Biometric data guidance consultation

Start date: 18 August 2023

End date: 20 October 2023

Consultation on draft guidance for biometric data

The call for supporting evidence will remain open until **20 October 2023**. The ICO welcomes feedback on the specific questions set out below.

Please submit responses by **5pm on 20 October 2023**.
We may not consider responses submitted after the deadline.

Or print off this document and post to:

Identity and Trust Team (Technology Policy)
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
If you have any general queries about the call for supporting evidence or would like further information, please email the team at
biometrics@ico.org.uk

Privacy statement

For this call for supporting evidence, we may publish a summary of the responses but will not publish the actual responses received from organisations or individuals.

Should we receive an FOI request for your response we will need to consider whether we make it available. However, at this point, we would always seek to consult with you for your views on the disclosure of this information before any decision is made.

For more information about what we do with personal data please see our [privacy notice](#).

Our questions

Answers to the following questions will be helpful in shaping our guidance and the supporting impact assessment. Some of the questions will not be relevant to you or your organisation, so please skip these as necessary or, as indicated in the descriptions.

1. How far do you agree that this guidance clearly sets out what data protection law defines as biometric data?

   ☐ Strongly agree
   ☐ **Agree**
   ☐ Disagree
   ☐ Strongly disagree
   ☐ Unsure/don't know

Comments:

> Overall the guidance offers some very clear analysis of the legal position and is most welcome. However we note that this guidance does not cover "classification systems" and it is difficult to comment before seeing how this guidance fits in with the next phase(s), and exactly what is to come. Could you keep the consultation on **all** phases open (or re-open any closed) when everything is published?

2. How far do you agree that this guidance sets out clearly the different tests for identifiability (i.e. whether data can be considered personal data) and unique identifiability (the test for biometric data?)

   ☐ Strongly agree
   ☐ Agree
   ☐ **Disagree**
   ☐ Strongly disagree
   ☐ Unsure/don't know

Comments:

An area where the guidance could be clearer is the question of whether "identification" includes "picking out" without actual linking to a known person. The phrase "personal data is only biometric data if it[...]can uniquely identify (recognise) the person it relates to" suggests that it does not, whereas "The purpose of any biometric recognition system is to identify someone. This is either because they are the person they claim to be (to verify them and their access) *or to identify them from others*" would suggest that it **does** include the wider activity of "picking out".

This will be a key distinction in considering classification systems such as sentiment analysis. Paragraph 3.15 of the Yoti sandbox exit report illustrates the importance of this distinction for developers. It would be useful to be consistent and clear on this point throughout the guidance.

It would also be helpful to have a very clear distinction made between the concepts of recognition and classification, with associated examples.

Finally, although the guidance does clearly distinguish between the test in Art. 4(14) of "allow or confirm" as against the "purpose" test in Art. 9(1), there seems to be greater difficulty in separating out the "specific technical processing" requirement from the "allow or confirm" element in Art. 4(14). Is it possible to give an example of a use of personal data which involves "specific technical processing", but not allowing or confirming a unique ID, to further clarify that these are separate tests and that both must be satisfied in order to be biometric data? Or if there are none, should this be acknowledged?

3. How far do you agree that the approach of using terms from industry standards (ie biometric recognition) assists in understanding how data protection law applies to biometrics.

☐ Strongly agree
☐ Agree
☐ Disagree
☐ Strongly disagree
☐ Unsure/don't know

Q3a Could this approach be adopted further in this guidance?

Please provide examples in the comments section below, along with any further reflections you have on this question.

Comments:

On the whole it is likely that industry guidance will not necessarily follow the nuance of the law and we see no value in following industry standards for the sake of it. It may be better to avoid confusion by not conflating the terms.

4. How far do you agree that the guidance clearly explains the legal status of biometric data when used for biometric recognition purposes (ie that a further condition for processing special category data is required?)

☐ Strongly agree
☐ Agree
☐ Disagree
☐ Strongly disagree
☐ Unsure/don't know

Comments:

It is well explained, but we would strongly recommend that even clearer links to other guidance be made in order to stop over-ambitious uses of biometric recognition systems without proper consideration of context. For example, by putting a link and warning to the ICO CCTV guidance in considering whether the "unlawful acts" special category applies, (which could perhaps also be expanded to discuss the general prohibition on keeping a "comprehensive register" without official authority) and adding a warning and clear link to the Art. 89 requirements (which include directives as to anonymisation, not always considered) to the consideration of "research purposes" as a special category condition. In all cases, continued reminders about Art. 6 lawful bases and other principles would also help to underline this point.

5. Are there other conditions for processing that you feel organisations could rely on to use biometric recognition, and would you be willing to be contacted to provide details for a potential case study?

☐ Yes, and willing to provide a case study
☐ Yes, but not willing to provide a case study
☐ No

if you have indicated you are willing to provide a case study, please contact biometrics@ico.org.uk

We would just comment that the handling of the question of "consent" is not always consistent. On the one hand, the thrust of the guidance is that consent will always be the first port of call for biometric recognition systems. However, other linked areas of guidance (for example the CCTV guidance, which is clearly related) talks about the difficulty of using consent as a special category condition due to the withdrawal problem.

We are not aware of any relevant current projects.

Comments:

6. How far do you agree that this guidance adequately describes the potential benefits **and** the possible risks of harm of deploying biometric recognition solutions?

☐ Strongly agree
☐ Agree
☐ Disagree
☐ Strongly disagree
☐ Unsure/don't know

Comments:

Overall the guidance strikes a reasonable balance between benefits and risks.

7. How far do you agree that the case studies are clear, realistic examples of how biometric solutions could be deployed, and the relevant data protection considerations?

☐ Strongly agree
☐ Agree
☐ Disagree
☐ Strongly disagree
☐ Unsure/don't know

Comments:

The examples given are generally clear and well-made. More examples would be extremely useful.

8. How far do you agree that this guidance provides a clear explanation of all data protection obligations when using biometric data?

☐ Strongly agree
☐ Agree
☐ Disagree
☐ Strongly disagree
☐ Unsure/don't know

Comments:

> It is difficult to understand this before other phase(s) of the guidance are complete.

9. Are there any areas of this guidance that you found unclear, or require further detail? Please provide as much detail as possible.

Comments:

> Please see comments earlier.

10. Do you have any observations about what further detail would improve this guidance?

Comments:

> Please see comments earlier.

Impact Assessment

The following questions are about our impact assessment. Some of the questions may not be relevant to you or your organisation so please skip these as necessary, or as indicated in the descriptions.

Impact assessment summary table

We are seeking views on our impact assessment summary table, which was provided as supporting evidence for the consultation. This sets out a high-level overview of the types of impacts that we have considered.

We will consider the proportionality of further assessment of the impacts as we move towards final publication of the guidance.

11. To what extent do you agree that the impact assessment summary table adequately scopes the main affected groups and associated impacts?
   ☐ Strongly agree
   ☐ Agree
   ☐ Disagree
   ☐ Strongly disagree
   ☐ <mark>Unsure/don't know</mark>

12. Can you provide us with any further evidence for us to consider in our impact assessment?
   ☐ Yes
   ☐ <mark>No</mark>

If yes, please could you provide the impact evidence or a link to it in the box below, or contact details where we can reach you to discuss further.

Answer in OPEN TEXT BOX, 1500 characters

Impacts on your organisation

These questions are specifically for respondents that **are acting on behalf of an organisation.** If you are not acting on behalf of an organisation, please skip straight to the 'About you' section.

13. Who in your organisation needs to read the guidance? (Please provide job titles or roles, not people's names).

Answer in OPEN TEXT BOX, 1500 characters

14. To what extent (if at all) do data protection issues affect strategic or business decisions within your organisation?
   a. Data protection is a major feature in most of our decision making
   b. Data protection is a major feature but only in specific circumstances
   c. Data protection is a relatively minor feature in decision making
   d. Data protection does not feature in decision making
   e. Unsure / don't know

15. Do you think the guidance set out in this document presents additional: (select one option)
   a. cost(s) or burden(s) to your organisation
   b. benefit(s) to your organisation
   c. Both
   d. Neither

     e. Unsure / don't know

IF ANSWER TO Q5 is a,b or c, then ask questions 16, 17 and 18.

16. Could you please describe the types of additional costs or benefits you might incur?

Answer in OPEN TEXT BOX, 1500 characters

17. Can you provide an estimate of the costs or benefits you are likely to incur and briefly how you have calculated these?

Answer in OPEN TEXT BOX, 1500 characters

18. Please provide any further comments or suggestions you may have about how the guidance might impact your organisation.

Answer in OPEN TEXT BOX, 1500 characters

About you

Q11: Are you answering as: (tick all that apply)

☐ An organisation or person employing workers

☐ A legal representative of a developer or adopter of

☐ A representative of a professional, industry or trade association

☐ An organisation representing the interests of employees, workers or the self-employed (eg charity, employment advocacy organisation)

☐ A trade union

☐ A recruitment agency

☐ An academic

☐ A supplier of biometric solutions

☐ An individual acting in a professional capacity

☐ An individual acting in a private capacity (eg someone providing their views as a member of the public)

☐ An ICO employee

☐ Other

If you state 'Other' please ensure that you specify here:

Q12: If you are representing an organisation, please specify the name of your organisation (optional):

Shoosmiths LLP

Q13: How would you describe your organisation?

☐ 0 to 9 members of staff

☐ 10 to 249 members of staff

☐ 250 to 499 members of staff

☐ 500 or more members of staff

Q14: What best describes your current position in relation to biometric technologies (tick all that apply)

☐ A developer of biometric recognition systems

☐ A developer of other biometric systems (not biometric recognition)

☐ A potential adopter of biometric technologies

☐ A current user of biometric technologies

☐ A representative of civil society/academia

☐ A regulator/local/regional/national government

☐ Other (please state below)

An adviser of developers and users of biometric systems.

Q15: What best describes your **main** area of interest for biometrics?

☐ Biometric verification: (use cases around access control/ time recording)

☐ Biometric identification (use cases around recognition)

☐ Other biometric use-cases (detection)

☐ Other biometric use-cases (categorisation/classification)

☐ Other (please state below)

These are all relevant areas of interest given the wide range of advice and clients we cover.

Q16 We may want to contact you about our impact assessment and some of the points you have raised. If you are happy for us to do this, please provide your email address:

Alice.wallbank@shoosmiths.com

Thank you for taking the time to complete this consultation.