



04/12/2017

## GDPR consent: a problem for Learning Analytics?

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# GDPR consent

## Must be...

Free/easily withdrawn

» So can't link it to participation in something else (e.g. learning)

Informed

» So can't use it for things we didn't foresee at the time

Active

» So can't infer it from silence

## What problems/opportunities does that create?

- a) For production Learning Analytics?
  - b) For pilot Learning Analytics?
- (10 mins to discuss and report back)

## Consent works where...

Student can walk away/refuse/lie anyway [Free/easily withdrawn]

» System already has to cope with blank/false entries

We already know/can describe what will/won't happen [Informed]

Engagement is more important than coverage [Active]

» So good if you want lots of feedback (pilots?)

# Consent in Production Learning Analytics

## Which stages meet those requirements?

### Data Collection?

- » No, for observed/leftover data (i.e. most of the input to LA)
- » Getting consent for data we already have is hard; opt-in means biased

### Model Building/Pattern Finding?

- » No, because we don't know in advance what we're looking for

### Pattern matching?

- » No, because we want to check patterns across whole cohort

### Intervention?

- » Yes, because students can refuse/walk away
- » NB: Need to be especially careful if they can't

# Better legal basis for when consent doesn't work...

## Legal requirements of Art 6(1)(f)

Legitimate interest

» In improving learning

Necessary

» i.e. no less intrusive way to do it

Not overridden (balancing test)

» By risk to individual's rights/interests

# Better legal basis for when consent doesn't work...

## Practical requirements, actually things we want anyway

### Legitimate interest

- » So only use learning analytics results for that

### Necessary

- » Minimise/protect the data we process and the results
- » Only use inputs likely to be meaningful (use pilots to determine that?)

### Not overridden (balancing test)

- » So assess, minimise and monitor risks/impacts we create
- » Good way to detect/avoid discriminatory patterns

# “Public Authorities”

## GDPR

- Can't use legitimate interests (or consent) “for their tasks”
- Tasks must be defined by law
- Giving them “special powers” (ECJ C-188/89)
- No restriction for other activities

## Suggestion

- Use legitimate interests if most appropriate (best protection for data subjects)
- If ICO says it's a “task” then switch to either public interest or “special powers”

## Data Protection Bill

- Applies FoIA definition
- ICO says “hybrid authorities”
- Suggests “public interest” instead
- Same requirements, but no need to balance data subjects' rights!
- Guidance promised soon



# Where might consent work for data collection?

**(5 mins to discuss and report back)**

# Sensitive Personal Data/Special Category Data

Can't use legitimate interests for

- » Race, ethnicity
- » Religious/philosophical beliefs
- » Trade union membership
- » Genetic, biometric, health data
- » Sex life, sexual orientation

So need consent (or legal obligation) for

- » Collection (or obtaining from elsewhere)
- » Identifying and applying patterns
  - > Can't postpone consent, as for non-SPD
  - > i.e. must know consequences at start

So more constraints on "data-driven" for these data

Information satisfies "user can lie" test anyway, so don't give them cause to do so  
Seeking consent probably a good way to identify objectionable proposals

# Consent in learning analytics

Based on Cormack AN (2016), 3(1) Journal of Learning Analytics 91-106

## Collection

- » *Data debris*
- » **Necessary** for 1<sup>y</sup> purpose

## Donation

- » *Voluntary reporting*
- » Free, informed **consent**
- » No detriment

## Analysis

- » *Pattern-finding*
- » Stated 2<sup>y</sup> purpose
- » **Legitimate interests**
- » Necessary processing
- » Minimise impact
- » Balance rights & interests
  - › Individual opt-out

## Intervention

- » *Pattern-matching*
- » Maximise impact
- » Free, informed **consent**
  - › Choice: personal/vanilla

## Improvement

- » *Pattern-using*
- » No personal data

# References

## Regulators

- » <https://ico.org.uk/for-organisations/data-protection-reform/> (UK)
- » [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=50083](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50083) (EU)

## Regulation (2016/679/EU):

- » <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>

## Me:

- » <https://community.jisc.ac.uk/blogs/regulatory-developments/tags/Learning-Analytics>
- » <http://social.ji.sc/UG> (GDPR webinar)

# Thanks

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<https://community.jisc.ac.uk/blogs/regulatory-developments/tags/Data-Protection-Regulation>



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