

**THE MACFARLANE TRUST**

**DATA PROTECTION AND TRANSFER OF BENEFICIARY INFORMATION**

**Executive Summary**

- Before any transfer, the Trust should identify what personal data it is processing and for what purpose(s). As the Trust has not obtained explicit consent from applicants and beneficiaries to process their personal data in the past, it must also identify an alternative lawful basis for processing personal data (see section 3 below).
- As long as it is envisaged that THT would use the personal data for the same or similar purposes as originally collected by the Trust, information about beneficiaries could be transferred to THT without obtaining explicit consent (per the ICO's Data Sharing Code of Practice).
- In line with the principle of data minimisation, the Trust should only transfer personal data that would be necessary to enable THT to carry out its funding/loan functions in the future (see section 4 below).

**1. Background**

- 1.1 The Macfarlane Trust (the "Trust") plans to close in February 2019. It is considering a possible transfer of residual funds and assignment of outstanding beneficiary loans to The Terrence Higgins Trust ("THT") for future administration in line with the Trust's charitable objects.
- 1.2 In order to administer the loans in the future, THT would need personal data about the Trust's beneficiaries. THT may also need beneficiary personal data in order to administer the funds. This advice note considers the data protection implications of the transfer of beneficiary personal data from the Trust to THT.

**2. ICO Data Sharing Code**

- 2.1 As you are aware, data protection law changed in May this year with the introduction of the EU General Data Protection Regulation ("GDPR") and the UK Data Protection Act 2018 ("DPA"), which replaced the old Data Protection Act 1998.
- 2.2 The Information Commissioner's Office ("ICO") published a Data Sharing Code of Practice (the "Code") under the old data protection regime, which covered data sharing activities including the transfer of personal data in 'takeover' scenarios. The ICO is currently working on updating the Code to reflect the GDPR and DPA. The new version of the Code has not yet been published, however, we do not anticipate any fundamental changes to the current guidance regarding takeovers.



- 2.3 The mergers and takeovers section of the Code (pages 20 - 21) covers situations in which an organisation "*is taken over, merged, abolished or loses responsibility for carrying out a particular function*". We consider that the transfer of personal data from the Trust to THT would be akin to a takeover in this sense as THT will take over some of the Trust's functions in relation to its beneficiaries.
- 2.4 The ICO's key message is that personal data can be shared between organisations in merger or takeover situations, even if the sharing was not originally envisaged by either the organisation or the individuals, as long as the use of the personal data continues to be fair.
- 3. Fair processing of personal data**
- 3.1 I have discussed fair processing of personal data with Gill Edelman, Interim CEO. In short, the Trust must first be able to identify a lawful basis for collecting and holding the beneficiary personal data it has on file. Based on my knowledge of the Trust, I do not think that this will be a problem and I will discuss this further with Gill when I come to draft the Trust's Privacy Notice.
- 3.2 For information, I have summarised the lawful bases for processing personal data and 'special category' personal data in the schedule to this advice note. Based on the information I have received to date, I think it is most likely that:
- 3.2.1 the Trust is processing personal data on legitimate interests grounds and/or in order to comply with its legal obligations; and
  - 3.2.2 it is processing special category personal data under the substantial public interest condition (support for individuals with a particular disability or medical condition).
- 3.3 If THT would be using beneficiary personal data for the same purposes as it was originally collected by the Trust, it is likely to be fair to transfer that personal data without the beneficiaries' consent. This would be the case for the beneficiaries who have outstanding loans. The Data Sharing Code acknowledges that there will be cases in which an individual will have no real choice about whether their details are passed onto a new organisation and you can see that it would be unfair to suggest that loan beneficiaries have a choice about whether or not their information would be transferred.
- 3.4 The situation is different as regards beneficiaries who may wish to access THT's services in the future. They are likely to have more of a choice about whether or not they continue to deal with THT after the takeover so, when deciding whether it would be fair to transfer their personal data without consent, the trustees should take into account factors such as:
- 3.4.1 the extent to which the services that THT would provide will differ from the services that the Trust provided and whether beneficiaries are likely to have expected or envisaged that their personal data would be used for these purposes;



- 3.4.2 the extent to which THT would be prevented from providing services to beneficiaries in the future if they did not have access to this information and the impact this would have on beneficiaries; and
- 3.4.3 any potential sensitivities surrounding the data and/or the parties to the transfer. For example, I am aware that the Alliance House organisations previously felt strongly that consent should be obtained from individual beneficiaries before transferring their personal data to the NHS compensation schemes, given the sensitivity around the relationships between the NHS and those individuals.
- 3.5 In data protection terms, the question of fairness is something of a balancing exercise and trustees will need to weigh up the arguments in favour of transferring personal data without consent against the potential negative impact on beneficiaries.
- 3.6 On the one hand, the trustees may feel that the transfer of a minimum amount of beneficiary personal data to THT (e.g. names and dates of birth only) for the purposes of allowing THT to continue to manage funds in the future could be distinguished from the transfer of personal data (including special category data about health conditions) to the NHS and that it is fair to transfer the personal data without consent in this scenario.
- 3.7 On the other hand, the trustees may feel that there is a strong likelihood that beneficiaries would be unhappy about their details being shared with THT and/or there may be other ways for THT to identify beneficiaries, which would not require the Trust to share the personal information of every beneficiary outright. In these scenarios, trustees may decide that it would be unfair to transfer information without the explicit consent of the individuals.
- 4. What data should be transferred?**
- 4.1 One of the fundamental principles of data protection in Article 5 of the GDPR is the principle that personal data should be "*adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed*". This is referred to as the principle of data minimisation.
- 4.2 In practice, this means that the Trust should identify the minimum amount of beneficiary personal data that THT would need in order to fulfil their purposes. The Trust should only transfer that much information and no more. This is particularly important in relation to special category personal data as this kind of information tends to be more sensitive and personal to the individual.
- 4.3 There is no set formula for calculating how much information you can lawfully transfer; in data protection terms, the question must always be one of necessity. If the Trust knows that THT would not need certain information in order to administer the funds and/or loans in the future, you should not transfer that personal data to them. Likewise, if the Trust is holding personal data that is irrelevant or is no longer required for your purposes, it should be deleted.



**5. Communications**

- 5.1 When I draft the Trust's Privacy Notice, I will include a statement which confirms that beneficiary personal data may be transferred to successor organisations in the event of a transfer or takeover. The Privacy Notice should be hosted on your website so that it is publicly available to anyone who wants to know how you may use their personal data.
- 5.2 Once you know that THT will be taking over the funds and loans, the Trust will also need to proactively communicate this to beneficiaries. The ICO's Data Sharing Code of Practice suggests that organisations can make their own decision about whether to contact individuals directly or whether to simply publish a notice that contains information about the transfer (for example, a notice on the Trust's website).
- 5.3 As a rule, the more sensitive or confidential the personal data that you hold, the more likely it is that the ICO will expect the Trust to write to beneficiaries personally to give them information about the transfer to THT. For the avoidance of doubt, these letters would simply provide information to the individuals about the transfer to THT, they would not ask for the person's explicit consent.
- 5.4 Under the GDPR, individuals do have the right to object to processing that is carried out in the public interest or on legitimate interest grounds. Assuming the Trust is relying on one of these bases to process beneficiary personal data (see paragraph 3.2.1 above), it could consider giving beneficiaries the opportunity to opt-out prior to the transfer, if time and resources permit. Alternatively, the Trust could include wording in the letters to beneficiaries which reminds them of their data protection rights, including the right to object to their personal data being processed and their right to request erasure of their personal data (often referred to as the 'right to be forgotten'), and provide contact details for the Data Protection Officer at THT should they want to exercise these rights in the future.
- 5.5 Once you know how much personal data you would need to transfer to THT, you can take a view on whether or not to send out letters to individuals informing them of the transfer. As we know from experience with the other Alliance House organisations that some beneficiary address details are now out of date, however, our advice would still be to publish information about the transfer on your website even if you do decide to send out letters.

**6. Contact details**

If you would like to discuss this issues set out in this note, or if you would like further information on any of the points mentioned, please contact Carla Whalen on GRO-C or at [carla.whalen@](mailto:carla.whalen@) GRO-C

**Russell-Cooke LLP**

**23 October 2018**



## **Schedule**

### **Lawful basis for processing personal data**

The GDPR requires the Trust, as data controller of the beneficiary personal data that you collect and hold, to identify a lawful basis for processing that personal data.

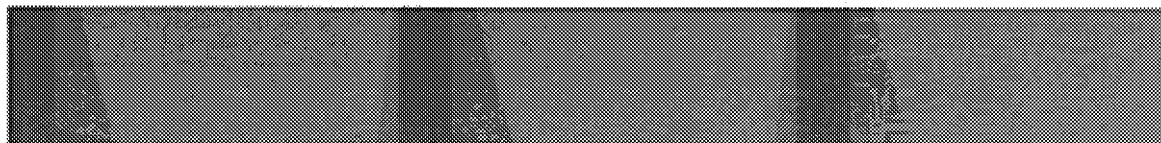
There are six lawful bases for processing personal data in Article 6 of the GDPR (these are very similar to the lawful bases under the previous Data Protection Act 1998):

1. you have the **consent** from the data subject – as I understand it, the Trust did not ask applicants to give their explicit opt-in consent when they made an application so this basis will not be relevant;
2. it is necessary for you to process the personal data in order to perform a **contract** you have with the data subject – this may be relevant for the loans, assuming that these beneficiaries entered into a legally binding loan agreement with the Trust;
3. it is necessary for you to process the personal data in order to comply with a **legal obligation** – for example, records that the Trust is obliged to keep in order to comply with finance and accounting legislation and/or HMRC requirements;
4. the processing is necessary to protect the **vital interests** of the data subject or another person – this is only available in emergency 'life or death'-type situations so will not be relevant for day-to-day processing;
5. processing is necessary for the **performance of a task carried out in the public interest** or in the exercise of official authority vested in the controller – this may have been relevant to processing that the Trust carried out under the direction of the Department of Health but it is unlikely to be relevant for the processing that THT will carry out after the transfer; or
6. processing is necessary for the purposes of the Trust's **legitimate interests** or the legitimate interests of a third party and those interests are not overridden by the rights and freedoms of the individual data subjects – this condition can be widely used and is most appropriate when the individual would know or expect you to use their personal data in this way (for example, someone applying to the Trust would expect you to keep a record of their application and any awards given).

When processing special category personal data (including information about an individual's health, race, religion, sex life or sexual orientation), the Trust must identify an additional lawful basis from those listed in Article 9(2) of the GDPR, which including:

1. explicit consent from the data subject;
2. processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;





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3. processing is necessary for reasons of substantial public interest, as set out in Schedule 1 to the Data Protection Act 2018 (this includes support for individuals with a particular disability or medical condition).