
LEGAL ADVICE REPORT

LEGALLY PRIVILEGED AND STRICTLY CONFIDENTIAL

1 September 2020



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In **your** corner

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1. Introduction

1.1 Description of instructions

1.1.1 To advise Leuva Patidar Samaj (S.N.V.) United Kingdom ("LPSUK") as to whether the printing of its membership directory is permitted under UK data protections laws (Data Protection Act 2018, the General Data Protection Regulations ("GDPR"), and The Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR"))

1.1.2 You have asked to cover the following matters in this Legal Advice Report:

- (a) A definitive view as to whether publishing the memberships directory is lawful.
- (b) LPSUK is not a data holding business and therefore it is right that it does not hold any persons' data (whether directly consented or the regions' members for anything but a short time for this directory project).
- (c) If LPSUK wish to become a members' organisation itself for any LPS person across the UK (whether online only or otherwise), it could do so as there is nothing in the constitution preventing it from doing so. Following on from this, LPSUK could invite all LPS persons in the UK, or in any region, to become members and print their details (assuming explicit consent is given), thereby absolving that region from any risks or reward associated with directory data management and publication.
- (d) A summary of the risks and liabilities being undertaken by LPSUK and its regional members in this project.
- (e) To dispel myths such as
 - (i) a small regional charity can be fined £0.5m in these circumstances, or
 - (ii) what happens if LPSUK is dissolved - does the region become increasingly liable for reported breaches.
- (f) Advice on a list of the risk and liabilities from our legal viewpoint, for this low risk project.

1.1.3 This Report is not intended for use by any other party other than LPSUK or for any other purpose;

1.1.4 The legal advice in this Report is provided in accordance with JMW's Terms of Business attached as Annex 1 which limits JMW's liability in accordance with its Client Care Letter provided to LPSUK.

1.1.5 JMW will not be liable for loss suffered by any other third party as a result of reliance upon it.

1.2 Enquiries

1.2.1 If you have any questions regarding this Report, please contact Toni Vitale.

1.3 Date

1.3.1 The date of this Legal Advice Report is 1st September 2020.



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2. Executive summary

- 2.1 The ICO has the power to fine any charity up to 4% of its worldwide annual turnover or £17m whichever is greater. £500,000 was the limit under the previous legislation but the likelihood of any fine is practically zero here for the reasons set out in this Advice Note. Even if there was a 'technical breach' of the data protection laws, the most likely enforcement action to be taken in the event of a publication such as the members' directory is that any errors should be corrected in the future or that the directory should not be published again. The ICO would take into account any remedial steps taken by a charity in response to a breach and would respond to complaints rather than take proactive action. It is unlikely any fine would be imposed for a 'first offence'. Examples of a 'technical breach' are: publishing a member's details after they had withdrawn their consent or publishing errors in a member's details.
- 2.2 Publication of the membership directory is lawful under the relevant UK data protection laws.
- 2.3 LPSUK is a data controller and will be processing the personal data lawfully in respect of the memberships directory.
- 2.4 We confirm that if LPSUK wish to become a members' organisation itself for any LPS person across the UK (whether online only or otherwise), it could do so as there is nothing in the constitution preventing it from doing so.
- 2.5 Following on from this, LPSUK could invite all LPS persons in the UK, or in any region, to become members and print their details (assuming explicit consent is given), thereby absolving that region from any risks or reward associated with directory data management and publication.

3. Compliance with applicable data protection laws

3.1 The Data Protection Act 2018 strengthened the rights of individuals to access and amend their personal data, and gave individuals more control over the use of their personal data, placed greater emphasis on an organisation's accountability; and introduced more serious consequences for non-compliance, including fines of the greater of 4% of an organisation's annual worldwide revenue or £17m

3.2 Key definitions

3.2.1 The Data controller is the company, organisation or individual who holds personal data and determines the purposes and manner in which it will be processed. LPSUK will be the data controller for the purpose of publishing the membership directory.

3.2.2 The Data processor is any person (other than an employee of the data controller) who processes the data on behalf of the data controller. For example an IT support or payroll contractor.

3.2.3 Lawful Basis

(a) In order to use personal data a data controller must identify a lawful basis, also called 'condition for processing', and document it in their Data Protection policy. There are six lawful bases for processing data and a data controller must decide which one covers each type of data it collects.

(b) In the case of the publication of the directory, the two most appropriate lawful basis are:

(i) *Legitimate Interest* - The processing is necessary for the legitimate interests of the data controller (providing that the processing is not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject). Collecting and holding the contact details of LPSUK members and others in regular contact with it is in the legitimate interest of the charity because LPSUK needs this information to enable it to keep in touch with such people and provide pastoral support as appropriate. LPSUK does not therefore need to obtain the consent of its members to hold their personal information; and

(ii) *Consent* – which must be unambiguous, express and freely given. In the case of LPSUK, the consent obtained for publication in the membership directory meets these criteria and is in fact "explicit consent".

3.3 Consent in the context of publication of the directory.

3.3.1 Under the GDPR, consent is defined as being fully informed, unambiguous, involving some kind of positive step on the part of a data subject (e.g. by ticking a box, returning a signed form or by clicking through a carefully and specifically worded consent statement on a website). It is clear that there is no room for implied consent. In addition, the GDPR makes it quite clear that consent must be very easy to withdraw at any time without detriment to the data subject. The GDPR states that consent will not be the appropriate ground where there is an 'imbalance of power' between the data controller and the data subject (such as in the employer/employee relationship) or where the data subject's personal data is needed in order to enter into a contract with the data subject. In other words, the data subject must really have a free choice.

3.3.2 I am satisfied that the process used to obtain express consent for publication of details in the membership directory meets the definition of consent in GDPR and is valid. It is also clear that consent could be withdrawn but if this were done after publication of the directory LPSUK would not have to reprint the directory, it could simply remove the relevant names and address for the next edition.

3.4 PECR

3.4.1 There are additional legal rules which apply to 'electronic Direct Marketing' (i.e. sending people marketing/ fundraising by electronic means such as phone, text and email) - these are the Privacy and Electronic Communications Regulations 2003 (PECR). The main purpose of the directory is to provide contact information of LPSUK members but it could be seen as further the aims of LPSUK and therefore fall within the definition of direct marketing. PECR therefore needs to be considered

3.4.2 Is the publication of the membership directory "Direct Marketing"?

- (a) Both the GDPR and PECR impose restrictions on Direct Marketing. The GDPR gives individuals a specific right to object to their personal data being used for it. Additionally, sending electronic Direct Marketing (e.g. text, email and telephone calls) can require prior consent under PECR.
- (b) Fundraising communications will always be regarded as Direct Marketing. However, Direct Marketing is interpreted widely by the ICO to capture all targeted promotional material and goes beyond fundraising messages, to include even the promotion of "aims and ideals" of a charitable organisation and

communications about upcoming events and activities – i.e. newsletters will be considered to fall within this definition.

- (c) A communication will also be Direct Marketing if it is partly promotional, even if this is not its sole purpose, for instance an administrative message relating to a previous donation which would not be considered Direct Marketing, will become Direct Marketing if it also includes a solicitation for further support..
- (d) The membership directory is a useful source of information for members but it is also can be seen as furthering the aims of the charity by publicising the contact details of members. It is likely that its publication and dissemination amongst members may be regarded as direct marketing.

3.4.3 Were the PECR consent rules complied with in respect of the directory?

- (a) Prior consent is required for the sending of any electronic marketing message which includes by email. Telephone or text (but not the dissemination of the directory by post alone.
- (b) Consent for the purposes of both PECR and the GDPR means any freely given, specific, informed, unambiguous indication of an individual's wishes by which he or she, by a statement or clear affirmative action, signifies agreement to the processing of personal data relating to him or her.
- (c) The GDPR has 'raised the bar' for what constitutes valid consent under PECR. Whilst under the previous law, implied consent, or pre-ticked boxes, could be acceptable, valid consent must be unambiguous and expressed by a clear affirmative action. Effectively this means that individuals must have taken a clear action to demonstrate their willingness for future contact, must know what they are agreeing to and must have a clear understanding of what you will do with their information.
- (d) I am satisfied that the process of obtaining consent for the purposes of publication of contact information in the directory complies with the PECR consent requirements. Indeed the consent obtained was explicit which is only normally required for the processing of special category data. "Special categories of personal data" means information about an individual's racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health, sex life or sexual orientation and biometric data. None of these are being gathered or published beyond the obvious link to the LPS ethnic origin.

- 3.5 The publication of the directory by LPSUK is therefore lawful under applicable data protection laws.

4. Specific scenarios and advice requested

- 4.1 Is LPSUK a data holding entity and does it hold any persons' data (whether directly consented or the regions' members for anything but a short time for this directory project).

4.1.1 LPSUK is a data controller for the purposes of publication of the directory. This means that it is liable for any data protection breaches or breaches of data protection laws committed. However as advised above, the publication of the directory is lawful. LPSUK will be temporarily processing members' data for the purposes of the publication of the directory.

- 4.2 If LPSUK wish to become a members' organisation itself for any LPS person across the UK (whether online only or otherwise), it could do so as there is nothing in the constitution preventing it from doing so.

4.2.1 Yes this is correct.

- 4.3 Following on from this, LPSUK could invite all LPS persons in the UK, or in any region, to become members and print their details (assuming explicit consent is given), thereby absolving that region from any risks or reward associated with directory data management and publication.

4.3.1 Yes this is correct. If an LPS region were to provide personal data to LPSUK this could be lawful under data protections laws provided this has been notified to members in the relevant privacy notices..

- 4.4 A summary of the risks and liabilities being undertaken by LPSUK and its regional members in this project.

Risks	LPSUK	Regional members
Someone makes a claim against LPSUK (directory publisher) after LPSUK is dissolved, but the region still exists	LPSUK would have no liability as it has been dissolved	Regional members would only be liable for their own breaches of data protection laws not for any breaches committed by LPSUK unless a regional member and LPSUK were joint data controllers which in the context of the membership directory publication they are not. LPSUK is an independent data

Risks	LPSUK	Regional members
		controller
Data breach by LPSUK or its printer before publishing the directory	LPSUK would be liable for any data breach. It would have a duty to report the breach to the ICO. It is unlikely that enforcement action would be taken by the ICO for a one-off breach. The ICO would be interested in steps taken and implemented to avoid a breach re-occurring. It is also unlikely that LPSUK would be liable to pay any financial compensation to members unless they could establish a risk of harm to them.	Regional members' liability would be the same as LPSUK but only in respect of any breaches which were the fault of the regional member. There would be no joint and several liability with LPSUK.
Error/Omission in the directory	Unless a member could establish a risk of harm to themselves, or loss, then it is unlikely any financial liability would fall on LPSUK. LPSUK could undertake to correct any errors in the future.	A regional members' liability would be the same as LPSUK but only for its own breaches of data protection laws. A regional member would not be liable for LPSUK's breaches.
Third party exploitation of published data, where consent has been given and correctly published	LPSUK would have no liability for a third party's use of the data contained in the members directory	Liability is the same as LPSUK's
Wrongful inclusion in the directory	Unless a member could establish a risk of harm to themselves, or loss, then it is unlikely any financial liability would fall on LPSUK. LPSUK could undertake to correct any errors in the future.	A regional members' liability would be the same as LPSUK but only for its own breaches of data protection laws. A regional member would not be liable for LPSUK's breaches.
Max liability for consequential, financial loss per ICO	The ICO has the power to fine any charity up to 4% of its worldwide annual turnover or £17m whichever is greater. However the most likely	Same as LPSUK but a regional member would have no liability for LPSUK's breaches.

Risks	LPSUK	Regional members
	enforcement action to be taken in the event of a publication such as the members' directory is that any errors should be corrected in the future or that the directory should not be published again. The ICO would take into account any remedial steps taken by a charity in response to a breach and would respond to complaints rather than take proactive action. It is unlikely any fine would be imposed for a 'first offence'.	

5. Conclusion

- 5.1 As the publication of the directory is lawful and not a breach of data protection laws, there is little or no risk in proceeding with the publication. If a member were to complain about the publication because they had not read the privacy notice or did not understand what they were consenting to, LPSUK could undertake to remove their details from the next print run, thereby mitigating any risk to zero.

Annex 1

JMW Terms of Business