those of the individual.

! Action

Identify the basis upon which all personal data is processed within your organisation. Where it is by consent, consider whether there is an alternative basis for processing that data.

Whilst the legislation came into effect on 25 May 2018, the obligations are on-going and any organisations who have not addressed the changes in law, should do so promptly and those that have, should keep procedures under review.

> "The process of withdrawal of consent should be just as easy as the process for giving that consent

! Action

Review and amend existing policies, procedures, contracts and other documentation which relate to data processing to ensure that all requirements of the GDPR are met.

! Action

Undertake a full audit of the data collected and processed by the organisation.

! Action

Review and shape your procedures in line with the data you hold and the processing activities undertaken.

Procedures

The rules within the GDPR relating to the policies and procedures organisations must have in place are complex and detailed.

Whilst the principles they are designed to promote and protect are similar to those within the Data Protection Act 1998, the procedures in place within most organisations will not meet the new requirements.

The onus has increased on organisations to have effective policies and procedures focussing particularly on high risk operations and processing that involves new technologies.

This may result in the need to undertake privacy impact assessments to identify high risk processing and to consult with the UK's Information Commissioner's Office ("ICO") if high risks are identified.

New obligations as part of the GDPR's procedural changes include:

- ensuring the "pseudonymisation" of data disclosed between parties
- minimising the data that is held, i.e. only holding or retaining data that is actually necessary
- implementing technical and organisational measures to facilitate compliance.

Audits of both data collected and of organisation's processing activities is a key steps to ensuring compliance.

Enforcement

The level of fines which can be imposed under the GDPR has been the headline item in press reports, and understandably so. The Data Protection Act 1998 capped the level of fine the ICO can issue at £500,000 which, in past cases involving global companies with enormous turnovers, was a very limited deterrent.

The GDPR seeks to ensure that data protection becomes a priority for organisations of all sizes.

The GDPR introduces a new and much higher 2-tier approach to fines which apply for particular types of infringement:

For less serious infringements

€10m or 2%

a maximum of €10m or 2% of group worldwide turnover (whichever is the greater)

Most serious types of infringements

€20m or 4%

a maximum of €20m or 4% of group worldwide turnover (whichever is the greater)

When considering historic cases involving data protection breaches, the value of 4% of group worldwide turnover for certain multi-nationals who have previously been involved in large scale data protection breaches is truly eye-watering.

The GDPR sets out the factors that regulators should take into account when setting the level of a fine, including:

- Was the infringement intended?
- Was negligence evident in the infringement?
- Have there been any previous infringements by the organisation?
- Did the organisation co-operate with the ICO?
- What type of personal data was affected?

The best way of avoiding fines of any level will, of course, be to ensure that your organisation complies with the GDPR.

! Action

Review your commercial agreements to check for any caps on your liability and/or the liability of any of your own service providers and seek to vary any contracts that provide inadequate protection.

! Action

Ensure that staff are fully trained on how to identify a data protection breach and put in place a procedure for breach notification that ensures breaches are reported swiftly.

! Action

Look out for updates from Brachers in relation to further guidance and implementation of the GDPR by the ICO.

Failures to notify the ICO can result in fines at the lower level of up to €10m or 2% of group worldwide turnover (whichever is the greater).

Data breaches

In a substantive move away from previous rules, the GDPR makes it mandatory for data controllers to notify the relevant national authority (i.e. the ICO in the UK) within 72 hours of becoming aware of any data protection breach likely to result in material harm/or risk.

Such a notification may lead to instructions from the ICO to notify the relevant data subjects of the breach as well, a task which may be very challenging, not to mention reputationally damaging. Internal records of all data protection breaches must be kept and maintained.

Failures to notify the ICO can result in fines at the lower level of up to €10m or 2% of group worldwide turnover (whichever is the greater).

GDPR and Education

Schools and other educational establishments hold more information than ever before, from student, parent and staff records, to CCTV footage. It is therefore essential to understand the GDPR and what it means for your organisation.

Child's personal data

One of the most important changes under the GDPR is to the rights of children. The GDPR identifies children as "vulnerable individuals" who need "special protection". It is therefore crucial that schools ensure children of the relevant age give their active, informed consent for data to be gathered and processed.

What is the relevant age?

GDPR states that, if consent is the school's basis for processing the child's personal data, consent must be given or authorised by a person with parental responsibility for that child although it should be kept in mind that consent is only one of the means by which personal data can lawfully be processed.

Schools are likely to rely on legitimate interest for basic record keeping information held about children as well as other details such as contact details for family members and other relevant information which is required for safeguarding purposes.

This requirement applies to a child who is below the age of 16 years; however the GDPR allows member states to lower the age, provided that such lower age is not lower than 13 years. The Data Protection Act 2018 sets the relevant age in the UK at 13.

This means that schools need to ensure that they implement age-verification measures, and make 'reasonable effort' to verify parental responsibility for those under the relevant age.

In many cases, schools will rely on consent of parents and guardians, and therefore it is essential that all consent is clearly documented and the reasons for processing are specific and clearly recorded.

Under GDPR, consent is much more difficult to rely on and therefore steps should be taken now to ensure appropriate process and record keeping arrangements are put in place.

Online services offered to children:

If a school offers an 'information society service' (i.e. an online service) and if it wishes to rely on consent rather than another lawful basis for processing personal information, the school must process the child's personal data only if consent has been obtained from a parent or guardian (or the child, depending on the relevant age).

Information society services:

This includes any internet services that the school provides, such as signing up to apps and homework websites, using the child's personal information for the purposes of providing information, creating personal email addresses for pupils or creating online profiles.

The GDPR identifies children as "vulnerable individuals" who need "special protection".

Do schools need a Data Protection Officer (DPO)?

The GDPR outlines three circumstances when an organisation must appoint a DPO. If you:

1. are a public body;
2. carry out large scale systematic monitoring of individuals; or
3. carry out large scale processing of special categories of data or data relating to criminal convictions and offences.

As a public body, circumstance 1 applies to maintained schools and academies, meaning that you will need a DPO. If you are an 'independent school' then circumstance 2 may apply to you.

The term 'large scale' has not yet been defined so it cannot be assumed that an independent school needs a DPO. However, because of the nature of data that all schools collect and process, and that the data subjects are children, it may be wise for independent schools to appoint a DPO.

Appointing a DPO will assist in demonstrating that the school takes the data protection of pupils seriously.

10 point action plan

1. Make sure that the GDPR is being discussed at the top level of your organisation and that those managing the business are aware of the need to ensure compliance together with the risks of not complying.

2. Appoint a DPO or other individual whose responsibility it will be to oversee data protection within your organisation.

3. Ensure that your DPO has received all necessary training to allow them to undertake the role. Ensure that sufficient budget is set aside to allow them to do this and to access any additional support they will need.

4. Undertake a full audit of the data collected and processed by your organisation.

5. Identify the basis upon which the data is processed and consider whether there are alternative grounds for processing the data other than relying on consent.

6. Review and shape your procedures in line with the data you hold and the processing activities undertaken.

7. Put in place a procedure for breach notification that ensures that details of any breaches of the GDPR reach the DPO or other appointed individual swiftly.

8. Provide training to all staff so that they can recognise a breach of the GDPR and are aware of who to notify.

9. Review your commercial agreements to check for any caps in your liability and/or the liability of any of your own service providers and seek to vary any contracts that provide inadequate protection.

10. Seek external expert advice where you need it.

Contact our specialist legal team

Whilst the GDPR presents some new and complex challenges for organisations, it is important not to be daunted by them. With a good understanding and the right support, compliance can be achieved.

At Brachers we have a team of experts on hand who can assist you with all aspects of GDPR compliance, whether the personal data that you handle relates exclusively to your employees or extends further into your commercial practices.

Catherine Daw
Head of Employment
01622 655291
catherinedaw@brachers.co.uk

Colin Smith
Partner, Employment
01622 776451
colinsmith@brachers.co.uk

Antonio Fletcher
Partner, Employment
01622 776516
antoniofletcher@brachers.co.uk

Louise Brenlund
Associate, Employment
01622 776405
louisebrenlund@brachers.co.uk

Julie Alchin
Associate, Commercial
01622 776428
juliealchin@brachers.co.uk

Sarah Hewitt
Solicitor, Commercial
01622 776459
sarahhewitt@brachers.co.uk

Our services

Corporate
Commercial
Litigation
Dispute Resolution
Debt Recovery and Insolvency
Construction, Planning and Environment
Licensing and Health & Safety
Employment
Kent HR

Head office
Somerfield House
59 London Road
Maidstone, Kent
ME16 8JH

Call us on 01622 690691
Visit us at brachers.co.uk

@brachersllp

Brachers LLP

Maidstone | London | Discovery Park