

10 ePortfolios and the Law: What you and your organisation should know

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Objective

This chapter sets out the basic legal issues that you and your organisation should keep in mind regarding your use of ePortfolios in youth work, including copyright, data protection and accessibility. It also highlights a number of issues and measures that you can use to identify and address those issues that might particularly affect your work.

10.1 Introduction

Across Europe, regardless of the country in which an ePortfolio system is used, a similar set of questions with legal implications tends to need to be considered. These questions are:

- Who owns the information held in the ePortfolio system?
- Who has the right to see and use personal information in the ePortfolio system?
- Who has the right to see and use other valuable information in the ePortfolio system?
- What happens if the ePortfolio system is misused by learners?
- What happens if the ePortfolio system can't be used by certain types of learner because they are disabled, they lack technical skills, or they face cultural barriers?

Which of these questions affects your particular use of an ePortfolio system will depend on factors such as:

- What type of data is collected, stored and used?
- Who apart from the learner is allowed to have access to the data?
- How, and when, can learners make information in their ePortfolio available to others?

The legal issues may already have been considered by your organisation. Most legal issues are best dealt with before ePortfolio systems are rolled out for use with learners. This means that the relevant legal risks can be identified, their impact assessed, and suitable processes and guidance developed to address them. Everyone involved in the development and use of ePortfolio systems, whether they are managers, information technology specialists, or tutors, should take time to **discuss as a team what legal issues the use of the system might raise**.

It is a good idea for organisations to use those discussions to **produce written advice and good practice guidelines**. A successful ePortfolio system may be used for many years, and creating this sort of information will help ensure that future staff and learners can be quickly and effectively advised about the issues. Spending some time thinking about the issues may also help you to spot issues where further advice is required, either from your senior colleagues or from legal advisors - remember that it is better to **ask for any advice you need at an early stage**, rather than later after something has gone wrong.

It is important to remember that laws affecting your work may change over time. Some laws, such as copyright laws and personal data protection laws are changing very rapidly due to the impact of new technologies. It is helpful to **try to keep up-to-date with relevant legal developments** to see how they might affect your use, or your learners' use, of the ePortfolio system. A periodic reassessment of the legal risks, an annual review of the accuracy of your written advice and good practice guidelines, and an occasional **check on your organisation's and your learners' actual use of the system**, is a helpful way to make sure that both your and your learners' use is within the law.

10.2 Data Protection, Privacy and Confidentiality

The ways in which ePortfolio systems are used means that there is often a lot of personal information about learners stored in them. This information may be added by the learners themselves, or by a range of other people, such as tutors, administrators and employers, depending upon the purpose of the ePortfolio and the organisation using it. As well as adding information, tutors, and other members of an organisation, such as managers, administrators, information technology specialists and employers, may be able to access and extract information from an individual's ePortfolio for particular purposes.

Data protection laws affect what can be done with an individual's personal data, by people other than the individuals themselves. Most European countries have some type of data protection law. In the European Union (EU) countries, national laws are based on the EU Data Protection Directive 1995. However, national laws vary quite widely in content and national regulators tend to take different approaches to their enforcement, so knowledge of your national system is important.

Under data protection laws, **organisations and their staff (data controllers) who make decisions about how other people's (data subjects') personal data is to be used have to follow certain rules.** Data controllers should remember three principles: purpose, fairness and transparency.

- Purpose - data controllers may use data subjects' personal data only where they have a clear and lawful purpose for doing so.
- Fairness - data controllers who have identified a clear and lawful purpose for using a data subject's personal data must show that their use respects the data subject's rights.
- Transparency - data controllers must provide data subjects with a basic minimum amount of information about the use of their personal data.

The important thing to remember is that **an organisation is a data controller only if it, or a member of staff acting for it, makes decisions about how and when any of the personal data in an ePortfolio are used.**

- If your organisation just hosts the ePortfolio for a learner and has no control over the use of the contents, data protection legislation will not apply to it, or to you as a representative of your organisation working with learners.
- If your organisation does exercise some control over how the personal data in an ePortfolio is used, it may be considered a data controller, and it will have to ensure that it, its employees, and third parties, comply with national data protection law when accessing the ePortfolio.

Your organisation will normally have decided, prior to using an ePortfolio system, whether, under your national legislation, its functions are likely to mean that the organisation is a data controller. **When you use personal data on behalf of a data controller, it is they, and not you, who are directly responsible if the law is broken.** However, it is likely, either through your employment contract or other contractual agreement, that you will be required to take certain precautions to ensure that learners' personal data is not misused as a result

of your actions. **If you are using learner personal data on behalf of an organization, you should be provided with training about how that data may be used.**

Learners may occasionally use other people's personal data in their ePortfolio. This means that **learners may sometimes be considered by the law to be data controllers.** Where this is the case, your organisation should provide clear guidance both to you, and to the learners, about what learners may and may not do with other people's personal data.

Apart from data protection law, **some countries also have particular privacy or confidentiality laws that relate to personal information.** Obeying data protection law may not be enough to meet the requirements of those laws. Some training and jobs obviously have higher expectations of confidentiality, for example, where ePortfolios are used in support of health-related learning or work. In such cases, greater restrictions may be placed on the data that end users can use in their ePortfolios, or stricter security requirements may be placed on the ePortfolio system.

Most organisations have a person who is responsible for data protection and confidentiality matters. **If you are not certain whether a particular use of personal data is permitted, you should ask for advice before beginning, or allowing learners to begin, that use.** This is especially important where you want to allow the use of personal data from a learner's ePortfolio by anyone other than the learner.

10.3 Ownership and use of information in ePortfolios

The ownership of information that is placed in an ePortfolio can sometimes be controversial. Some examples include:

- An ePortfolio held at an organisation relating to a course of study or training where all the information is created by a learner for their personal use and stored on their home computer - while copyright law across the EU varies, it would normally be the case that users own the information they have created.
- An ePortfolio held at an organisation relating to a course of study or training which incorporates information from an organisation's administrative systems about the learner such as grades, examiner's comments and tutor assessments - here it is likely that some of the information is 'owned' by the organisation and some by the learner.
- An ePortfolio relating to a work experience placement created by a learner on a program designed to help the long-term unemployed - here the learner and possibly the employer will have rights in the data, for example, if the learner has placed into an ePortfolio material held by the employer - copyrighted material, trademarks, material received in confidence etc.

When they create digital/digitised works that they may then place in an ePortfolio, **learners may be creating works in which they have intellectual property rights, such as copyright.** Other parties may also have rights in information that a learner may wish to put in an ePortfolio, and there may be a clash between what the learner wishes to do with the information, and what the third party thinks is an appropriate use.

Organisations should ensure that tutors understand the types of rights in information that the use of an ePortfolio may raise, and how these may affect what learners may legally use. **Tutors should be able to explain to learners what the appropriate uses of information in ePortfolios are, and to discuss why other uses may be inappropriate.** In the Information Society, understanding how the laws relating to ownership of digital materials works is increasingly important. **Misuse of some types of third party information, for example digital music files (MP3s) may leave organisations, tutors and learners exposed to legal actions,** for example, for breach of copyright. Even where legal action is

unlikely, misuse may damage relations between the learner, the organisation, and third parties, such as sponsors and employers.

In circumstances like sponsored education, work placements etc it is important that organisations ensure that relevant third parties like sponsors and employers are aware of the type of information that may be placed in learner ePortfolios, and what it may be used for, so that such **other information owners can provide input into tutor discussions with learners about acceptable uses.**

10.4 Misuse of ePortfolio Systems by Learners

ePortfolio systems may permit learners to extract information from their ePortfolio for presentation to third parties, or permit third parties access to parts of the ePortfolio selected by the learner. Some systems permit users to publish material from their ePortfolio onto webpages hosted by the ePortfolio provider. Publication of ePortfolio-based material may create legal risks, in that learners may make available material that is inappropriate for publication. **Allowing learners to publish ePortfolios on webpages through an organisation may leave the learner and the organisation open to civil or criminal liability for content issues** such as libel, breach of copyright, contempt of court, obscenity and indecency. An organisation considering providing such a service should normally have considered how best to reduce those risks while maintaining as many as possible of the benefits of the service.

It is good practice for an organisation to:

- provide guidance to its learners about the risks of making ePortfolio information widely available;
- provide guidance to tutors about the risks to learners and to the organisation, and what the organisation's procedures for dealing with them are;
- have clear and well publicised rules (and sanctions) for inappropriate publication by learners;
- have administrative procedures for dealing with third party complaints.

It is also helpful, as part of the learner's use of an ePortfolio system, if **tutors can provide advice about how learners can use their ePortfolio appropriately, and encourage discussion of ethical issues relating to the use and publication of certain types of data.**

10.5 User Accessibility, Disabilities Discrimination, and other Social Inclusion Policies

As a tutor, it is important to remember that while ePortfolios potentially offer important advantages to learners, not all learners will find new technologies either helpful or desirable. Certain groups may find the use of ePortfolio technologies has the effect of excluding them from particular activities. Some potentially disadvantaged groups of learners are immediately obvious. In particular, disabled learners for whom technology often provides new opportunities, but also new interfaces to negotiate, may find the challenges considerable. Other groups potentially disadvantaged include:

- learners with poor literacy skills
- learners with poor concentration or memory skills
- learners with limited access to the necessary levels of technology

- learners forced to change between ePortfolio systems on a regular or irregular basis, such as Travellers and children of military personnel

Specific educationally-related disability anti-discrimination laws, such as the United Kingdom's Special Educational Needs and Disability Act 2001 (SENDA) seem to be relatively new, and definitions of disability vary widely across the EU Member States. However, many European countries are in the process of passing laws which mandate that disabled learners, and other at-risk groups, must not be unreasonably disadvantaged in their access to educational provision.

When using ePortfolio systems, you should **take care to ensure that learners are not inadvertently disadvantaged by your use of a particular ePortfolio system, or particular elements of such a system**. Where there are problems, you should advise your organisation and **take appropriate measures to ensure that alternative solutions are provided to reduce or remove those disadvantages**. It is good practice to **make a written record of potential problems for learners for future reference** as well as to **record what particular measures were adopted to prevent particular groups of learners being disadvantaged**. This will permit both you and your organisation to demonstrate first, that you have taken appropriate account of the disadvantages that might be faced by those learners and second, that measures adopted by you and your organisation to address those disadvantages are proportionate and reasonable.

Summary

- Early consideration of how the law relates to your work can save considerably more effort later on, by allowing you and your organisation to plan to prevent legal risks, or reduce their impact.
- Having a basic understanding of the legal issues is important, so ask your organisation if it can provide relevant training, or access to useful resources.
- Tutors have an important role to play in informing their organisations of potential problems, as working closely with learners provides a clearer view of the practical legal issues that ePortfolios raise.
- Tutors have an important role to play in informing their learners about the implications of their use of information in an ePortfolio, and in discussing the legal and ethical issues involved - knowing these rules is a vital Information Society skill.
- Maintaining adequate documentation of processes and decisions taken with regard to legal issues helps to provide continuity to both your and your organisation's approach to those issues over time.

Examples of more detailed legal materials available for staff working in eLearning and using ePortfolios can be found at:

The JISC Lifelong Learner Legal Study (UK)

http://www.jisc.ac.uk/index.cfm?name=project_learner_records_legal_study

The JISC Legal Information Service (UK)

<http://www.jisclegal.ac.uk/publicationspage.htm>