Call for views on the General Data Protection Regulation derogations

Response from the University of Cambridge

Preamble

This response is submitted by the University of Cambridge (hereafter 'the University'). We welcome the opportunity to comment on many of these derogations. We would, however, wish to start by noting our concern about the lack of clarity surrounding the definitions in the UK of a 'public authority', and of its 'tasks', under the General Data Protection Regulation (GDPR). These definitions both have fundamental repercussions as to the available legal bases for the processing of personal data set out in Article 6(1) and determine whether or not a data controller must appoint a statutory Data Protection Officer under Article 37(1). The University would welcome a solution to this uncertainty, either by way of subsidiary legislation or by way of an authoritative public announcement by the Government.

Theme 1 – Supervisory Authority

The University has no comments.

Theme 2 – Sanctions

With regard to Article 36(5), the University does not consider that additional requirements should be introduced whereby data controllers should consult with the ICO following a Data Protection Impact Assessment as the conditions already set out in the Article are sufficient to ensure that the rights and freedoms of data subjects are protected.

With regard to Article 83(7), the University does not consider that public authorities should be subject to administrative fines, or at least that any fines levied on them should be proportionately reduced, especially in light of the wide range of additional corrective powers granted to the ICO under Article 58(2). For the same reason the University does not consider that any additional penalties should be introduced under Article 84(1).

Theme 3 – Demonstrating Compliance

The University has no comments.

Theme 4 – Data Protection Officers

The University has no comments beyond those made in the Preamble.

Theme 5 – Archiving and Research

The University notes that the processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes is already granted a range of protections in the GDPR. It is our view, nonetheless, that in order to ensure that scientific and historical research in the UK is not unnecessarily restricted, it is important that the Government considers exempting processing for those purposes from the requirement to fulfil the rights of access, rectification, restriction or objection, as permitted under Article 89(2). This is not to say that individual data controllers will not choose to fulfil those rights on a voluntary basis where so doing will not prejudice the results or administration of the research project. With regard to data processed solely for archival purposes, we see little value in allowing the exercise of any of the rights listed in Article 89(3) because to do so would impact upon the integrity of the archival material which by definition is being retained in the public interest.

Theme 6 – Third Country Transfers

Article 49(1)(d) permits a third country transfer for important reasons of public interest which, by virtue of Article 49(4), should be recognised in Member State law. The University considers that 'transfers' of personal data wherein members of a data controller's staff travel overseas on business and consult personal data held on an electronic device (whether directly or by accessing a server based in the UK), should be regarded as a transfer in the public interest. This should be on the explicit condition that other safeguards are in place to protect the personal data, including but not limited to the security measures listed in Article 32. While we recognise that this type of transfer will not have been the primary driver behind the wording of Article 49(1)(d), it is our view that, without such a finding, the removal of the ability to make such a transfer following the data controller's self-assessment of adequacy (as currently permitted under the Data Protection Act 1998 [DPA]) will have major adverse consequences to the operations of many data controllers that operate internationally without having offices in those third countries.

Theme 7 – Sensitive personal data and exceptions

The University considers that, insofar as each is permissible under the various headings employed in Article 9, a range of additional legal bases for the processing of special category personal data should be introduced to mirror those currently set out in the Data Protection (Processing of Sensitive Personal Data) Order 2000. This will allow data controllers to continue to process such data in various important public interest circumstances.

Theme 8 – Criminal Convictions

The University considers that, insofar as each is permissible under the terms of Article 10, a range of additional legal bases for the processing of personal data relating to criminal convictions and offences should be introduced to mirror those currently set out in the Data Protection (Processing of Sensitive Personal Data) Order 2000. This will allow data controllers to continue to process relevant data in various important public interest circumstances.

Theme 9 – Rights and Remedies

With regard to Article 17(3)(b), the University considers that it is a task carried out in the public interest for educational institutions to retain indefinitely proper records of their current and former students and accordingly processing for this purpose should be exempt from the right to erasure. If educational institutions are forced to erase records then they will not be able to verify reliably the receipt (or otherwise) of qualifications, and such an outcome would be neither in the public interest nor in the interests of data subjects.

Theme 10 – Processing of Children's Personal Data by Online Services

The University considers that the threshold in Article 8(1) should be lowered to 13 years as that appears to be a suitable age below which an individual might be deemed incapable of giving informed consent to the processing of their personal data for such services. We note that the ICO, in its initial 'GDPR: 12 Steps to Take Now' guidance document, itself suggested that the UK was likely to legislate in this way with regard to this Article.

Theme 11 – Freedom of Expression in the Media

The University welcomes the fact that processing for 'academic […] expression' is expressly included in Article 85. The University is fundamentally committed to freedom of speech and accordingly we consider that processing that falls under Article 85 should be granted similar exemptions from the GDPR as those granted under section 32 of the DPA to processing for the special purposes as defined in section 3 of that Act.

Theme 12 – Processing of Data

We refer to our Preamble above: the University considers the situation created by the wording of Article 6 to be highly unsatisfactory and we do not see how data controllers can proceed with certainty without legislation to determine these issues. With regard to Article 6(2), that legislation should determine what are, and are not, 'tasks carried out in the public interest', in particular with regard to public authorities. The legislation should clarify that, for

public authorities, their tasks carried out in the public interest or in the exercise of their official authority under Article 6(1)(e) equate to those same 'tasks' that are expressly excluded from any reliance on Article 6(1)(f), meaning that the legal basis in Article 6(1)(f) remains available to public authorities in pursuit of all of their activities not determined to fall under Article 6(1)(e). Without the clarity that would be created by such legislation, the University considers that this fundamental aspect of the GDPR will attract numerous costly, burdensome and unnecessary legal challenges. For universities, it is suggested that any such legislation should determine that carrying out academic research is a task carried out in the public interest: in the absence of such a clarification, and with the uncertainty created by the wording of Article 6(1)(f), it is difficult to pinpoint the appropriate legal basis for those types of academic research involving personal data (including pseudonymised data) that necessarily proceed without the consent of the data subject. The inclusion of such a provision for the processing of special category data for research purposes in Article 9(2)(j) would suggest that it is clearly the view of the lawmakers that consent is not the only available legal basis for such processing.

Any legislation introduced under Article 88 should be mindful of the need of employers to process their employees' data for the range of purposes listed in that Article without the need for consent (noting that to seek such consents in any event is unlikely to be lawful given the wording of Recital 43).

Theme 13 – Restrictions

The University considers that, insofar as each is permissible under the terms of Article 23, a range of exemptions from the data subject rights (including the right to receive privacy notices) should be introduced to mirror those currently set out in Part IV of, and Schedule 7 to, the DPA. The Government should take a broad view of the 'public interest' in Article 23(1)(e) and include amongst such activities those of management planning, negotiations and the fair and proper operation of examination processes (as already allowed for under paragraphs 5, 6, 8 and 9 of Schedule 7 to the DPA). This will prevent the exercise of the rights by data subjects impinging on the fundamental matters of public interest listed.

Theme 14 – Rules surrounding Churches and Religious Associations

The University has no comments.

Additional question – cost impact

The University notes the substantial protections given to data subjects under the GDPR and considers that the best way in which the Government can mitigate the additional administrative overheads created for data controllers is to implement the full range of derogations at its disposal in the widest possible way, and to supplement that with a clear

legislative position or an authoritative public announcement on the definitions of public authorities and their tasks for GDPR purposes.

University of Cambridge
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