

Review of the Balance of Competences: Information Rights. Data Protection and Access to Official Information: Newspaper Society response

The Newspaper Society represents the regional media industry. Its members publish around 1100 regional and local titles, with 1700 associated websites in the UK with ever developing mobile information services. The local press is the UK's most popular print medium read by 30 million people a week. Local media websites attract 79 million unique users each month. Local newspapers are trusted by their readers- both editorially (and it was 'much praised' not criticised as the Report of the Leveson Inquiry noted) and as advertising media. Over 60% of people act upon advertising in local newspapers.

This short note summarises issues relevant to the Balance of Competences review. We refer you also to views expressed at the Information Rights Workshop and to past submissions on the current EU data protection proposal, UK data protection consultations, submissions relating to the Leveson Report recommendations and submissions opposing proposed changes to UK freedom of information legislation that would restrict its use by the regional and local media or reduce its remit.

The Newspaper Society shares the general concerns of the UK business and advertising community about the additional regulatory burdens that the new data protection framework legislation threatens to impose upon the UK. It also shares the strong concerns of media associations and media organisations across Europe about the potentially chilling and restrictive effect that the new proposals could have upon press freedom, freedom of expression and freedom of information, and their support for explicit mandatory journalistic, literary and artistic exemptions to all relevant provisions.

The media has longstanding concerns about the impact of EU data protection legislation upon the practice of freedom of expression and press freedom (across media platforms). It is important that the European institutions are not allowed to acquire competence over media regulation and data protection regulators do not become the pan- European regulators of journalism and media content,

The European Commission and European Parliament do not have competence to legislate on press content controls. Nor was data protection supposed to be an agent of media control. However data protection legislation emanating from Europe is seen as a legitimate means of media control, including by reference to the interpretation of legislative exemptions. There is a danger of regulatory creep.

Perhaps this can be illustrated by reference to the 1995 publication by Butterworths of The Law of Journalism, written by the NS legal advisers. Of its 550 pages, only 4 pages were necessary at that time to describe how to approach the potential practical effects of the Data Protection Act 1984, upon journalism, in view of the then Data Protection Registrar's helpful interpretation of the Act and the assistance given by Government departments to counter the misunderstanding of other public bodies and services which unnecessarily inhibited the release of information to press and public. The 1984 Act was of course broadly predicated upon transparency of data use.

At the same time, the new data protection directive was reaching its final stages. The media across Europe was making strong representations to the European institutions for adequate journalistic, literary and artistic exemptions to enable day to day newsgathering, reporting, investigation in view of the impossibility of lawful publication or broadcast without them. The data protection regulators across Europe were seeking to narrow any exemption given, confining it to only that deemed necessary. That directive's definitions of data and processing were all embracing and set conditions precedent to lawful use.

The NS and BBC submissions to the UK government's consultation on implementation of the 1995 directive outlined in practical terms why those exemptions had to be translated into UK law, plus regulations made for further gateways for sensitive processing, to enable the lawful operation of the

media, print and broadcast. The UK had of course no written constitution or human rights legislation guaranteeing freedom of expression and press freedom and lacked freedom of information legislation, as pre-existing protections against a directive predicated on privacy for personal data. The Freedom of Information Act 2000 had to specify that data protection overrode FOI rights.

Once the Data Protection Act 1998 came into force, despite the exemption and regulations creating additional gateways for release and publication of sensitive data, data protection has been cited as the basis for refusal of information and as the basis for legal action against the media. The Google Spain decision has underlined the crucial importance of the special purposes exemption for all media under the current legislation and a robust, certain and broad exemption from the right to be forgotten and right to object and other provisions of the new EU measure. It would not just be commercially devastating to the media, but hugely damaging to the local press role as contemporary chroniclers and uniquely rich record of the region. We hope that the UK government will do nothing to undermine the special purposes exemption under current legislation and will strive to build in strong defences, protections and exemptions in the new EU measure.

By 2013, the ICO himself pointed out that implementation of the Leveson recommendations, on stripping back those much needed statutory exemptions in the 1998 Act, would transform him into the de facto statutory regulator of the press. This was not the purpose of the EU or UK legislation. The NS and media organisations are strongly opposed to the implementation of the data protection recommendations of the Leveson Report, which received scant consideration and would have a highly detrimental effect upon journalism. Moreover, the consultative ICO draft good practice guidelines on data protection and journalism have been severely criticised by specialist media lawyers and the media. The draft's approach again illustrates the danger of regulatory creep in the UK and danger of competence creep in the EU, since the draft would apparently aim to render impossible anything other than what the ICO deemed to be 'public interest' journalism accompanied by impractical and minutely documented processes, even for the most routine and unexceptionable reporting.

Meanwhile, once again media organisations across Europe have had to make strong representations to the European institutions for the reinstatement and retention of the explicit exemptions for journalistic, artistic and literary processing to ensure that the new measure, regulation or directive, would at least guarantee existing levels of protection for freedom of expression, media freedom, freedom of information and open justice and greater clarity as to their operation. The NS has welcomed Parliamentary statements made by UK ministers to date on the preservation of current levels of protection, as these are as vital to the straightforward operation of hyper local, local and regional media in print, online and mobile or broadcast, as to the national and international news media with global reach.

The MoJ is well aware of newspaper, industry and business concern about the general commercial and economic effect of the current EU draft measure. The current measure could result in adverse effects upon the commercial revenues derived from advertising and marketing, sales and subscriptions upon which independent businesses depend. These problems stem from over prescriptive legislation, definitions of personal data, consent requirements, operation of rights to object and to be forgotten, disproportionate sanctions, human resources implications as well as the dangers of the measure becoming a regulation, as yet unknown additional problems of delegated legislation, or its eventual method of interpretation and enforcement by regulatory authorities.

Freedom of information is of course strongly supported by the regional and local press at national, regional and local level for central and local government and public bodies. It would strongly oppose any changes to UK legislation that would reduce the ambit of the FOIA, or restrict regional and local journalistic use of the Act, including by way of time or costs constraints. In general, it would not favour any legislative change that reduced public and press rights to information, whether due to the introduction of EU measures or UK government policy.

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