

HESA: Welsh FEI Data Collections

Data Protection Guidance

Summary of Key Points

- FEIs funded by HEFCW are required to provide information, including personal data, to HEFCW who require it to carry out their public functions.
- FEIs must comply with the Data Protection Act 1998 and inform their students and staff about how their personal data is processed.
- The [HESA Collection Notices](#) describe the organisations with whom data collected by HESA is shared and the purposes for which it is processed by them.
- The HESA Collection Notices must be made available to data subjects whose personal data is submitted to HESA.
- FEIs must not state or imply that the submission of data to HESA is subject to the consent of data subjects.
- This document does not constitute legal advice and HESA recommends that you seek professional advice on Data Protection compliance.

Introduction

This guidance note sets out key issues which you need to consider, with the benefit of professional advice, before proceeding further with the process of signing a subscription agreement with HESA ("the Agreement") or submitting data to HESA. It identifies some steps which you may need to take before that determination has been made and/or before you have signed the Agreement, if you are going to be able to submit data to HESA lawfully and comply with the Agreement later on.

This note is not intended to alter the meaning of the provisions in your Agreement with HESA or the allocation of responsibilities in the Agreement. You should take your own legal advice on the Agreement and on the scope of your obligations under the Data Protection Act 1998 (DPA). However this guidance is intended to assist in that process by explaining HESA's position as to the relative responsibilities of HESA and providers under the Agreement and the DPA.

- You are responsible for ensuring that any submission of personal data to HESA is lawful and compliant with the DPA. This includes ensuring that the basis on which you collect and submit data takes account of the way in which it will be processed by HESA and others.
- Failure to comply with the DPA carries significant contractual and financial consequences, as the Agreement includes an indemnity from you covering any loss or damage HESA and HEFCW suffer as a result of your breach.

- In addition, breaches of the DPA can result in sanctions being imposed by the Information Commissioner, who has power to impose fines of up to £500,000.

This means that you need to understand how your submission of data to HESA fits into the legal framework and be able to communicate clearly with your data subjects about this. This is explored below in this guidance document, and it is essential that you read this in full.

Reason for providing this guidance

Data protection compliance is of central importance to HESA's business and its ability to fulfil its agreements with its customers. This includes its agreements for the collection and processing of data which is requested for the purposes of statutory duties on central government, higher education funding and regulatory bodies and higher education providers. Any concerns about HESA's handling of data or the basis on which data is passed to HESA by providers is likely to have a very significant adverse impact on HESA's ability to collect data in future and therefore on its ability to sustain its operations.

The legal basis on which HESA collects and shares data is affected by a number of factors which are determined by the organisations from which data is collected and which are not under HESA's direct control. The Agreement between HESA and Welsh FEIs which sets out the basis on which data is supplied by you to HESA will set out a number of requirements on you ("the provider"). Some of the steps needed to comply with those requirements may need to be taken by you before you have signed the Agreement with HESA.

The purpose of this note is therefore to provide guidance on the meaning and purpose of some of those requirements, in order to maximise your understanding of these requirements and their practical implications and thereby reduce as far as possible the risks of data protection breaches affecting HESA's data collections. This note is being circulated prior to the Agreement itself to enable you to take action within an appropriate timescale to ensure compliance with the fair processing requirements, in particular:

- ensuring you have a clear understanding of the legal grounds on which you are processing data,
- amending your fair processing policies and notices,
- notifying students of those amendments.

The Agreement: general requirement as to data protection compliance

The Agreement contains over-arching obligations on providers and HESA to:

- Comply with the DPA
- Assist each other in complying with the DPA

These are backed by a specific contractual warranty from the provider as to their DPA compliance and an associated indemnity from the provider to cover any losses suffered by HESA or HEFCW as a consequence of breach of the DPA. There is also a specific requirement for you to reimburse HESA for any legal costs incurred in taking advice on any potential or actual DPA breach which you identify in relation to your provision of data to HESA.

While more detailed obligations relevant to data protection compliance and confidentiality will also be specified in the Agreement it is essential that providers carry out their own thorough review of the data protection implications of collecting and passing data to HESA as provided for in the Agreement.

If data is processed in breach of the Act, it is often not possible to "correct" the breaches after the event i.e. a breach in the process used to collect the data may make it impossible for HESA to lawfully receive and use the data. Due to the warranty and indemnity provisions mentioned above, this may have a significant financial impact on you.

In addition, failure to submit data to HESA may have an impact on your relationship with HEFCW (as submitting data is a condition of your funding agreement with HEFCW). In the future (from 2017) it would be likely to affect your ability to have a fee and access plan approved and therefore your ability to charge particular fees, as the requirements for fee and access plans will include illustrating that the provider can meet all the necessary data capture and reporting requirements for HEFCW. Therefore you should identify and implement any actions or decisions required to ensure complete compliance with the Act before you sign the Agreement and before you pass any data to HESA. If providers delay in taking and implementing professional advice on data protection requirements this may result in a provider not being able to submit data to HESA and/or facing significant liabilities under the Agreement or termination of the Agreement.

Fair processing requirements

The Act requires the processing of any personal data to be "fair". It provides that processing will not be fair unless data subjects are notified of the identity of the data controller, the purpose or purposes for which the data are intended to be processed, and any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair. That information should either be given directly to the data subject or made readily available to them, and this should happen before the processing takes place. Where the processing to be done includes passing the information to a third party, fairness will require this to be made clear, and will usually mean identifying the third party and explaining the purpose(s) for which they will receive/use the information.

The Agreement will set out some specific provisions to help ensure that providers comply with these fairness requirements. This note sets out some guidance on the steps which HESA considers should be taken by providers in order to comply with those provisions and ensure that the passing of data to HESA for the purposes of its Collection and its subsequent use by HESA and others is "fair" as defined by the Act and the Information Commissioner.

The wording of your organisation's fair processing notices and the way in which information is brought to the attention of your students are issues for the organisation, taking into account the nature of all the data which you collect, use and pass to third parties and the profile of your student body. The guidance below relates only to notice of your submission of personal data to HESA.

Contents of your fair processing notices

In this document, "fair processing notice" ("FPN") refers to the notice or policy in which you explain to students the nature of the information you collect and hold about them and how this will be used. "HESA Collection Notices" refers to HESA's FPNs which are accessible through the link below.

HESA considers that, in order to comply with the Act, the FPN should contain the following information:

- Your intention to pass personal data to HESA should be explicitly stated, giving HESA's full name (Higher Education Statistics Agency).
- The data submitted will include sensitive personal data as well as personal data and that the basis for processing this data is set out in HESA's Collection Notices.
- The nature of the purposes for which HESA uses data should be given in summary/overview
- Access to the complete, unamended text of the relevant HESA Collection Notice must be provided. This means either reproducing the whole of the text within the body of your FPN or providing a direct, clickable link to each of the relevant HESA Collection Notices on HESA's website. Those links are available on this page: <http://www.hesa.ac.uk/fpn>

It is for the provider to decide how/to what extent its FPN should explain the legal basis for the collection, sharing and use of the data. **However it is essential that the FPN does not, either expressly or impliedly, indicate that the transfer of data to HESA or its use by HESA (including onward use by third parties) is based on/dependent on/subject to the consent of the data subject.** This applies to both personal data and sensitive personal data.

This is because consent is revocable at a later date. Therefore reliance on consent to justify our processing would place us at very significant risk in terms of our ability to collect and deliver comprehensive datasets to meet the requirements of government and other users. HESA does not rely on consent as the basis for other collections of student and staff data.

HESA's collection and use of both personal data and sensitive personal data as described in the HESA Collection Notices is justified by reference to other provisions of the DPA, without the need to rely on consent in either Schedule 2 or Schedule 3. These provisions include paragraphs 3 and 6 of Schedule 2, paragraph 9 of Schedule 3 and paragraph 10 of Schedule 3 together with paragraph 9 of the Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000 [SI 2000/417].

You should therefore carefully review your FPNs in light of this guidance to ensure that they include or give access to the full text of HESA's Collection Notices and that they are consistent with the position set out in this guidance note. This means reviewing both the parts of the FPNs which deal explicitly with HESA/the data to be provided under the Agreement and any generally-applicable sections of the FPNs which refer to the status of the document, the basis on which data is provided or what students should do if they have concerns about the use of their data.

In HESA's view, as soon as data is submitted by you to HESA (including for initial quality assurance purposes, prior to the final data submission) HESA becomes a data controller in common with you (the provider) in respect of all data submitted.

[Communicating about changes to FPNs](#)

Providers should carefully consider the nature and extent of the changes required to their FPNs in light of their proposed data submission to HESA and the steps to be taken to bring those changes to the attention of students. This will obviously be particularly important for organisations which will

be submitting personal data to HESA for the first time. However it may also be relevant to organisations who have previously submitted data to HESA where the scope of the data collected or the purposes for which it was to be used might have been different. As a minimum, you must at least actively consider whether your FPNs require amendment, taking professional advice on the legal basis for your data submission and the nature of the steps required to ensure fair and lawful processing.

Where changes are being made to your FPN, the following points should be taken into account:

- HESA considers that in order to comply with the requirement for fair processing, providers' own FPNs which refer to the planned sharing of data with HESA and the links to HESA's own FPNs should be made available to students an appropriate period in advance of the collection of the data. It is your responsibility to allow sufficient time to take legal advice and manage any risks appropriately, including taking and acting on advice as to when notice should be given prior to collection of the data in order to comply with the fairness requirements in the DPA. This is likely to mean taking some steps with regard to notifying FPN amendments prior to the signature of the Agreement;
- Any changes to your FPN in order to describe the intended submission of data to HESA should be notified to students in the following ways:
 - For new students, i.e. those providing data to the provider organisation at the commencement of a course of study, the provider FPN should be made readily available to the student before or at the point that the data is collected;
 - In relation to current students (i.e. those still undertaking courses at the provider organisation) whose data has already been collected by the provider organisation, appropriate steps should be taken to notify the students of the change in the FPN and to encourage them to read your amended FPN;
 - In relation to any former students who are no longer undertaking courses of study at the provider organisation but whose data will or may still be passed to HESA within the collection, again appropriate steps should be taken to notify the individuals of the change in the FPN and to encourage them to read your amended FPN.
- What constitutes "appropriate steps" will depend on the circumstances, including the extent of the changes to your FPN, the extent to which the sharing of data with HESA on the basis referred to above represents a departure from previous practice for the organisation, the profile of your student body and their access to particular forms of communication and the extent to which you have contact details for former students.

Areas of particular risk

The following represent particular risk factors with regard to the collection of data and your ability to achieve fair processing in relation to the Collection:

- Where significant changes are required to your existing FPN in order for it to comply with the requirements above, this is likely to affect the extent of the steps required to bring the change to the notice of those who have already provided the relevant data to your organisation. Examples of significant changes would be:

- where currently you do not provide personal data (or particular types of personal data, such as sensitive personal data) to third parties except in very exceptional circumstances, or where the scope of such data sharing is limited to closely-defined circumstances which are individually specified in your FPNs;
- where currently you process data only or mainly by consent, or have given any commitment not to change the nature of your processing or data sharing without consent;
- Where a significant proportion of the data you would be submitting to HESA relates to former students for whom you do not have contact details, and who therefore cannot be directly notified of the changes to your FPNs.

Where these factors exist, you will need to consider carefully, with the benefit of your own legal advice, what steps can and should be taken to ensure that you can sign up to the Agreement and participate in the Collection lawfully. You should remain alive to the possibility that there might be circumstances in which you will not be able to provide all of the data which you originally intended to submit under the Agreement while complying with the DPA. If you become concerned that you may not be able to make the intended submission of data to HESA due to DPA compliance issues, please inform HESA as soon as possible through: Email: liaison@hesa.ac.uk