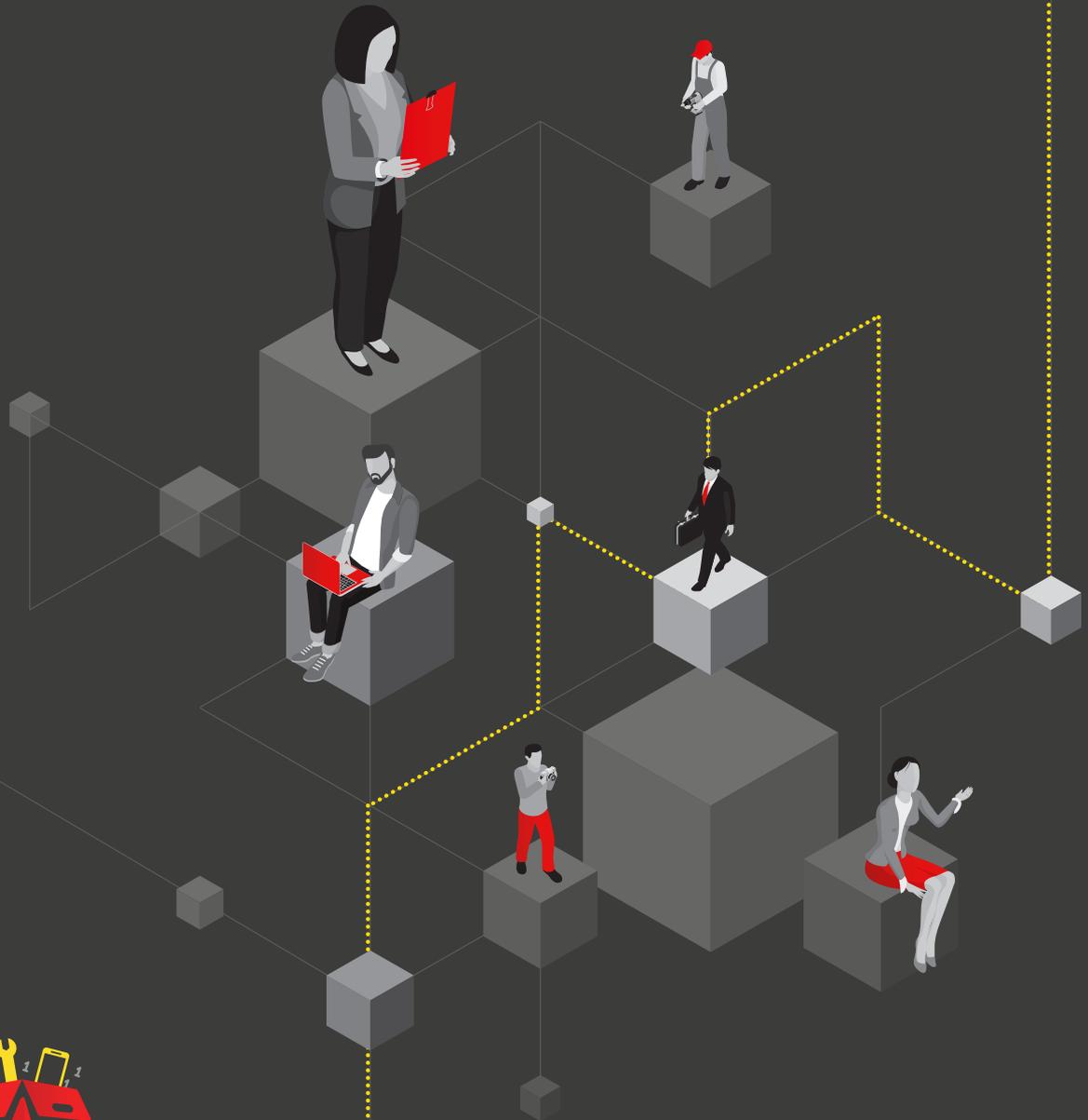




WHAT IS SPECIAL CATEGORY DATA



Guidance for Organisations

This document is purely for guidance and does not constitute legal advice or legal analysis. It is intended as a starting point only, and organisations may need to seek independent legal advice when renewing, enhancing or developing their own processes and procedures or for specific legal issues and/or questions.



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Special Category Data

Special category data is personal data which the Data Protection (Jersey) Law 2018 ('**DPJL**') says is more sensitive, and so needs more protection. In particular, this type of data could create more significant risks to a person's fundamental rights and freedoms if it is lost. For example, by putting them at risk of unlawful discrimination.

The types of personal information/data subject to additional protection under the DPJL, are listed under Article 1 of the DPJL:

- Data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership;
- Genetic or biometric data that is processed for the purpose of uniquely identifying a natural person;
- Data concerning health;
- Data concerning a natural person's sex life or sexual orientation; or
- Data relating to a natural person's criminal record or alleged criminal activity.

Article 9(2) of the DPJL says that:

'...in the case of any processing of data that includes special category data, it must meet at least one of the conditions mentioned in Part 2 of Schedule 2.'

Special category data includes personal data **revealing or concerning** the above types of data. Therefore, if you have inferred or guessed details about someone which fall into one of the above categories, this data may count as special category data. It depends on how certain that inference is, and whether you are deliberately drawing that inference.

Most of the categories are self-explanatory, but 'biometric data', 'genetic data' and 'data concerning health' are specifically defined in the DPJL.

Article 38(2) of the DPJL says that you cannot use special category data for solely automated decision-making (including profiling) that has legal or similarly significant effects, unless you have explicit consent or meet the substantial public interest condition. You also need suitable measures in place to safeguard the data subject's rights, freedoms and legitimate interests.

What are the conditions for processing special category data?

The conditions are listed in **Schedule 2** Part 2 of the DPJL:

In some cases you must also have an 'appropriate policy document' in place to rely on these conditions.

What's different about special category data?

You must still have a lawful basis for your processing under Schedule 2 (Article 9), in exactly the same way as for any other less sensitive personal data. The difference is that you will need to satisfy a specific condition under **Schedule 2** Part 2 of the DPJL.

You must determine your condition for processing special category data before you begin processing it. To help you evaluate the risks of processing this category of data you could undertake a **Data Protection Impact Assessment (DPIA)**.



You need to carry out a DPIA if 'a type of processing is likely to result in a high risk to the rights and freedoms of natural persons, a controller must carry out an assessment of the impact of the envisaged processing operations on the protection of personal data before the processing' (Article 16(1)). You are more likely to need to do a DPIA for processing special category data.

You should choose whichever special category condition is the most appropriate in the particular circumstances.

What are the conditions for processing special category data?

The conditions are listed in **Schedule 2** Part 2 of the DPJL, you will need to meet certain criteria to process special category data.

What is genetic data?

The DPJL defines genetic data in Article 1:

'Genetic data' means personal data relating to the inherited or acquired genetic characteristics of a natural person that give unique information about the physiology or the health of that natural person and that result, in particular, from an analysis of a biological sample from the natural person in question such as DNA or RNA analysis.

Not all genetic data will necessarily constitute 'personal data' within the meaning of the DPJL. A genetic sample itself is not personal data until you analyse it and that analysis produces some data which you can then link back to an identifiable individual.

In most cases, you process genetic information to learn something about a specific identified individual and to inform you about taking some action in relation to them. This is clearly personal data – and special category data.

However, the definition of personal data also includes identification by reference to 'one or more factors specific to the...genetic...identity of the person', even without their name or other identifier.

So, in practice, genetic analysis which includes enough genetic markers to be unique to an individual is personal data and special category data, even if you have removed other names or identifiers. Any genetic test results which are linked to a specific biological sample are usually personal data, even if the results themselves are not unique to the individual, because the sample is by its nature specific to an individual and provides the link back to their specific genetic identity.

However, there are cases where genetic information is not identifiable personal data. For example, where you have anonymised or aggregated partial genetic sequences or genetic test results (e.g. for statistical or research purposes), and they can no longer be linked back to a specific genetic identity, sample or profile, a patient record, or to any other identifier.

What is biometric data?

The DPJL defines biometric data in Article 1:

'Biometric data' means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, that allow or confirm the unique identification of that natural person, such as facial images or fingerprint data.



EXAMPLE

A business introduces an electronic fingerprint scanning system to monitor employee timekeeping. This system is processing biometric data to identify individual members of staff, so the business needs a valid condition for processing that special category data.

Facial imaging and fingerprint data are just two examples, but these are not exhaustive. Many other types of physical, physiological or behavioural 'fingerprinting' fall within the definition.

Examples of physical or physiological biometric identification techniques:

- Facial recognition;
- Fingerprint verification;
- Iris scanning;
- Retinal analysis;
- Voice recognition; and
- Ear shape recognition.

Examples of behavioural biometric identification techniques:

- Keystroke analysis;
- Handwritten signature analysis;
- Gait analysis; and
- Gaze analysis (eye tracking).

All biometric data is personal data, as it allows or confirms the identification of an individual. Biometric data is also special category data whenever you process it 'for the purpose of uniquely identifying a natural person'. This means that biometric data will be special category data in the vast majority of cases.

What is data concerning health?

The DPJL defined data concerning health in Article 1:

'Data concerning health' means personal data related to the physical or mental health of a natural person, including the provision of health care services, that reveal information about his or her health status.

Health data can be about an individual's past, current or future health status. It not only covers specific details of medical conditions, tests or treatment, but includes any related data which reveals anything about the state of someone's health.

Health data can therefore include a wide range of personal data, for example:

- Any information on injury, disease, disability or disease risk, including medical history, medical opinions, diagnosis and clinical treatment;
- Medical examination data, test results, data from medical devices, or data from fitness trackers;
- Information collected from the individual when they register for health services or access treatment;



- Appointment details, reminders and invoices which tell you something about the health of the individual. These fall under 'the provision of health care services' but must reveal something about a person's health status. For example, a GP or hospital appointment in isolation will not tell you anything about a person's health as it may be a check-up or screening appointment. However, you could reasonably infer health data from an individual's list of appointments at an osteopath clinic or from an invoice for a series of physiotherapy sessions; and
- A number, symbol or other identifier assigned to an individual to uniquely identify them for health purposes.

What's different about special category data?

- You must still have a lawful basis for your processing under Schedule 2 (Article 9), in exactly the same way as for any other personal data;
- You must determine your condition for processing special category data before you begin processing it;
- You should also undertake a Data Protection Impact Assessment if you think that the processing is likely to result in a high risk to the rights and freedoms of natural persons;
- You should choose whichever special category condition is the most appropriate in the circumstances.