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THE Legal Lens SERIES

Topic:

**Data Privacy and Consent:
Key Legal Considerations for
Organizations**



Rita Nmarkwe

Associate Counsel



We deem it necessary to preface this exposition by stating clearly that Nigeria operates a constitutional legal system whereby all authorities and powers derive their source and validity from the Constitution of the Federal Republic of Nigeria, 1999 (“the Constitution”). The Constitution itself bears eloquent testimony to its supremacy by virtue of **section 1(1) and (3)** thereof, which provide as follows:

1. (1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

The above foundation having been laid, the rights of Nigerian citizens, specifically the right to privacy is enshrined in the Constitution and provided for in **section 37**, which reads as follows:

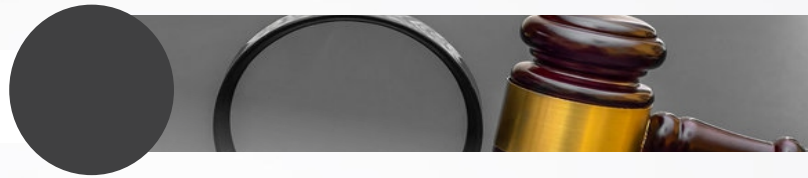
“The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.”

In furtherance of this constitutional provision, **section 4(2)** of the Constitution empowers the National Assembly to make laws for the peace, order and good government of the Federation. It is, therefore, pursuant to the referenced provision of the Constitution that the National Assembly enacted laws including the **Nigeria Data Protection Act, 2023 (NDPA)**, **Cybercrimes (Prohibition, Prevention Etc) Act 2015**, **Freedom of Information Act, 2011 (FOI Act)**, **National Identity Management Commission (NIMC) Act 2007**, **Child Rights Act 2003**, among others, to regulate processing of personal data and ensure its protection. Pointedly, the Nigeria Data Protection Act is the primary statute enacted for data protection and it aims to

- i)** safeguard the constitutionally guaranteed fundamental right of privacy;
- ii)** protect personal information/data of citizens;
- iii)** establish the **Nigeria Data Protection Commission and its Governing Council** for the regulation of the processing of personal information of data subjects;
- iv)** enforce safe practices that protect personal data and privacy rights of citizens and
- v)** provide recourse/remedies if and when there is a breach of privacy rights, among others.

Pertinently, while **sections 4, 5 and 6 of the NDPA** establish the **Nigeria Data Protection Commission (NPDC)** and prescribe its functions and powers its **sections 24 and 25** provide for the duties and responsibilities of a data controller or processor in relation to data in its custody.

The summary of the data protection regulatory framework as deducible from the provisions of the Act and the **Nigeria Data Protection Regulation (NPDR)** is that any person who legitimately receives or is in custody of data relating to a subject can only utilize the data for the purpose for which the data is volunteered or comes to the custody of the data controller, except in limited circumstances, some of which will be discussed further.



Under what Circumstances can Personal Data be Processed in Accordance with the Law?

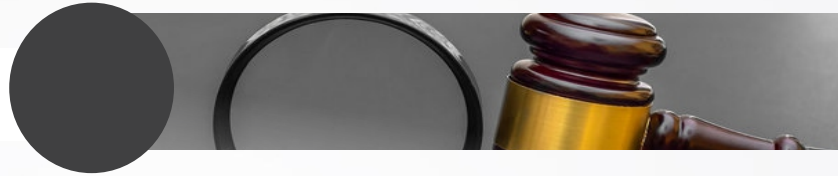
Having earlier established that the primary statute governing personal data processing in Nigeria is the **Nigeria Data Protection Act, 2023**, by virtue of **section 25 of the NDPA and section 2.2 of the Nigeria Data Protection Regulation (NDPR) 2019**, data processing is considered lawful if at least one of the following conditions is fulfilled:

1. **Consent:** The data subject has given their consent to the processing of their personal data for one or more specific purposes.
2. **Contract:** The personal data processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract.
3. **Legal Obligation:** The personal data processing is necessary for compliance with a legal obligation to which the controller is subject.
4. **Vital Interests:** The personal data processing is necessary to protect the vital interests of the data subject or another person.
5. **Public Interest:** The personal data processing is necessary for the performance of a task carried out in the public interest or in the exercise of official public authority vested in the controller.
6. **Legitimate Interests:** The personal data processing is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

Additionally, it is worth noting that the **NPDA** and **NDPR** also require that the processing of personal data must be fair, lawful and transparent, and that the controller must provide the data subject with certain information, such as the purpose of the processing, the categories of data being processed, and the rights of the data subject.

When is Consent Required for Data Processing, and when can Data Controllers Process Data without It?

In the domain of data protection in Nigeria, consent is the bedrock that underpins the entire regulatory framework. As defined in **section 65 of the NDPA**, consent refers to any freely given, specific, informed, unambiguous indication, whether through a written or oral statement or an affirmative action, that signifies an individual's agreement to the processing of their personal data.



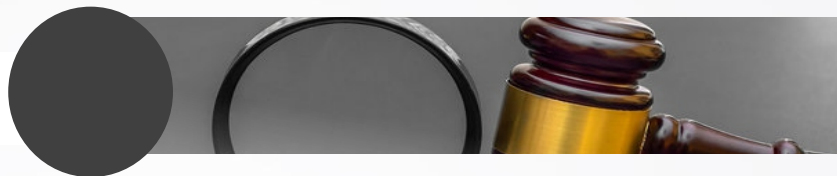
In simpler terms, consent is the permission granted to data collectors to collect, store, and process one's personal information. Therefore, the importance of consent in data processing cannot be overstated.

Generally, consent is required for any form of personal data processing, as stipulated in **section 25 (1) (a)** of the **NDPA**. This provision unequivocally states that data processing only be lawful where the data subject has given and not withdrawn consent for the specific purpose or purposes for which the personal data is to be processed. This means that consent is an ongoing requirement, and data subjects have the right to withdraw their consent at any time, thereby bringing an end to the processing of their personal data.

However, there are instances where data controllers can process data without obtaining explicit consent. **Section 25 (1) (b) of the NDPA** provides five permissible grounds for legitimate data processing without consent. These grounds include:

- i. **Contractual necessity:** The performance of a contract to which the data subject is a party, or to take steps at the request of the data subject prior to entering into a contract.
- ii. **Legal Obligation:** Compliance with a legal obligation to which the data controller or data processor is subject.
- iii. **Vital Interest:** The protection of the vital interests of the data subject or another person.
- iv. The performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller or data processor.
- v. **Legitimate Interest:** The pursuit of legitimate interests by the data controller or data processor, or by a third party to whom the data is disclosed.

These five instances represent the exceptions to the general rule that consent is required for data processing. In these circumstances, data controllers can lawfully process data without obtaining explicit consent, provided that the processing is necessary and proportionate to the purpose for which it is being carried out. Conclusively, consent is a fundamental principle of data protection in Nigeria, and organizations must prioritize obtaining explicit consent from data subjects before processing their personal data. However, there are instances where consent is not required, and organizations can rely on one of the five permitted grounds to lawfully process data without explicit consent. By understanding these exceptions and adhering to the principles of data protection, organizations can ensure that they are handling personal data in a responsible and lawful manner.



What is “Legitimate Interest”, and how should it be balanced against the Rights of Data Subjects?

The concept of legitimate interest in the context of data protection in Nigeria is an intricate one. The **NPDA** does not provide for an express definition of legitimate interest, instead it opted to detail what does not constitute. But as can be gleaned from the **NDPA**, legitimate interest refers to the legal standing to collect and process data from data subjects without first obtaining their direct explicit consent. Instructively, **section 25(2) of the NDPA** stipulates that the collection of personal data shall not be deemed legitimate in certain circumstances, including where it overrides the fundamental rights, freedoms, and interests of the data subject, is incompatible with other lawful bases of processing, or where the data subject would not have a reasonable expectation that their personal data would be processed in the manner envisaged. These provisions align with global standards for data collection and processing and highlight the importance of balancing the rights of data subjects with the needs of data collectors.

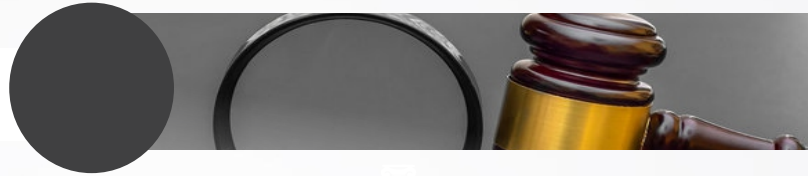
The concept of legitimate interest has been further extended to include fraud prevention, network protection, and the prevention of criminal acts perpetuated through data access.. This emphasizes the need for data holders and collectors to prioritize the protection of data, particularly when it relates to children. However, a challenge arises when the rights of data subjects conflicts with the needs of data collectors. Both parties have legitimate interests and rights, with data subjects having a right to privacy and data collectors having a right to utilize data for legitimate purposes. With this friction, it is essential to balance the conflicting interests by ensuring that the rights of data subjects are respected. While the NDPA does not provide a clear process for resolving conflicts between this interest and rights, the Information Commissioner’s Office (ICO) in the United Kingdom offers guidance through its three-fold test to determine whether a legitimate interest exists. This test consists of Purpose Test, the Necessity Test, and the Balancing Test.

The Purpose Test requires data collectors to conduct an intention review, asking themselves why they want to collect, process, and store data, and what benefits they hope to achieve.

The Necessity Test demands that data collectors evaluate whether collecting data is truly necessary, and whether alternative means can achieve their objectives without infringing on data subject rights.

Finally, the Balancing Test requires a re-evaluation of the prospective impacts or risks of collecting and processing data on the data subjects fundamental rights.

Conclusively, the concept of legitimate interest in Nigerian data protection law provides a window for collecting data from data subjects without their consent, while still prioritizing data subject’s rights and freedoms. By adopting a balanced approach, data collectors can navigate the complex landscape of legitimate interests and data subject rights, ultimately upholding the principles of responsible data collection and processing.



What is the Statutory Obligation on Data Controllers for Obtaining Valid Consent for Personal Data Processing?

The validity of consent for personal data processing is predicated on four essential pillars: it must be **freely given, specific, informed, and unambiguous**. Both **NDPA and the NDPR** reinforce this notion by statutorily obligating data controllers to ensure consent is validly obtained as it serves as the foundational element that facilitates the collection of personal data. In accordance with **section 26 of the NPDA**, data controllers are responsible for demonstrating proof of consent prior to data collection, thereby underscoring the importance of transparency and accountability in the personal data processing ecosystem.

The **NDPA** further clarifies that a data subject's silence, inactivity, or non-responsiveness cannot be misconstrued as consent, emphasizing the need for explicit and affirmative consent. Therefore, consent must be obtained in a clear, simple, and accessible language, devoid of any form of ambiguity. The consent must not be based on pre-selected confirmations that may be misleading or coercive. The law also recognizes that valid consent can be obtained through various means, including written, oral, or electronic communications, providing flexibility for convenience of data subjects.

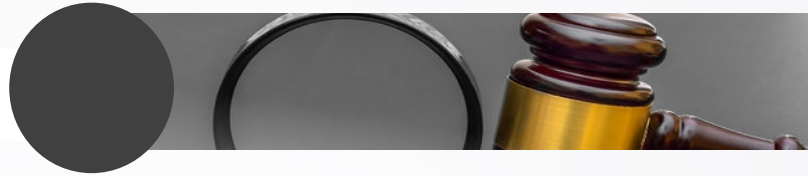
A crucial aspect of the **NPDA (section 35)** is the provision that stipulates that data subjects have the right to withdraw their consent at any time and must be informed of this right, this provision ensures that data subjects can retain control over their personal data and can make informed decisions about its processing. Furthermore, the **NDPA** provides protection for data collectors in the event of consent withdrawal, stipulating that they shall not be held liable for the lawfulness of data collected prior to the withdrawal of consent. This provision strikes a balance between the rights of data subjects and the responsibilities of data controllers, promoting a culture of accountability and trust.

Pertinently, the NDPA's framework prioritizes the protection of data subjects, considering various scenarios and ensuring that consent is not only freely given but also intentional. Additionally, the **NPDA** acknowledges that consent may be given in the context of a contract or service provision, and it provides guidance on the processing of data in such situations.

Ultimately, the **NDPA** establishes a legal framework for obtaining valid consent, emphasizing the importance of transparency, clarity, and data subject autonomy.

Under what Circumstances is it Legally Permissible to Process Sensitive Personal Data?

Sensitive Personal Data carries significant weight and has the potential to have far-reaching consequences on the data subjects if mishandled. In light of this, it is essential to obtain such data from the data subject through legitimate means, with explicit consent generally being a crucial requirement in situations that pose a higher risk to data subjects or raise serious data protection concerns.



Consequently, **section 30 of the NPDA**, prohibits the processing of sensitive personal data, except in the following circumstances:

- i. Where a data subject has given and has not withdrawn consent to the processing for the specific purpose or purposes for which it will be processed.
- ii. Where processing is permitted for employment or social security laws.
- iii. To protect the vital interests of the data subject.
- iv. Non-profit organizations can process data for legitimate activities.
- v. For legal claims, advice, or proceedings.
- vi. For substantial public interest, medical care, or community welfare.
- vii. Public health and archiving purposes are also allowed with safeguards.
- viii. The processing must be proportionate to the aim pursued and safeguard the data subject's rights.

The **NPDA** further emphasizes the importance of consent in the processing of sensitive personal data. The Act defines consent **in section 65** as ***"any freely given, specific, informed, and unambiguous indication, whether by a written or oral statement or an affirmative action, of an individual's agreement to the processing of personal data relating to him or to another individual on whose behalf he has the permission to provide such consent."***

In essence, when processing sensitive personal data, it is crucial for data controllers and data processors must prioritize the data subject's rights and interests by obtaining explicit and informed consent. This can be achieved through transparent and accessible means, ensuring that the data subject is aware of the purpose, risks, and implications of sensitive personal data processing.

LAGOS

God's Grace House

5, Maple Close, Osborne
Foreshore 2, Ikoyi, Lagos.

ABUJA

God's Grace House

6, Oshakati Close, Off
Constantine Street, Wuse Zone 4,
Abuja.