

# LEGACY FUNDRAISING, CONTESTED WILLS, & DATA RETENTION

## A GUIDANCE NOTE

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### Why this is an important issue to get right

Legacies are an increasingly important income for charities – with gifts in Wills reaching around £3bn and rising every year. They are often received after a long relationship between a supporter and a charity. That relationship might however not be linear and straightforward - donors can come and go, leave a long break between donations and support a charity in different ways. Crucially, they might have left a legacy gift to a charity years ago, after making a single donation or at a time in their lives when they were very involved with that charity. The charity might not be aware of this potential legacy gift, which makes it difficult to know what to do with a supporter's personal data, particularly in relation to how long it should be retained for.

This becomes a real issue when we look at one of the trickiest issues in legacy fundraising – contested Wills. Disputes over Wills can be lengthy, complicated and potentially distressing for all parties involved. But charities have a duty to protect their income and ensure that all the donations they receive are put towards fulfilling the organisation's charitable purposes and helping their beneficiaries.

That can mean that if there is a dispute over a Will, the charity may need to be prepared to put forward an argument and evidence to help ensure that they can receive the legacy gift that was left to them.

Traditional advice on how best to manage disputes around the validity of a Will prescribes having a paper trail which you can use to evidence a relationship, an intention to leave the gift, and the purposes or wishes of the supporter. But if data has been deleted in efforts to achieve compliance with data protection rules on data retention, then the charity will not be able to produce that evidence, leading to potential complications for the charity and executor.

## What's in this guide?

The IoF has put together this guide to help charities and fundraisers navigate the issues surrounding data retention and legacies, and to put forward options for how charities can appropriately record and retain personal data so that it can be accessed in the case of a contested Will.

## What it is not

This guide does not provide a definitive answer for all charities to questions of data protection compliance without the need for further thought and consideration. It sets out a principles-based approach which aims to be consistent with GDPR, but each charity will need to consider its own position, supporters, and processes before choosing to adopt an approach to data retention, and seek professional or legal advice where necessary.

As with all data protection decisions, charities should document their decision-making on why they consider that processing personal data in a particular way and for a particular length of time can be justified; not only to comply with the accountability principle under GDPR, but also to use as a record if there are complaints, or if a regulator (such as the ICO) challenges the decision.

## ‘Just in case’ is not a valid basis to keep data!

Like all organisations, charities are only permitted to process personal data if they can show that they are doing so in accordance with one of the 6 lawful bases for processing under Article 6 GDPR. In relation to processing personal data for the purpose of legacy fundraising and administration, the most applicable legal basis is likely to be either consent or legitimate interests. See [here](#) for more information on the legal bases for processing personal data.

The ‘storage limitation’ principle under GDPR provides that organisations must not hold onto personal data ‘for longer than is necessary for the purposes for which the data is processed’. This means, as a general rule, that you can’t keep data for a rainy day (or in this case, a legacy-dispute day) in the event that data is required as evidence in a disputed Will case. You need to make sure that you have a lawful basis to retain the data, as well as a clear reason or need for retaining data for a particular length of time. So, while you might think your charity has a need to keep the personal data of everyone who has ever interacted with you just in case they leave a legacy in the future, this is unlikely to be compliant with the storage limitation principle, or a valid use of legitimate interests, unless your charity has clear justifications for doing so and can rely on a valid lawful basis (for example, where there has been more than one incident of contact with the individual and you are heavily reliant of legacy income and/or can demonstrate cases where such data was needed in the past).

(NB. Each organisation should of course come to their own view on their use of legitimate interest, undertake a legitimate interest assessment, and seek professional advice where needed.)

If you have someone's consent to be able to keep their data for legacy administration purposes then that's a more secure lawful basis – but remember that consent would need to be specific, informed, freely given, and unambiguous. If you have been speaking with a supporter about a legacy gift, and they say that they are pledging a gift, then you could go back and ask them for consent to keep their data for their lifetime for the administration of the Will. However, it may be difficult to get consent in all cases, and consent is unlikely to last forever in any event. Legitimate interests may therefore be a more appropriate legal basis for processing personal data for legacy purposes in certain cases, as discussed below.

## **Retaining data could be valid where the chance of a legacy gift is higher**

There is unfortunately no one-size-fits-all approach in assessing whether legitimate interests can be used as a valid legal basis for retaining the data of these supporters – each organisation needs to weigh up a range of factors and undertake a balancing exercise so that they can assess this for themselves. For this reason it is really important to ensure that you have undertaken a “Legitimate Interests Assessment” to inform your decisions. Careful consideration would need to be given to your charity's particular circumstances to show that keeping the data is necessary (e.g. how reliant is it on legacy income, how likely is it to receive legacies from former supporters who have not informed it that they intended to do so, and the potential risks from failing to keep the data).

You'll also need to consider the supporter's point of view, thinking about: what indication you have about a potential legacy gift, whether you are still in contact with the supporter, how long ago they last interacted with you, the strength of an ongoing or past relationship with your cause – did they only give a small one-off gift a number of years ago, or have they given (or been in contact) at various points over an extended period of time? It will be up to each charity to build a case using evidence and insight to be able to justify these decisions. The more you can demonstrate that careful thought and consideration has gone into it, the stronger your position should be – records of this thought process should be retained.

In situations where a person has told you that they have left a legacy or pledged to do so, then then, in the absence of indications to the contrary, there would seem to be clear justification for retaining relevant personal data on the grounds of legitimate interest – given that there is a clearer indication that someone has left a legacy gift and a greater need to retain the data in order to administer the legacy and/or defend a claim against the Will.

In other cases, while it is unlikely that you would be able to retain all supporter data indefinitely for legacy purposes, you may be more likely to be able to justify keeping data when there is a pattern of behaviour that indicates that a person is more likely to leave a legacy gift in their Will. Each charity will need to look at the interactions and relationships with supporters to assess whether it is justified in the circumstances to retain their data for legacy purposes. While no one specific action is likely to be sufficient, a combination of actions from an individual may be; for example, where an individual has donated to the charity, signed up for a newsletter, downloaded or requested a legacy pack, or attended a legacy event.

## Storing data & protecting privacy rights

If you are confident that you have a lawful basis for processing the data for the relevant period of time, you need to think about the practical steps that will need to be implemented in order to protect privacy rights, including making sure that you are keeping data securely and only using it for the purpose that was intended.

Given that data that is processed for the purposes of administering a legacy gift or defending a disputed legacy case might be kept for a long time, it should be separated from your usual day to day fundraising database. You will need to ensure (and be able to reassure your supporters) that there are sufficient safeguards in place for the use and retention of such personal data.

One approach could be to store the necessary data that would be required in the specific case of a contested Will in a separate archive/database, so that it is outside the scope of everyday use. When a charity decides that the supporter is 'lapsed' or inactive, in accordance with its internal data retention policies (often around 3 to 5 years of no interaction by the individual), their record and data would be archived and only accessed if needed in the case of a later dispute. Organisations might assess that an additional safeguard in this process would be for the archived data to only be accessed by certain authorised individuals (e.g. the head of Legacies or Fundraising), or if discussed and agreed by the charity's Trustee board (or delegated authority within the charity).

Only personal data that it is necessary to retain for this purpose should be archived, and any additional information should be deleted - in other words the whole record may not need to be retained, though it should be noted that in disputed legacies, it is often important to be able to establish a pattern of contact, or the details of a relationship, so more than just an individual's name, contact details and the fact that they are a supporter may need to be retained.

## Staying compliant

It is important to emphasise that processing data in this way is something each organisation will need to consider and justify for themselves on a case by case basis. It is not an approach which can just be adopted without careful consideration of whether it is appropriate for your charity, and taking steps to ensure it does not unduly impact on the privacy rights of individuals.

As mentioned, processing data for legacy purposes, even in a restricted archived form, requires a lawful basis for processing under GDPR (for example, consent or legitimate interests), and needs to be documented within your data retention policy and privacy notice, which should be actively communicated to those people whose data you process (in order to comply with the transparency requirements under Article 13 GDPR).

It may also be necessary (or at the very least good practice) to undertake a Data Privacy Impact Assessment (DPIA) in order to fully evaluate the needs of the organisation and the expectations and rights of individuals as part of your decision-making process in formulating your retention policy. It is important to also recognise that supporters who leave a legacy gift in their Will have the right to ask you to stop processing and/or delete their data and, crucially, this right needs to be explained to them. Charities must include information on their retention policy regarding the length of time legacy data will be kept for, (including archived data) in a privacy notice which is actively communicated to their supporters.

### **Key considerations for an organisation:**

- What lawful basis are you intending to use?
- If seeking to rely on legitimate interests have you undertaken a legitimate interest assessment?
- Have you got in place necessary safeguards and policies (including a robust data retention policy) to ensure that the data is held securely and for no longer than is necessary for the purposes for which it is processed?
- Have you documented your decisions and can justify and evidence them?
- Have you communicated your retention policy to your supporters?

## Other useful resources and guidance

[Fundraising Regulator and Institute of Fundraising GDPR & Charitable Fundraising: Spotlight on Legacies](#)

[Information Commissioner's Office \(ICO\)](#)

[Institute of Fundraising](#)

[Institute of Legacy Management](#)

### **Disclaimer:**

The publication reflects interpretation of the law and guidance as at January 2019 and we advise all fundraisers and charities to be aware of the ICO guidance and to review it regularly. This publication does not constitute legal advice and charities should seek further advice where necessary.



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