

# GETTING EMPLOYEE CONSENT TO PROCESS THEIR PERSONAL DATA



**GEROUDIS**  
EMPOWERMENT

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The new Data Protection Act 2017 is active since **15th January 2018** in Mauritius, has imported certain concepts from European Union General Data Protection Regulations (**GDPR**) to our shores. The 'Consent' principle is one of them.

### To agree or not to agree - Consent!

The basis of data protection legislation is the protection of that personal data from which an individual can be identified. What the new legislation imposes is that any business needs to get consent from a **data subject** (person to whom the personal data relates) before starting to process this personal data. Personal information itself now includes biometric identifiers, online identifiers (such as possibly IP addresses).

### A. So what are the rights?

To summarise - consent of a data subject to authorize processing of its personal data must be:

1. given freely, be specific, informed and unambiguous;
2. retained and given as evidence of proof that it was given;
3. such as can be withdrawn at any time.
4. given by a parent for any child below 16 years and the controller should check this;
5. explicit if transferring personal data outside Mauritius if the appropriate safeguards are not there.

As responsible for the HR function in a Mauritian Business, therefore, you may be the best placed to consider whether such consent has been given for any processing which your company carries out on personal data of its employees.

The checklist could be:

1. What data collect from our employees?
2. What data do we collect on our employees without asking them?
3. List out each of the purpose for which the data is collected?
4. How much time has the data been kept or processed?
5. Is it accurate?
6. Who has access to it?
7. On what grounds was it collected – e.g. consent was given, its obligatory under the law, performance of a contract etc...
8. Can we prove consent where consent is required?

Consent is one of many grounds on which a business can process personal data. As a business, firstly, you should consider whether consent is the appropriate reason for contemplating processing of personal data or whether another ground should be chosen. After all, the principle of asking for consent in fact proposes to give the data subject control and the genuine choice of accepting or declining the terms proposed by the controller (person who shall be processing the personal data) for the data processing.

The controller therefore has a duty to assess whether it will meet the requirements under the law prior to proposing.

The fact that consent is given, should not mean that the controller can then go about accumulating as much information about the individual and using it for whatever purpose the controller desires. There must be a specified purpose of processing and fundamental fairness that information permissions given for one use is not extended to another unrelated one.

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The Data Protection Act 2017 stipulates that consent should be:

- Freely given
- Specific
- Informed
- Unambiguous indication of wishes of a data subject by which he signifies his agreement to personal data relating to him being processed

## B. Elements of a valid consent:

### B.1 Freely given

The law is nascent in Mauritius and we not have any jurisprudence as yet. Our legislation, however, borrows heavily from the European Union and principles of the GDPR and the GDPR interpretation is expected to set the standards for compliance for Mauritius. The more so since Mauritius has signed Convention 108 of the EU to comply on Data subject rights for automated processes, and the data principles in the convention are 'pasted' from the convention directly into our law.

Under EU GDPR Working group interpretations, free implies real choice and control for data subjects. If there is no real choice, and where the subject feels compelled to consent or will endure negative consequences if they do not consent, then consent will not be valid.

#### B.1.1 Imbalance of Power:

##### Public Authorities:

GDPR interpretation provisions clearly indicate that it is unlikely that public authorities can rely on consent for processing as whenever the controller is a public authority, there is deemed to be an imbalance of power. However, not all interaction between a data subject and a public body would be considered such as to jeopardise the consent being freely given. Consumers who use the services of a public service authority may sometimes be considered free to agree on processing of their personal data, and it would depend on the circumstances.

##### Employment context:

This is the biggest conceptual change for businesses: the EU suggests that consent given in the employment context is rarely if ever freely given. It is unlikely that the data subject is able to deny his employer consent to data processing without experiencing the fear or real risk of detrimental effects because of a refusal. For collection and processing of personal data in the work environment, therefore, another lawful basis to consent should be considered.

Again, there are exceptions and exceptional circumstances when employees can be considered to have given free consent, namely when their decision will not adversely affect them.

Generally bundling of consent with other terms (of an agreement) for example may not count as free consent. In other words, if personal data needs to be processed in the context of an employment contract, then the consent options may be moot, and another reason to process could be found. However, personal data which is to be processed in the context of an employment contract is expected to be interpreted strictly, and would, for example, not consist of special categories of data but only basic information required to manage the contract.

Additionally, consent is given for the specific purpose required, and is not to be bundled for several purposes at one go, unless consent is expressly given for each of them. Separate consent is required for each purpose. To obtain proper consent, separate the purposes and obtain consent for each purpose. The employer may have to show that it is possible to refuse or withdraw consent without detriment in the employment context in order to justify the freedom of the choice made.

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## B.2 Specific

Generally, to be compliant with the specific part, controllers should consider:

1. Making sure that once there is consent on a specific purpose, there is no scope creep such that data is used for other purposes.
2. Granularity in consent requests
3. Clear separation of information related to obtaining consent for data processing activities from information about other matters.

Granularity in consent requests would require the controller having assessed all purposes for which consent is required and having provided the data subject the right to authorize processing under each of the purposes.

## B.3 Informed

For consent to be informed, the data subject should have enough information at his disposal to make a choice.

The DPA 2017 suggests that at least the following information would be required:

- The controller's identity and contact details, and where applicable its representative and any data protection officer;
- The purpose of each of the processing operations for which consent is sought
- The intended recipients of the data;
- Whether or not the supply of the data by the data subject is voluntary or mandatory;
- The existence of the right to withdraw consent;
- The existence about the right of access to and rectification, restriction or erasure of personal data concerning the data subject or to object to the processing;
- The existence of automated decision making, including profiling, and information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject;
- The period for which the personal data will be stored;
- The right to lodge a complaint with the commissioner;
- If the consent relates to transfers about the possible risks of data transfers to third countries in the absence of an adequacy decision or appropriate safeguards;
- Any further information necessary to guarantee fair processing in respect of the data subject's personal data, having regard to the specific circumstances in which data are collected.

Surprisingly, the DPA does not extend to telling the data subject of the actual data which is collected and to be processed but do consider adding such information as common sense would dictate it.

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### B.4 Unambiguous

A clear affirmation means that the data subject must have taken a deliberate action to consent to the processing. Consent can be collected through written or recorded oral statement including by electronic means. Actively ticking a box would be considered unambiguous active consent. As mentioned above, consent obtained through accepting the general terms of a contract and terms and conditions of service may not be unambiguous (nor freely given). Blanket acceptances are not seen as clear affirmative action to consent to the use of personal data.

If your business is presently undergoing an audit and compliance exercise to comply with the DPA and expected GDPR, do consider, during your contractual reviews, consent provisions and whether the terms of such consent are according to what legislation now provides.

### For more information

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