



Working together to improve the lives of people in debt

A supplementary document to MALG's Briefing Note 4:

"Appropriately processing data from individuals with mental health problems under the Data Protection Act (1998)"

March 2016

"BEST PRACTICE IN THE USE OF 'FLAGS' TO BE PLACED ON THE ACCOUNTS/CASE FILES OF INDIVIDUALS IN VULNERABLE CIRCUMSTANCES WHO ARE UNABLE TO MANAGE MONEY"

1. Background & Introduction

Creditor Sector

Ever since full computerisation was introduced into business, companies within the creditor sector of the industry, who adopted such computer systems have used internal 'flags' (markers) to categorise and distinguish different types of individuals including, in recent years, states of vulnerability. These 'flags' then enable the company to take certain particular actions on those accounts so marked.

Each company has adopted its own internal 'flags' and it is believed that what has developed is an unsatisfactory myriad of different titled 'flags', many of which denote completely different things to different companies.

It is good practice for creditors not to sell debts where the creditor is aware that a customer has a mental health condition and the Lending Code specifically sets out that subscribers to that Code should not sell such debts. At the moment without the use of properly designated universally agreed 'flags' this exercise is very difficult to both complete and to monitor.

It is important to note that the 'flags' that are the subject of this note are only internal 'flags' and not external 'flags' used for reporting data to credit reference agencies as an example.

It should also be noted that this approach is primarily intended for use in a Collections and Recoveries environment. There will be wider data protection and practical considerations in implementing flags and data sharing arrangements across large organisations, which means that wider application of the proposal may not be appropriate.

Advice Sector

Although not so widespread, such 'flags' are also used within the debt advice sector by certain organisations to assist with managing cases.

The FCA

In the FCA's Occasional Paper No 8 on Consumer Vulnerability, (<http://www.fca.org.uk/news/occasional-paper-no-8>) published in February 2015, the whole approach to vulnerability has been widened and although it does indeed include vulnerability where that vulnerability affects the individual's ability to manage money, it also includes a number of other vulnerabilities that need to be taken into account.

To assist with understanding vulnerability the FCA has given the following definition:

"A vulnerable consumer is someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care."

2. The creation of the document.

A small working party of creditors and advisers was set up by MALG in 2014 to look at this issue, liaise with both the ICO and the FCA with a view to arriving at a simple formula to make the use of 'flags' that relate to the vulnerability of consumers, where that vulnerability affects their ability to manage money, fair, simple and workable.

This short paper, which acts as a Supplement to The MALG Briefing Note 4 "Appropriately processing data from individuals with mental health problems under the Data Protection Act (1998)", received early directional support from both the ICO & FCA, reflects best practice in this area and the Information Commissioner's Office has been consulted and it has been shared with The Financial Conduct Authority.

3. The Issue

There are concerns of a potential lack of transparency and fairness in the present use of sensitive 'flags' when it comes to attempting to identify health issues classified under 'sensitive personal data' (or wider forms of vulnerability) . As already stated, it is known that the 'flags' used at the moment within both the creditor and advice sector of the industry differ enormously in range and also in the names given to the 'flags'. It appears that many creditors use a different flag for almost every possible variety of vulnerability, which it is believed is far too prescriptive and tends to impede further conversation. As an example, if there is a

'flag' for bereavement, then by placing that flag against the account a creditor may feel that sorts the problem and the collector will read that 'flag' as the finite truth of the case, whereas it may be far more complicated than that. Use of the 'flag' 'VULNERABLE' should result in the creditor or adviser engaging with the individual more deeply and professionally and making fuller notes. 'Tick boxing' infers that the individual has been placed in a box, nothing further needs to be done and the case is solved. The job is very often not done and in many cases a proper outcome does not necessarily result.

The ICO is supportive of appropriate data processing in the context of 'flags'. It is believed there should be more consistency in what 'flags' are used and it is recommended that a far simpler formula should be adopted which is fairer to the individual, encourages better engagement with the individual, fuller notes and avoids the placing of the individual into a 'box' that in so many cases does not fit.

'Tick boxing' is also considered poor practice by the FCA as well as being against their Principles.

4. The Recommendations

The recommendation is that three 'flags' should be used to cover all vulnerability cases where that vulnerability affects the individual's ability to manage money or deal with their debts at the current time. These 'flags' should be called 'VULNERABLE', 'VULNERABLE (MH)' and VULNERABLE (NEC).

The (MH) denotes mental health conditions exist and the (NEC) where a vulnerable issue has been identified but the individual has either declined to give their explicit consent to hold this information but the flag is being used to aid the management of the customer's account where it is clearly to their benefit, or where explicit consent is being sought but has not yet been obtained.

The use of three 'flags' only should initiate better conversations and engagement with the individual and stop 'tick boxing'. It should ensure more careful handling of such cases. Naturally supplementary notes can always be added to the individual's file when appropriate, which should assist the organisation placing the 'flag' to understand more fully the particulars of each case so 'flagged'. The use of the general word "VULNERABLE" should automatically encourage fuller notes on the file as to what the vulnerability is. In turn this should lead to better and more in depth engagement with the individual and better outcomes.

5. Non-engagement

Creditors

One of the problematic areas is when creditors attempt to engage with their customers through correspondence and receive no response. Is this customer a 'won't pay' and avoiding engagement purposely or are they unable to respond to such communication because of their vulnerability? Creditors want to act in a way that benefits their customers but such lack

of engagement is a large hurdle over which in many cases it is almost impossible to jump.

Problems can also arise when vulnerability is advised, perhaps via letter, telephone or provided by a third party, but the creditor is still unable to obtain explicit consent, due to lack of further engagement. In some cases the purpose may be made clear from the original contact i.e. there is an expectation that such information be used to assist in managing the customer's account and hence this should be recorded as such. In the absence of such assurance the VULNERABLE (NEC) should be used.

It must be remembered that the easiest way to deal with any of these complications is to start by always seeking to get the customer's 'explicit consent'. Every effort therefore should be made to obtain this 'explicit consent'. As stated in MALG Briefing Note 4 under paragraph 3.5. It is envisaged that processing sensitive personal data without obtaining 'explicit consent' should be limited to rare occasions when there is a genuine concern for the customer's wellbeing or safety.

Advisers

The advice sector can also experience similar scenarios where their client does not respond to communications or indeed refuses to give 'explicit consent' under the Data Protection Act.

6. Qualifying of flags.

The recommended approach removes the necessity of qualifying the vulnerability - mild/ severe/ short term/ long term by use of a 'flag'. Instead, by encouraging engagement the extent and possible length in time of the vulnerability should be able to be both discovered by communication with the individual and then added to that person's file. This should produce a far more comprehensive record of the vulnerability, its state and possible duration, if known. However, it does highlight the importance of regular reviews of the individual's condition so that the data and 'flag' is not held for longer than it should be.

7. Reviews and removal of flags

It is believed that the correct procedure for placing a 'flag' on an account/case file should be reasonably straight forward but its removal is often where systems break down. Under the Data Protection Act, personal data can be retained as long as it is accurate, relevant and processed in compliance with all other data protection principles. Under the Treating Customers Fairly Principle of the FCA, the length of time such data is held is of prime importance and a flag should not be maintained unless it is necessary to ensure the individual can be treated appropriately and it is believed that the information is still current.

A regular review of the case should be undertaken and the recommendation is for this to be on a six monthly basis, where appropriate, for both creditors and advisers unless a change of circumstance warrants an earlier review. This may well include a review of

the medical evidence, where necessary. Each case should be looked at on an individual basis.

If a 'VULNERABLE (MH)' 'flag' is removed because it is known that the mental health condition has improved, consideration should be given as to whether the case is still needing care and therefore a general 'VULNERABLE' 'flag' should still be applied.

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