



December 18, 2019

Lever, Inc.
155 5th Street
San Francisco, CA 94103

Re: Evaluating the Limitations of Legitimate Interest and Consent in Talent Relationship Management

To Whom it May Concern,

Lever is a Talent Relationship Management software, helping our customers find potential employees, accept applications from prospective employees, and manage the full hiring and engagement cycle with those candidates. To help our current and prospective customers navigate legal components of bringing Lever into their organization, we continue to build resources – like the attached memorandum template – as a resource for you.

The attached template memorandum concerning the “Collection, Use and Processing of Personal Data” is not intended to be legal advice, as the processes, laws and obligations for each of our customers may differ from what is true for Lever, and we are not able to provide legal advice to our customers. The content in the template represents the analysis Lever has performed on its own processes. While this template may not directly apply to your business practices, we hope this will be a helpful starting point.

The purpose of this template is to provide a starting point for our customer’s internal discussions with counsel regarding appropriate purposes for processing under the General Data Protection Regulations (“GDPR”). When Lever undertook this analysis for its own business, we started by mapping our hiring processes to understand the sources of personal data from candidates and to understand where that data would flow. As a next step, we evaluated the purpose and necessity of these types of data to the Lever business as part of a legitimate interest analysis, then looked at the expectations and risks to the candidate to determine balance. We recommend that a customer seeks counsel to engage in a similar exercise to evaluate how their unique business practices may cause differences in analysis.

In speaking with hundreds of customers regarding their compliance posture for GDPR and other data protection laws, we have come to believe that compliance is a team effort, both internally and as part of a coordinated effort with trusted vendors. Where Lever can be of assistance, or where you believe that additional resources would be useful in meeting compliance obligations, we encourage you to reach out to our Lever Support Team by opening a ticket, or to me at privacy@lever.co.

Sincerely,

DocuSigned by:

.....287DF8CD49D5407.....
David Hollady
Lever, Inc.
Corporate Counsel
Data Protection Officer

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To: File

From: Data Protection Officer

Date: November, 2019

Re: General Data Protection Regulation : Collection, Use and Processing of Personal Data

1. BACKGROUND, SCOPE AND STRUCTURE

- 1.1 In furtherance to [Controller Entity Name] (“we” or “our”) compliance with the EU General Data Protection Regulation 2016/679 (the “GDPR”), we are providing this memorandum to further define and explain our collection, use and processing of personal identifiable information (“PII”) of individuals, namely, citizens of the European Union and other jurisdictions subject to the GDPR who apply for a position with our company or who are identified as potentially qualified candidates (“Candidate”). Due to the complexity of privacy and data security concerns, we may provide a series of memoranda, which will address different aspects of our operations.
- 1.2 Our vendor, Lever, Inc. (“Lever”), provides a talent cloud management software platform (“Platform”) accessible to users via a web interface. Candidates providing PII to our company will generally navigate to our website and submit a job application through our website which will flow into our instance of the Platform. When a Candidate provides PII through our website that flows into the Platform, our privacy policy will govern the interaction between the Candidate our company.
- 1.3 The Platform manages the applicant process, providing functionality to manage the interaction between us and the Candidate, track the Candidate through application stages, seek feedback from our employees regarding a Candidate, make hiring decision and send an offer letter.
- 1.4 We may use other integrations into the Platform to enable additional functionality with systems such as email, background checks, employee onboarding, and HRIS. Processing by Lever integrations is not included in the scope of this memorandum.
- 1.5 We are the GDPR data controller, and Lever acts as a GDPR data processor for our company and provides comprehensive GDPR related product functionality to allow us to best meet our compliance needs. Lever is certified under EU-U.S. and Swiss-U.S. Privacy Shield framework to fulfill GDPR requirements for safe data transfers outside of the EEA to Lever’s hosting facilities contracted with Amazon Web Services in Oregon, USA.

2. PERSONAL DATA PROCESSING

- 2.1 Under the GDPR, “personal data” (or PII) is defined as “any information relating to an identified or identifiable natural person (called a data subject, or for our purposes, a “Candidate”).
- 2.2 Due to the nature of the Platform, we may retain PII of data subject categories necessary and common to the process of fielding job applications and processing employment applications, including Candidates, our employees and Candidate employment references. For Candidates in the Platform, we commonly store: first name; last name; email address;

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address; telephone number; employment history; education; location; salary; job position; publicly available trade union memberships and other information that may be requested by us or submitted by a Candidate as part of a hiring process. We request only as much information that is required during the candidate evaluation process in keeping with data minimization efforts as required under GDPR Article 5, section 1(c). We also store our own employees' name, email address who use the Platform.

- 2.3 We do not request sensitive PII such as health data, legal data, credit card or bank account information as part of a hiring process.
- 2.4 A Candidate may choose to provide information other than what we request. By choosing to provide additional or different information, the Candidate consents to our Company's Privacy Policy and the Processing of the information submitted as described in Section 3 below. In the event that a Candidate provides information that was not requested by us, a Candidate may still reach out to us through the Platform or as described in our Privacy Notice to request removal of the PII.

3. NATURE AND PURPOSES OF PROCESSING

- 3.1 "Processing" of PII under the GDPR is defined as "any operation or set of operations which are performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction". For instance, both the collection of PII from a Candidate, as otherwise publicly available, and the displaying PII through the Platform constitute different processing activities under the GDPR.
- 3.2 On our behalf and based on our instructions, the Platform processes PII and other data for the purpose of enabling the candidate relationship management, administering hiring and managing candidate evaluation processes.
- 3.3 PII will be subject to the following basic processing activities: collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.
- 3.4 We may collect and store other data subject categories and will notify Candidates upon collection of the data and where appropriate, obtain Candidates' consent.

4. TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

- 4.1 According to Article 45 GDPR, a transfer of personal data to a third country (i.e. a country which is not a member of the EU or the European Economic Area) may take place without requiring any specific authorization where the EU Commission has decided that the third country ensures an adequate level of protection. For instance, the United States has implemented Privacy Shield, which is a framework of protections for data transfers from the EU to the United States. Under Privacy Shield, the EU recognizes that any United

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States organization that joins Privacy Shield is deemed to have an adequate level of protection. Consequently, if a receiver of personal data is certified under Privacy Shield, no safeguards under Article 46 GDPR are necessary. If the receiving country is not deemed ensure an adequate level of protection, the transferring party has to implement appropriate safeguards, as listed in Article 46 GDPR. As set forth above, our processor, Lever, maintains the Privacy Shield certification. We have entered into a Data Protection Agreement with Lever as the lawful basis for transfer under Privacy Shield.

- 4.2 Article 46(c) GDPR allows for transfer to a third country if standard data protection clauses adopted by the EU Commission are applied. These clauses can be made part of an agreement.
- 4.3 Lever may utilize sub-processors to assist in the lawful transfer of PII. As a condition of any transfers, Lever requires its sub-processors to comply with privacy and confidentiality obligations through contracts with each sub-processor. Further, sub-processors are subject to review and audit by Lever. Lever has provided the list of sub-processors on its website located at: <https://www.lever.co/subprocessors/>.

5. DATA PROCESSING PURPOSES

- 5.1 Under Article 5 of the GDPR, PII may only be processed for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes. Our purpose is to establish a potential employment relationship with Candidates and efficiently manage and track the hiring process for each Candidate.
- 5.2 A processing activity can have several different purposes. Each such purpose requires its own legal ground (as further described below) and all legal requirements (including but not limited to the obligation to inform the Candidates of each purpose set forth above) must be fulfilled for each purpose. Further, Article 25 GDPR sets out that only PII which is necessary for each specific purpose shall be processed (data protection by default).
- 5.3 Article 5 of the GDPR sets out that PII shall be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed (data minimization). We have configured the Lever platform to minimize the PII collected and processed solely to the information required to consider a job applicant for employment.

6. LEGAL GROUNDS FOR PROCESSING

- 6.1 Generally, Article 5 of the GDPR sets out that any processing of PII must be lawful if at least one of the legal grounds set out in Article 6.1 of the GDPR is applicable. Set forth below is our analysis of the lawful purpose of processing Candidates' PII, the necessity for our Company to be able to process Candidates' PII weighed against the Candidates' good faith interest in engaging with our Company with respect to employment opportunities.
- 6.2 *Identification of potential Candidates*
 - 6.2.1 We collect and process publically available information of Candidates we believe would be candidates for employment at our Company. During this time prior to engaging with the

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Candidate, we rely on **legitimate interest** as the legal grounds under which we may collect and process PII.

6.2.2 We utilize the Platform to gather PII made publicly available by potential Candidates that we believe would be interested in employment opportunities at our company. We collect only the information that is required to consider a Candidate for employment opportunities.

6.2.3 According to Article 6.1(f) of the GDPR, processing is lawful when necessary for “the purposes of the **legitimate interests** pursued by the controller or 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”.

6.2.4 The nature of the locations where information is publicly sourced indicate a good faith interest in new employment opportunities such as professional networking websites. Our interest in identifying new candidates for employment, the likely interest of Candidates in new opportunities, and public nature of information result in a low risk to the interests or fundamental rights and freedoms of the Candidate.

6.2.5 We have a legitimate interest in compliance with our company’s sustainability and growth of our operations. Through use of the Platform we are able to focus on providing efficient means to consolidate potential Candidates’ data, including basic PII, in order to lessen the time and resources it requires to gather recruitment information thus decreasing the amount of time from identifying potential Candidates through to hiring and onboarding. Without the ability us to gather and utilize PII, our recruitment cycle will increase, consequently creating gaps in staffing needs, potentially missing Candidates who are available for hire, and not supporting our company’s growth and fulfilling our obligations to our customers.

6.3 *Contact with potential Candidates and Candidate Applications*

6.3.1 Utilizing the public information we are able to review, if we find a potential Candidate who matches the experience and skill set we are seeking for an available career opportunity, we will make contact with the potential Candidate through the Platform. At this point in time, we are continuing to rely on our legitimate interests described in Section 6.2.

6.3.2 When a Candidate applies for an employment opportunity and provides PII, but has not yet provided consent or indicated that the Candidate does not provide consent, we will rely on the legitimate interests described in Section 6.3.3.2.

6.3.3 When a Candidate applies for an employment opportunity, or when contact has been made with a Candidate, there are four decision points:

6.3.3.1 **Consent:** According to Article 6.1(a) of the GDPR, processing is lawful when the data subject (here, our Candidate) has given consent to the processing for one or more specific purposes. The Platform is designed to track Candidates’ consent when and where provided. We have reviewed and determined that the points in the Platform requiring consent are specific and unambiguous and are presented in a manner which is clearly distinguishable from other matters, in an intelligible and easily accessible form, using clear and plain language. We have also determined that it has designed the points of consent to be informed, meaning that the purposes of the processing that are subject to the consent are clearly described to comply with the concept of informed consent. We have provided links to our Privacy Notice on each page of our website with contact information to object

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to the processing of a Candidate's PII. Additionally, we have provided links to our Privacy Notice on the website where a Candidate would submit PII as part of an application employment opportunities with contact information to object to the processing of a Candidate's PII. Since providing PII that is not publicly available to and in the Platform, we reviewed and determined that the consent is voluntary and freely given.

6.3.3.1.1 The Candidate is interested and provides consent to continued contact from our company. Consent then becomes our legal grounds to continue collecting and processing PII. The Candidate is provided opportunities to decline consent at any time during the processing.

6.3.3.2 ***Continued legitimate interest***

6.3.3.2.1 The Candidate either does not reply or replies without specifically providing consent within the Platform. In this event, we will continue exploring potential employment opportunities with the Candidate and will continue to rely on our legitimate interest as the legal grounds on which we will continue engaging with the Candidate using his or her PII. Where a Candidate has not requested deletion of their information, we have a continued interest in contacting that person for employment opportunities using publicly available information, or using information provided by the Candidate for purposes of seeking employment opportunities. As the Candidate has not requested the removal of their PII, and the information was either publicly available or freely given by the candidate, our interest discussed in Section 6.2.5 applies and in processing the information outweighs the interests or fundamental rights and freedoms of the Candidate.

6.3.3.2.2 The Candidate does not reply at all. In this instance, we keep the Candidate's PII in the Platform for future opportunities that may be of interest to the Candidate. The legal basis continues as a legitimate interest as discussed above, since the Candidate did not provide any reason for us to believe that he or she did not wish to be contacted in the future regarding employment opportunities. Where a Candidate has not requested deletion of their information, we have a continued interest in contacting that person for employment opportunities using publicly available information, or using information provided by the Candidate for purposes of seeking employment opportunities to meet our interests described in Section 6.2.5. As the Candidate has not requested the removal of their PII and the information was either publicly available or freely given by the Candidate, our interest in processing the information outweighs the interests or fundamental rights and freedoms of the Candidate.

6.3.3.2.3 We engage in discussions and interviews with the Candidate, but the Candidate is ultimately not offered a position. We keep the Candidate's information on file for future opportunities. Where a Candidate has not requested deletion of their information, we have a continued interest in contacting that person for employment opportunities using publicly available information, or using information provided by the Candidate for purposes of seeking employment opportunities as candidate may be suited to future opening. As the Candidate has not requested the removal of their PII and the information was either publicly available or freely given by the Candidate, our interest in processing the information outweighs the interests or fundamental rights and freedoms of the Candidate.

6.3.3.3 ***Legal Basis Terminates.*** The Candidate declines consent or provides us with a notice to remove his or her PII from our records. In this case, our legal grounds on which to continue to collect, use, process and store no longer exist. The Platform provides us with the mechanism to anonymize the data if we wish and then delete the PII from the Platform.

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- 6.4 *Offer and Acceptance of Employment.* According to Article 6.1(b) of the GDPR, processing is lawful when necessary for the **performance of a contract** to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract. [Caution: Employers in at-will states may wish to remove this bullet and leave the second bullet so as to not imply that there is an employment contract between employer and employee.]

7. FINDINGS

- 7.1 We take compliance with legal obligations seriously, balancing the operations of its business and efficiency of the Platform with the interests and fundamental rights of individuals. We use Candidates' public data through various social and professional networking sites and other social media platforms. We take care to gather only the data that we can access through review of public and readily accessible means. Once a Candidate consents to the collection, use, processing and storage of his or her PII through interaction with the Platform, the Platform's additional data fields become available for a Candidate to provide additional PII. Candidates choose whether they wish to provide additional PII, thereby signaling to us that they have decided that their interest in providing their PII through the Platform overrides what could be considered a fundamental right or freedom. We also request consent upon this interaction.
- 7.2 Collecting public information from recruiting and networking sites is consistent with the very purpose that Candidates freely provide their PII on a publicly available site, that is, to provide themselves and potential employers with enough data upon which the potential employer can determine whether a Candidate has at least the minimum experience and skillset required to qualify for an available employment opportunity. We maintain a database of Candidate information whether a Candidate is successful or unsuccessful in gaining employment, so that the Candidate may be contacted in the future for a new employment opportunity as mentioned above, as the opportunity and our needs change.
- 7.3 Under Article 21 of the GDPR, Candidates have a right to object to processing based on legitimate interest. In the event of such objections, we must be able to demonstrate compelling legitimate grounds (which is a slightly higher threshold) for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defense of legal claims. The Platform provides such mechanisms to object to processing and other rights afforded by the GDPR.
- 7.4 Depending upon the point of interaction and lifecycle of recruitment through onboarding, we determined that we have a legitimate interest in collecting, using, processing and storing PII of Candidates in the Platform to service the needs of our business to recruit the best talent, and providing effective ways for our recruiters and hiring managers to connect with Candidates while minimizing the inefficiencies and potential inaccuracies of human data entry.
- 7.5 For more information about rights as a data subject and Candidate, please visit our Privacy Policy [Notice] located at: _____.

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