



GIBRALTAR REGULATORY
AUTHORITY

(6) Identifying the 'Lawful Basis'

Guidance on the General Data Protection Regulation

DISCLAIMER

Please note that, on 1st January 2021, the EU General Data Protection Regulation 2016/679 ("EU GDPR") was superseded by the Gibraltar General Data Protection Regulation. The legislation however remains largely the same, and therefore, the general principles relating to the EU GDPR as may be referenced within this Guidance Note, continue to apply to the current regime.

30 August 2018

Guidance Note IR01/18

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SUMMARY

The General Data Protection Regulation and the Data Protection Act 2004 list the lawful bases that organisations can rely on to process personal data legitimately, depending on the 'category' of personal data. This Guidance Note aims to identify the lawful bases that are available for organisations to rely on, for each category, in a practical and concise manner.

Lawful bases for personal data	Lawful bases for special categories of personal data	Lawful bases for data relating to criminal convictions and offences
1. Consent.	1. Explicit consent.	1. Consent.
1. Consent.	2. Employment, social security and social protection.	2. Employment, social security and social protection.
1. Consent.	3. Vital interests.	3. Vital interests.
1. Consent.	4. Not for profit use.	4. Not for profit use.
1. Consent.	5. Public data.	5. Public data.
2. Contract.	6. Legal proceedings.	6. Legal proceedings.
3. Legal obligation.	7. Health or social care purposes –	7. Health or social care purposes –
4. Vital interests.	(a) preventative or occupational medicine;	(a) preventative or occupational medicine;
5. Public task–	(b) assessment of the working capacity of employee;	(b) the assessment of the working capacity of an employee;
(a) justice;	(c) medical diagnosis;	(c) medical diagnosis;
(b) parliament;	(d) provision of health care or treatment;	(d) the provision of health care or treatment;
(c) statutory function; or	(e) the provision of social care;	(e) the provision of social care;
(d) Minister or Gov. Dept.	(f) the Mangt. of health/social care systems; or	(f) the Mangt. of health/social care systems; or
6. Legitimate interests.	(g) medical research.	(g) medical research.
	8. Public health.	8. Public health.
	9. Research.	9. Research.
	10. Substantial public interest –	10. Judicial acts.
	(a) statutory function;	11. Administering commission of offences relating to indecency.
	(b) Minister or a Gov. Dept.;	12. Substantial public interest –
	(c) justice;	(a) statutory function;
	(d) parliament;	(b) Minister or a Gov. Dept.;
	(e) equality;	(c) justice;
	(f) racial & ethnic diversity;	(d) parliament;
	(g) preventing or detecting unlawful acts;	(e) equality;
	(h) protecting the public against dishonesty;	(f) racial & ethnic diversity;
	(i) regulatory compliance or assisting with compliance;	(g) preventing or detecting unlawful acts;
	(j) journalism;	(h) protecting the public against dishonesty;
	(k) preventing fraud;	(i) regulatory compliance or assisting with compliance;
	(l) preventing terrorist financing or money laundering;	(j) journalism;
	(m) supporting individuals with particular disabilities or medical conditions;	(k) preventing fraud;
	(n) counselling;	(l) preventing terrorist financing or money laundering;
	(o) safeguarding children;	(m) supporting individuals with particular disabilities or medical conditions;
	(p) safeguarding economic well-being of individuals;	(n) counselling;
	(q) insurance;	(o) safeguarding children;
	(r) occupational pensions;	(p) safeguarding economic well-being of individuals;
	(s) political party;	(q) insurance;
	(t) elected representative responding to requests;	(r) occupational pensions;
	(u) disclosures to elected representatives;	(s) political party;
	(v) informing elected representatives about prisoners;	(t) elected representative responding to requests;
	(w) publication of legal judgements;	(u) disclosures to elected representatives;
	(x) anti-doping in sport; or	(v) informing elected representatives about prisoners;
	(y) sports integrity;	(w) publication of legal judgements;
		(x) anti-doping in sport; or
		(y) sports integrity;
		13. Substantial public interest (extension)
		14. Insurance (extension)

1. INTRODUCTION

To process personal data legitimately under the General Data Protection Regulation ("GDPR") and the Data Protection Act 2004 ("DPA") organisations need to have a 'lawful basis'. Identifying the lawful basis that an organisation relies on to process personal data is a fundamental step in ensuring data protection compliance.

The GDPR and the DPA list the lawful bases that organisations can rely on, depending on the 'category' of personal data i.e. whether the information is 'personal data', 'a special category of personal data' or 'data relating to criminal convictions and offences'. This Guidance Note aims to identify the lawful bases that are available for organisations to rely on, for each category, in a practical and concise manner.

The information provided should be treated as guidance with appropriate consideration being given to the actual legal requirements. Footnotes referencing the legislation are included so that readers are able to link and relate the guidance to the specific provisions in the law.

2. GENERAL GUIDANCE

- The lawful basis that is most appropriate to use will depend on the circumstances of the organisation and purposes of the processing.
- Most lawful bases require that processing is 'necessary'. In these cases, the lawful basis cannot be relied on when an organisation can reasonably achieve the same purpose without the processing.
- Organisations must identify and document its lawful basis, including the reasoning for relying on the lawful basis identified, before it begins collecting and using personal data. This is important and useful as the accountability principle¹ requires organisations to be able to demonstrate compliance. It is also important and necessary for the transparency requirements, which oblige organisations to inform individuals upfront about the lawful basis that they rely on to process their information².
- Organisations may find that more than one lawful basis could apply in a particular case. If so, the organisation may identify and document all of them. In some cases, more than one basis applies to the processing because the processing has more than one purpose, and if this is the case this should be identified from the start.
- If a public authority can demonstrate that the processing is to perform tasks as set down in Gibraltar law, then it will be able to use the public task basis. If not, it may still be able to consider consent or legitimate interests in some cases, depending on the nature of the processing and its relationship with individuals. There is no absolute ban on public authorities using consent or legitimate interests as their lawful basis, but the GDPR does restrict public authorities' use of these two bases.

3. THE THREE CATEGORIES OF PERSONAL DATA

The law differentiates between 'personal data', 'special categories of personal data' and 'data relating to criminal convictions and offences'.

- Personal data - in summary, if you can associate information with an individual, it is personal data. e.g. name, address, IP, telephone number, physical characteristics, life history, location data, etc... The law defines personal data as follows –

¹ Article 5(2) of the GDPR

² Article 13(1)(c) of the GDPR

'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

Within the broad definition of personal data, the law gives a distinctive status to certain types of personal data, which are defined as 'special categories of personal data' and 'data relating to criminal convictions'. Both categories are considered more sensitive, require greater protection and can only be processed in more limited circumstances.

- Special categories of personal data – defined in law as follows –
personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
- Data relating to criminal convictions and offences – defined simply as data relating to criminal convictions and offences or related security measures.

4. PERSONAL DATA

The lawful bases that organisations can rely on to process personal data are the following –

- 4.1. **Consent**³: the individual has given clear consent to process their personal data for a specific purpose.
- 4.2. **Contract**⁴: 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.
- 4.3. **Legal obligation**⁵: the processing is necessary for you to comply with the law (not including contractual obligations).
- 4.4. **Vital interests**⁶: the processing is necessary to protect someone's life.
- 4.5. **Public task**⁷: the processing is necessary for –

³ Article 6(1)(a) of the GDPR

⁴ Article 6(1)(b) of the GDPR

⁵ Article 6(1)(c) of the GDPR

⁶ Article 6(1)(d) of the GDPR

⁷ Article 6(1)(e) of the GDPR

- 4.5.1. the administration of justice⁸;
 - 4.5.2. the exercise of a function of parliament⁹;
 - 4.5.3. the exercise of a function conferred on a person by an enactment or rule of law¹⁰; or
 - 4.5.4. the exercise of a function of a Minister or a government department¹¹.
- 4.6. **Legitimate interests**¹²: 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.)

5. SPECIAL CATEGORIES OF PERSONAL DATA

When an organisation collects and uses a special category of personal data, it must identify both a lawful basis in the foregoing paragraph 4 and one of the following:

- 5.1. **Explicit consent**¹³: the individual has given explicit consent to the processing of those personal data for one or more specified purposes.
- 5.2. **Employment, social security and social protection**¹⁴: the information is necessary for one of the following¹⁵ –
 - 5.2.1. performing obligations imposed on the organisation in connection with employment, social security or social protection; or
 - 5.2.2. exercising the rights of an individual in connection with employment, social security or social protection.
- 5.3. **Vital interests**¹⁶: the processing is necessary to protect the life of the individual when they are physically or legally incapable of giving consent.
- 5.4. **Not for profit use**¹⁷: the processing is carried out in the course of legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit

⁸ Section 10(a) of the DPA

⁹ Section 10(b) of the DPA

¹⁰ Section 10(c) of the DPA

¹¹ Section 10(d) of the DPA

¹² Article 6(1)(f) of the GDPR

¹³ Article 9(2)(a) of the GDPR

¹⁴ Article 9(2)(b) of the GDPR

¹⁵ Schedule 1, part 1, paragraph 1(1) of the DPA

¹⁶ Article 9(2)(c) of the GDPR

¹⁷ Article 9(2)(d) of the GDPR

body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the individuals.

- 5.5. **Public data**¹⁸: the personal data is information that was manifestly made public by the individual.
- 5.6. **Legal proceedings**¹⁹: the data is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity.
- 5.7. **Health or social care purposes**²⁰: the information is necessary for one of the following –
 - 5.7.1. **preventative or occupational medicine;**
 - 5.7.2. **the assessment of the working capacity of an employee;**
 - 5.7.3. **medical diagnosis;**
 - 5.7.4. **the provision of health care or treatment;**
 - 5.7.5. **the provision of social care;**
 - 5.7.6. **the management of health care systems or services or social care systems or services; or**
 - 5.7.7. **medical research.**

It is important to note that reliance on the above are subject to obligations of secrecy²¹.

- 5.8. **Public health**²²: the information is necessary for reasons of of public interest in the area of public health and is carried out by or under the responsibility of a health professional, or by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law.
- 5.9. **Research**²³: processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, and is carried out in accordance with Article 89(1) of the GDPR.
- 5.10. **Substantial public interest**²⁴: the processing is necessary for one of the following –
 - 5.10.1. **the exercise of a function conferred on a person by an enactment or rule of law and for reasons of substantial public interest**²⁵;

¹⁸ Article 9(2)(e) of the GDPR

¹⁹ Article 9(2)(f) of the GDPR

²⁰ Article 9(2)(h) of the GDPR and schedule 1, part 1, paragraph 2 of the DPA

²¹ Section 13(1) of the DPA

²² Article 9(2)(i) of the GDPR and schedule 1, part 1, paragraph 3 of the DPA

²³ Article 9(2)(j) of the GDPR and schedule 1, part 1, paragraph 4 of the DPA

²⁴ Article 9(2)(g) of the GDPR and section 12(3) of the DPA and schedule 1, part 2 of the DPA

²⁵ Schedule 1, part 2, paragraph 6 of the DPA

- 5.10.2. the exercise of a function of a Minister or a government department for reasons of substantial public interest²⁶;
- 5.10.3. the administration of justice²⁷;
- 5.10.4. the exercise of a function of parliament²⁸;
- 5.10.5. equality of opportunity or treatment²⁹;
- 5.10.6. promoting or maintaining racial and ethnic diversity at senior levels of organisations³⁰;
- 5.10.7. preventing or detecting unlawful acts³¹;
- 5.10.8. protecting the public against dishonesty³²;
- 5.10.9. complying with, or assisting other persons, to comply with a regulatory requirement which involves a person taking steps to establish whether another person has committed an unlawful act, or been involved in dishonesty, malpractice or other seriously improper conduct³³;
- 5.10.10. journalism etc in connection with unlawful acts and dishonesty etc.³⁴;
- 5.10.11. preventing fraud³⁵;
- 5.10.12. preventing terrorist financing or money laundering³⁶;
- 5.10.13. supporting individuals with particular disabilities or medical conditions³⁷;
- 5.10.14. counselling³⁸;
- 5.10.15. safeguarding of children and of individuals at risk³⁹;
- 5.10.16. safeguarding of economic well-being of certain individuals⁴⁰;
- 5.10.17. insurance purposes⁴¹;
- 5.10.18. administering occupational pensions⁴²;
- 5.10.19. the activities of a political party⁴³;
- 5.10.20. an elected representative responding to requests⁴⁴;

²⁶ Schedule 1, part 2, paragraph 6 of the DPA

²⁷ Schedule 1, part 2, paragraph 7 of the DPA

²⁸ Schedule 1, part 2, paragraph 7 of the DPA

²⁹ Schedule 1, part 2, paragraph 8 of the DPA

³⁰ Schedule 1, part 2, paragraph 9 of the DPA

³¹ Schedule 1, part 2, paragraph 10 of the DPA

³² Schedule 1, part 2, paragraph 11 of the DPA

³³ Schedule 1, part 2, paragraph 12 of the DPA

³⁴ Schedule 1, part 2, paragraph 13 of the DPA

³⁵ Schedule 1, part 2, paragraph 14 of the DPA

³⁶ Schedule 1, part 2, paragraph 15 of the DPA

³⁷ Schedule 1, part 2, paragraph 16 of the DPA

³⁸ Schedule 1, part 2, paragraph 17 of the DPA

³⁹ Schedule 1, part 2, paragraph 18 of the DPA

⁴⁰ Schedule 1, part 2, paragraph 19 of the DPA

⁴¹ Schedule 1, part 2, paragraph 20 of the DPA

⁴² Schedule 1, part 2, paragraph 21 of the DPA

⁴³ Schedule 1, part 2, paragraph 22 of the DPA

⁴⁴ Schedule 1, part 2, paragraph 23 of the DPA

- 5.10.21. disclosure to elected representatives⁴⁵;
- 5.10.22. inform elected representatives about prisoners⁴⁶;
- 5.10.23. publication of legal judgements⁴⁷;
- 5.10.24. anti-doping in sport⁴⁸; or
- 5.10.25. sports integrity⁴⁹;

Note that to rely on any of the grounds listed above under paragraph 5.10, the organisation must have an appropriate policy document in place as per schedule 1, part 4, paragraph 39 of the DPA⁵⁰. Only in certain circumstances relating to anti-doping in sport, journalism, and preventing or detecting unlawful acts, does this requirement not apply.

6. DATA RELATING TO CRIMINAL CONVICTIONS AND OFFENCES

When an organisation processes personal data relating to criminal convictions and offences, it must identify both a lawful basis in the foregoing paragraph 4 and one of the following⁵¹:

- 6.1. Any of the grounds in paragraphs 5.2, 5.7, 5.8, 5.9, and 5.10 identified in the foregoing.
- 6.2. **Consent**⁵²: the individual has given his consent.
- 6.3. **Protecting the individual's vital interests**⁵³: the processing is necessary to protect the life of the individual when they are physically or legally incapable of giving consent.
- 6.4. **Activities by not for profit bodies**⁵⁴: the processing is carried out in the course of legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the individuals.

⁴⁵ Schedule 1, part 2, paragraph 24 of the DPA

⁴⁶ Schedule 1, part 2, paragraph 25 of the DPA

⁴⁷ Schedule 1, part 2, paragraph 26 of the DPA

⁴⁸ Schedule 1, part 2, paragraph 27 of the DPA

⁴⁹ Schedule 1, part 2, paragraph 28 of the DPA

⁵⁰ Schedule 1, part 2, paragraph 5 of the DPA

⁵¹ Section 12(5) of the DPA

⁵² Schedule 1, part 3, paragraph 29 of the DPA

⁵³ Schedule 1, part 3, paragraph 30 of the DPA

⁵⁴ Schedule 1, part 3, paragraph 31 of the DPA

- 6.5. **Public data**⁵⁵: the personal data is information that was manifestly made public by the individual.
- 6.6. **Legal claims**⁵⁶: the processing is necessary for, or in connection with legal proceedings, for the purposes of obtaining legal advice or otherwise necessary for establishing or defending legal rights.
- 6.7. **Judicial acts**⁵⁷: processing by a court or tribunal in their judicial capacity.
- 6.8. **Administration of accounts used in commission of indecency offences involving children**⁵⁸: the processing is of personal data about a conviction or caution for an offence relating to indecent photographs of children.
- 6.9. **Substantial public interest (extension)**: the grounds in paragraph 5.10, without meeting the "substantial public interest" test.
- 6.10. **Insurance (extension)**: extends the grounds in sub-paragraph 5.10.17 to the processing of personal data not revealing racial or ethnic origin, religious or philosophical beliefs or trade union membership, genetic data or data concerning health, for insurance purposes, with or without meeting the "substantial public interest" test.

⁵⁵ Schedule 1, part 3, paragraph 32 of the DPA

⁵⁶ Schedule 1, part 3, paragraph 33 of the DPA

⁵⁷ Schedule 1, part 3, paragraph 34 of the DPA

⁵⁸ Schedule 1, part 3, paragraph 35 of the DPA

7. GRAPHICAL ILLUSTRATION OF LAWFUL BASES

The following charts illustrate the lawful bases that organisations can rely on to process personal data, specific categories of personal data and data relating to criminal convictions or offences. as identified in the foregoing.

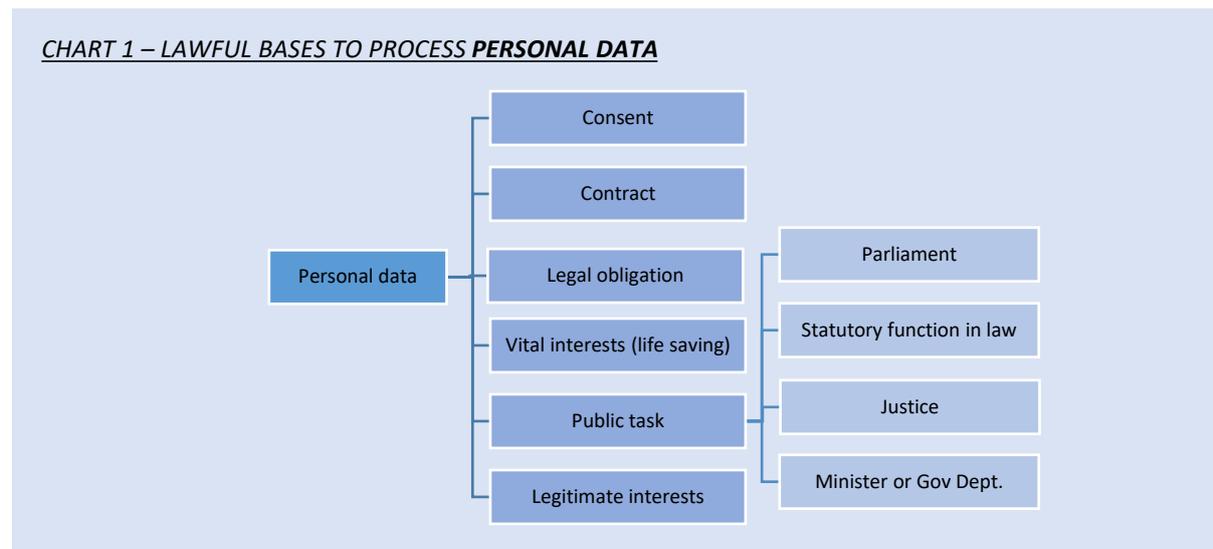


CHART 2 – LAWFUL BASES TO PROCESS SPECIAL CATEGORIES OF PERSONAL DATA

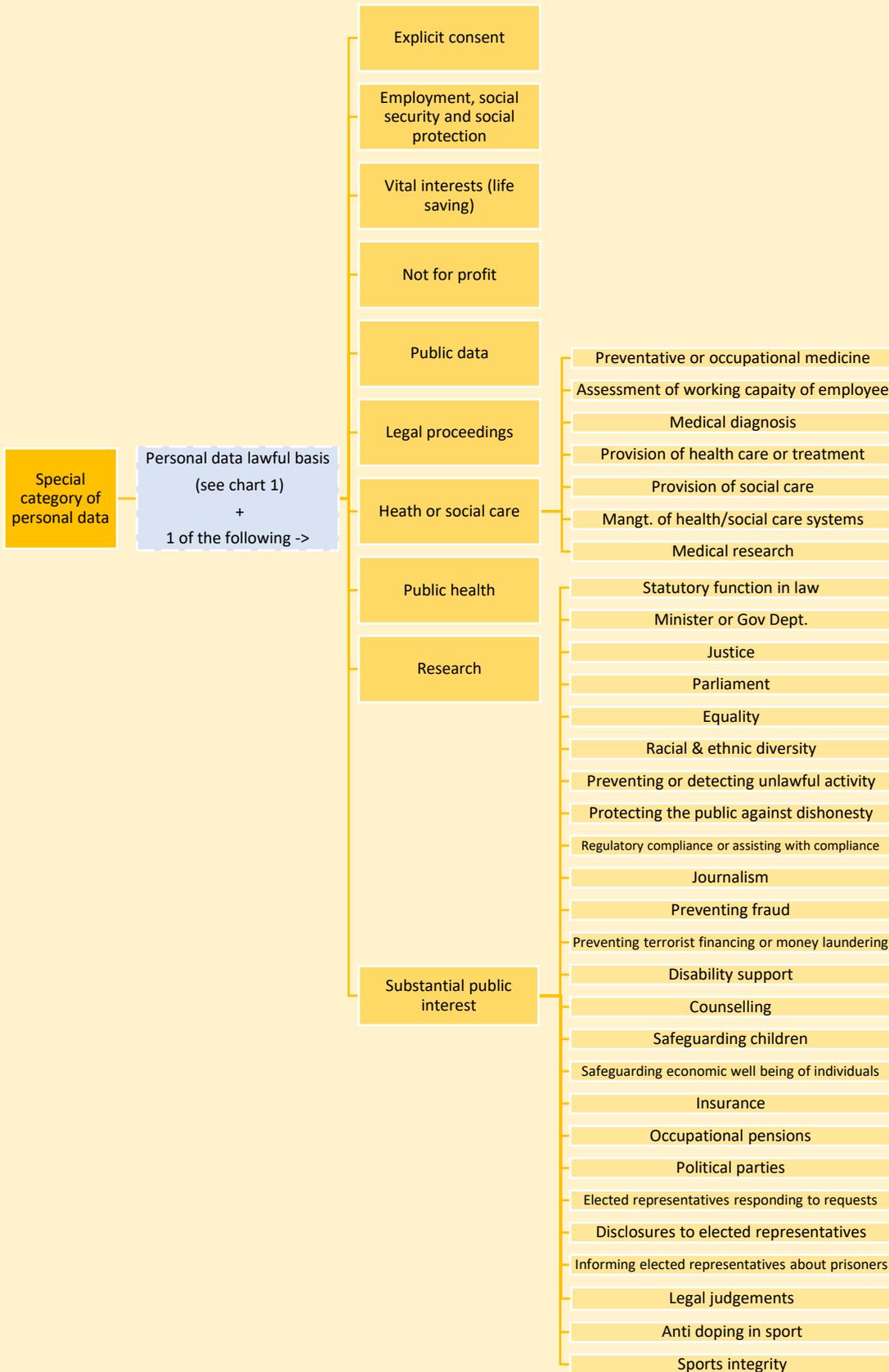
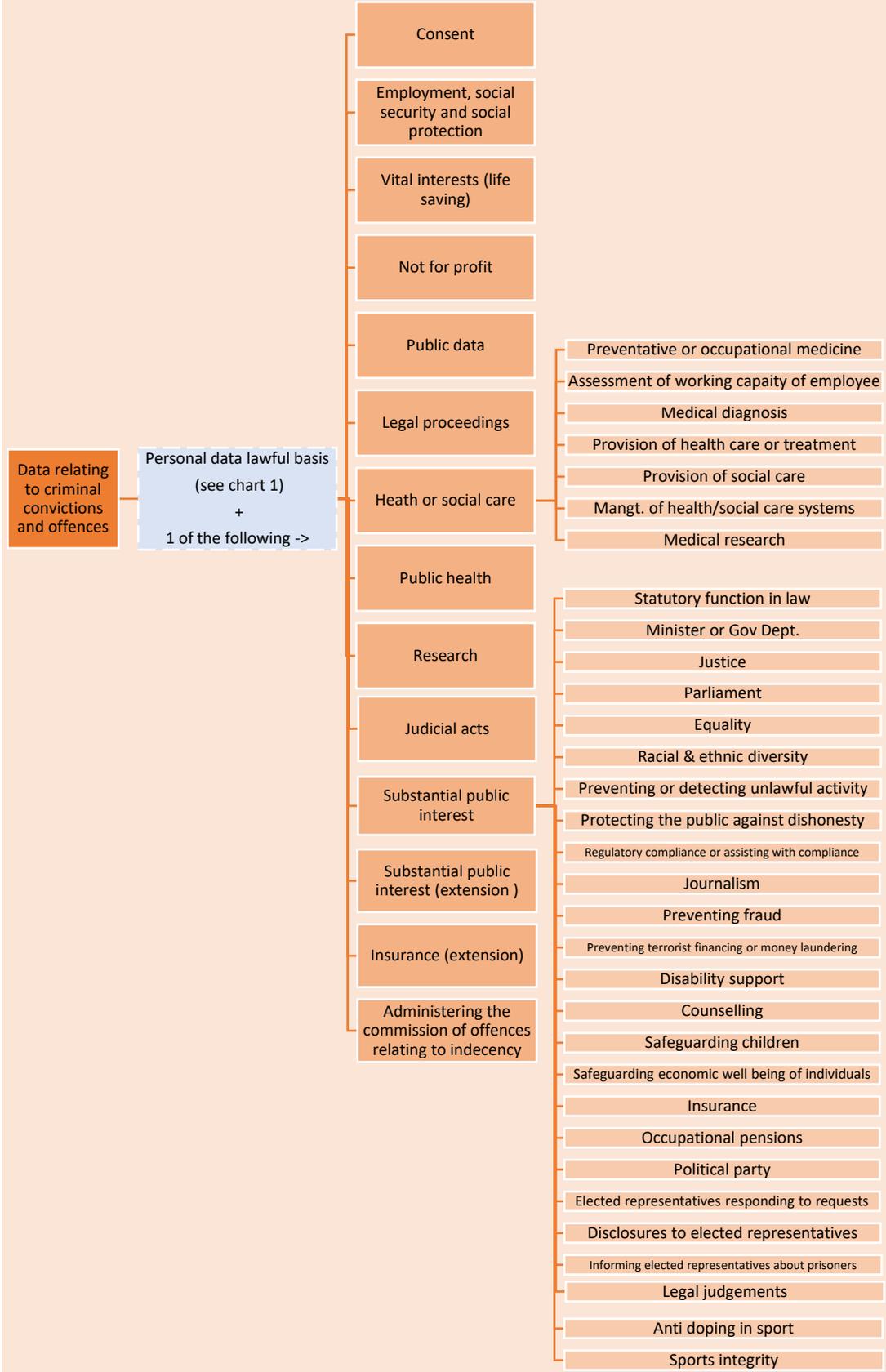


CHART 3 – LAWFUL BASES TO PROCESS DATA RELATING TO CRIMINAL CONVICTIONS AND OFFENCES



IMPORTANT NOTE

This document is purely for guidance. The document does not constitute legal advice or legal analysis. All organisations that process data need to be aware that the GDPR will apply directly to them. The responsibility to become familiar with the GDPR and the DPA and comply with its provisions lies with the organisation.

Where necessary, the Information Commissioner will review this Guidance Note in accordance with any updates or other developments. In the event of any conflict or inconsistencies between this Guidance Note and the GDPR and the DPA, the GDPR and DPA will take precedence.

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