CHARITY COMMISSION
FOR ENGLAND AND WALES

Charity Commission for England and Wales

DCMS - Call for views on the General Data Protection Regulation derogations

1. Introduction

1.1 The Charity Commission for England and Wales (the **Commission**) registers and regulates charities in England and Wales, to ensure that the public can support charities with confidence. We are an independent, non-ministerial government department. Under the Charities Act 2011 (the **2011 Act**), we have five statutory objectives, namely:

(a) to increase public trust and confidence in charities;

(b) to promote awareness and understanding of the operation of the public benefit requirement;

(c) to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities;

(d) to promote the effective use of charitable resources; and

(e) to enhance the accountability of charities to donors, beneficiaries and the general public.

1.2 The Commission's statement as to its regulatory approach is contained in this statement: https://www.gov.uk/government/publications/charity-commission-statement-of-mission-regulatory-approach-and-values/charity-commission-statement-of-mission-regulatory-approach-and-values#our-strategic-priorities

1.3 How the Commission processes personal data is set out in the Commission's Privacy Notice: https://www.gov.uk/government/organisations/charity-commission/about/personal-information-charter

1.4 The Commission estimates that there are about 164,000 charities in England and Wales. We estimate that the income of these charities is £64 billion. More information about the charity and voluntary sector are set out in Briefing Paper dated 21 July 2015: http://researchbriefings.files.parliament.uk/documents/SN05428/SN05428.pdf

1.5 This document sets out in more detail the Commission's information powers and how personal data may be processed by the Commission in its regulatory work to provide the context for the Commission's views in response to the Call for views on the General Data Protection Regulation derogation issued by DCMS on 12 April 2017. We have provided a response to those questions which the Commission has currently identified as being most relevant to the achievement of its statutory objectives and functions.

1.6 For more information on any of the issues discussed in this response, please contact

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2. Information powers

2.1 Charities and their professional advisors approach the Commission in its role as registrar to provide evidence that their organisation is charitable. The charity can then be entered onto the Register of Charities. Similarly, in the Commission's permissions and advice work, charities and their professional advisors approach the Commission with requests for legal authority and need to provide evidence to satisfy the legal test relevant to the individual power. For example if an Order is required under s.117 of the 2011 Act to dispose of land. The information provided will include personal data.

2.2 In its compliance work, the Commission undertakes some proactive work but also relies on members of the public, charity trustees, beneficiaries of charities, professionals working with charity and other public authorities to bring to the Commission's attention matters which are potentially of regulatory interest to the Commission. The information provided will include personal data.

2.3 The majority of the information provided to the Commission is provided voluntarily. Charity trustees are expected to co-operate with the reasonable requests of the Commission as regulator and failure to do so may be considered to be misconduct and mismanagement.

2.4 There are exceptions to information being provided voluntarily. All charities must prepare annual reports. Registered charities with an income over £25,000 must submit their annual report to the Commission (section 163 of the 2011 Act). Under section 169, every registered charity must prepare an annual return form containing such information as must be prescribed by the Commission. Annual reports and returns may contain personal data. Auditors and independent examiners of charities' accounts are under a duty to report matters which are likely to be of material significance to the Commission's inquiry power and powers to act for the protection of charities under s.156 of the 2011 Act.

2.5 The Commission does have express information gathering powers. It has the power to call for documents (section 52 of the 2011 Act) and to search records (section 53 of the 2011 Act). For example the Commission may exercise its powers under s.52 to require a charity's bank to provide it with copies of the charity's bank statements. Under section 336 of the 2011 Act, failure to comply with an Order under s.52 may on application by the Commission to the High Court be dealt with as for disobedience to an Order of the High Court. The Commission exercises these power where it is proportionate to do so. It would not be efficient use of the Commission's resources to use these powers every time a request for information is made.

2.6 Once the Commission has opened a statutory inquiry under section 46 of the 2011 Act, it has the power under section 47(2) of the 2011 Act to direct any person to provide accounts and statements in writing, to return answers in writing to any questions or inquiries; to provide copies of documents and to verify any such documents by statutory declaration; and to attend at a specified time and place and given evidence or produce any such documents.

2.7 Sections 54 to 59 of the 2011 Act provide a discretionary statutory gateway enabling the Commission to disclose information to other public authorities and this gateway also provides a discretionary power enabling other public authorities to disclose information to the

Commission. Under section 59 of the 2011 Act, nothing in sections 54 to 57 of the 2011 Act authorises the making of a disclosure which contravenes the Data Protection Act 1998.

2.8 The Commission has the following general function under section 15(1) 5 of the 2011 Act: "*obtaining, evaluating and disseminating information in connections with the performance of any of the Commission's functions or meeting any of its objectives".* For example the Commission may receive, process and share data under contractual arrangements to support its regulatory work.

2.9 Under section 60 of the 2011 Act it is an offence for a person knowingly or recklessly to provide the Commission with information which is false or misleading in a "material particular".

2.10 As a government department, the Commission is subject to the Freedom of Information Act 2000.

3. Theme 7 – Sensitive personal data and exceptions

3.1 As part of its regulatory remit, the Commission regularly processes personal data which would fall within the special categories of personal data. Examples of when the Commission may receive or obtain sensitive personal data (which may or may not be provided by the data subject) include:

- many religious organisations are registered as charities and the Commission will receive and process information about data subjects' religious beliefs. This information would be processed in any permissions case work required for the charity for example appointing new trustees under section 80 of the 2011 Act;
- detailed information about data subjects medical conditions to enable it to determine whether it should authorise a charity to make a payment under s.105 or s.106 of the 2011 Act, or as an explanation about why a charity trustee has not discharged their legal duties;
- information about the health of victims of abuse or religious beliefs of charity trustees in the course of its investigations and inquiries work;
- in its registration work, the Commission may receive detailed information about data subjects medical conditions, political beliefs, religious beliefs and/or sexual orientation as evidence of the charity's public benefit.

3.2 To obtain the consent of the individual data subjects is disproportionately administratively burdensome for the Commission although it will be appropriate for the Commission to do so in specific cases. This will continue to be the position under the General Data Protection Regulations ("GDPR").

3.3 To be compliant with the data protection principles under the Data Protection Act 1998, to process sensitive personal data lawfully and fairly, the Commission has relied on conditions 3 and 5 of Schedule 2 and condition 7 of Schedule 3 (that the processing was necessary for the exercise of any function of … a government department).

3.4 Article 9(2) of the GDPR does not have a similar provision to that of condition 7 of Article 3. Article 9(2)(g) does not prohibit the processing of the special categories of personal data if the processing is necessary for reasons of "substantial public interest". This is a higher test to that

in contained in Article 6(1)(e) which is appropriate given the special categories of personal data. However it is not clear how “public interest”, “substantial public interest” and “important public interest” (see for example Article18) will be differentiated in practice.

3.5 Although the Commission may be able to justify the processing of special categories of information relying on Article 9(2)(g) the Commission is concerned that this is not sufficiently certain especially for the Commission’s more routine registration, permissions and compliance work (which constitutes the majority of the Commission’s casework). Given the importance of charities to society and thereby their proper regulation, it is certainly arguable that something that is in an individual charity’s interest is in the substantial public interest because it is the substantial public interest that the use of charity money is made as efficient as possible.

3.6 Under Article 9(4), Member States may maintain or introduce further conditions, including limitations for processing. The Commission would welcome a similar condition to that of condition 7 of Schedule 3 of the DPA 1998.

3.7 If this is considered too broad in scope, the Commission suggests that regard be had to the purposes listed in section 31(2) of the Freedom of Information Act 2000 so processing would be necessary for these specified purposes. In particular subsections 31(2)(a) to (d) in addition to (f) to (h) would be useful to the Commission. The Commission would also consider it helpful if the registration of charities could be added as an additional purpose to this list.

3.8 We also consider that it would be helpful if it was clear that the processing may be necessary for the purposes of the data controller or the recipient of the information (see paragraph 5 below).

4. Theme 8 – Criminal Convictions

4.1 Although a civil regulator rather than a criminal prosecuting body, the Commission receives and holds detailed information which relates to criminal convictions and security measures which is relevant to its statutory objectives and functions. We may receive such information from the data subject, from members of the public and charity trustees. We also work closely with law enforcements agencies in the Commission’s regulatory work and regularly exchange information with them.

4.2 Criminal convictions may be evidence of misconduct and mismanagement of charity trustees. Charity trustees are disqualified from acting as trustees if they are convicted of certain criminal offences (section 178 of the 2011 Act as amended by the Charities (Protection and Social Investment) Act 2016). The Commission also has the power to disqualify charity trustees under section 10 of the Charities (Protection and Social Investment) Act 2016 including where the past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in a specified charity or class of charities.

4.3 The Commission in the course of its regulatory work, may become aware that criminal offences have potentially been committed. Such instances are reported to the law enforcement agencies.

4.4 The provisions for processing personal data relating to criminal offences were implemented into UK law as sensitive personal data under the DPA 1998. To be compliant with the data protection principles, in processing sensitive personal data lawfully and fairly, the Commission has generally relied on condition 5 (b), (c) and (d) of Schedule 2, and condition 7 of Schedule 3 (that the processing was necessary for the exercise of any function of ...a government department).

4.5 Under Article 10, there is a much more restrictive regime for the processing of personal data relating to criminal convictions. It will only be on relatively rare occasions that the law will oblige the Commission to process this category of personal data, for example in the context of money laundering or terrorism offences. The Commission is concerned that Article 10 has the potential to significantly impede its regulation of charities and therefore the wider public trust and confidence in charities.

4.6 In implementing this provision into legislation in the UK, the Commission would like to see adequate grounds provided for to enable the Commission to process such data, subject to adequate safeguards for the rights and interests of data subjects. We would again suggest that the purposes specified in the conditions for processing in Schedule 3 of the 1998 Act would be appropriate or the list of regulatory purposes specified in section 31(2) of the Freedom of Information Act 2000.

5. Theme 12 – Processing of Data

Article 6 – Lawfulness of Processing

5.1 The Commission notes that under Article 6(1) of the GDPR the widest condition for processing which is where the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (currently condition 6 of Schedule 2 DPA 1998 and now Article 6(1)(f)) is not available to public authorities.

5.2 The Commission has in the past properly relied on this condition for processing for some of the information disclosed to other public authorities under the statutory gateway provided for in the 2011 Act. When processing personal data under the statutory gateway in the 2011 Act, the Commission has also properly relied on condition 5 (b), (c) and (d) of Schedule 2 of the 1998 Act.

5.3 Examples of the personal data that may be disclosed under the statutory gateway to or from the Commission may include personal data in connection with criminal offences with law enforcement agencies, in connection with potential tax evasion or misuse of the gift aid provisions with HMRC, with local authorities about allegations of abuse, with local authorities about rate relief fraud and with Principal Regulators (sections 25 to 28 of the 2011 Act) concerning allegations that charity trustee have not complied with their legal obligations.

5.4 Condition 5 of Schedule 2 in the 1998 Act is similar to Article 6(1)(e) which provides that processing shall be lawful if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. However the

Commission notes two important differences. First, Article 6(1)(e) removes the wording "by any person" which is the wording used in condition 5(d) of Schedule 2. Secondly, it also requires the processing to be necessary in the exercise of the official authority *vested in the controller* whereas condition 5 (b) and (c) provided for it to be the exercise of *any* functions conferred on *any* person; and *any* functions… of a government department (italics for emphasis).

5.5 The discretionary power under the statutory gateway for the Commission to disclose personal data (and other information) to another public authority is on the basis that that "the disclosure is made for the purpose of enabling or assisting the relevant public authority to discharge any of its functions; or the information so disclosed is otherwise relevant to the discharge of any of the functions of the relevant public authority" (section 56 of the 2011 Act). The Commission is therefore concerned that the legal power is available to disclose the information to another government department but that the Commission would not be able to rely on Article 6(1)(e) because in some instances the processing may not be necessary for its own tasks or official authority. This would also apply to disclosures made to the Commission by other public authorities for the purpose of enabling or assisting the Commission to discharge any of its functions (section 54 of the 2011 Act).

5.6 This concern would also arise if the Commission was exercising its power under section 20 of the 2011 Act whereby the Commission may do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any its functions or general duties. If the Commission has the power to do something which is incidental, could processing personal data in this way be "necessary".

5.7 Notwithstanding that Article 6(1)(e) does not include the wording "by any person", the Commission's view is that it could rely on this provision to process personal data lawfully if to do so was necessary for a task in the public interest by another public authority. Alternatively, given the importance of charities to society and that it is in public interest for charities to be properly regulated, the Commission could disclose personal data to other public authorities to assist them in the regulation and/or prosecution of any matter relating to charities as a way of being necessary to achieve the Commission's statutory objectives to increase public trust and confidence in charities and to promote compliance by charity trustees with their legal obligations.

5.8 The Commission has taken this provisional view because it is our understanding that the fact that public authorities will not be able to rely on Article 6(1)(f) is not intended to have a chilling effect on the efficient and effective operation of government.

5.9 Under Article 6(3), the basis for processing referred to in (c) and (e) of paragraph 1 [of Article 6] shall be laid down by (a) Union law; or (b) Member state law to which the controller is subject.

5.10 The Commission would want any provisions enacted under Article 6(3) to be expressly clear that disclosures which can currently be lawfully and fairly made under the statutory gateways such as that provided for in the 2011 Act, and under its wide disclosure powers, would not be impeded.

Article 21 – Right to object

5.11 The data subject shall have the right to object to the processing of personal data concerning him or her which is based on Article 6(1)(e) and (f). To continue processing the controller has to be able to demonstrate compelling legitimate grounds for the processing which overrides the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

5.12 To process lawfully under Article 6(1)(e), the processing has to be "necessary" and has to be in the public interest. It is our understanding that necessary imports the concept of proportionality. It is therefore not clear what will be necessary in order to demonstrate 'compelling legitimate grounds' above and beyond that demonstrate to satisfy Article 6(1)(e). The Commission would wish to ensure that the processing that is necessary to exercise its powers and achieve its statutory objectives (including matters that are incidental to the statutory objectives) are not impeded.

5.13 The Commission would also welcome safeguards being in place to limit the possibility of legitimate rights for data subjects being improperly used to delay and undermine investigatory processes.

6. Theme 13 – Restrictions

6.1 Article 15 provides an enhanced right of access by the data subject. This is not subject to any limitation within the Article itself.

6.2 Under s.31 of the DPA 1998, personal data processed for purposes specified in section 31(2), are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of those functions. Section 31(2) of the 1998 Act includes purposes which are expressly relevant to the regulation of charities (sub section 31(2)(b), (c) and (d)).

6.3 Under Article 23 permits Member States to legislate domestically to restrict the application of various rights and duties under the GDPR.

6.4 The Commission would welcome an exemption to the right of access similar to that in section 31(2) of the DPA 1998. The Commission would welcome a widening of the purposes specified to be more akin to those purposes specified in section 31(2) of the Freedom of Information Act 2000 in particular subsections 31(2)(a) to (d) in addition to (f) to (h) .

6.5 The approach of section 31 of the DPA 1998 (and other exemptions within the DPA 1998) and the Freedom of Information to specify purposes rather than the specific government body which may rely on the exemption would be the Commission's preferred approach to drafting restrictions to the rights of data subjects.

6.6 The Commission relies on advice from its in house lawyers when exercising its powers as the legal framework for the regulation of charities is complex. The Commission also regularly receives or obtains the legal advice received by charities as evidence that charity trustees are meeting their legal obligations. The Commission would therefore welcome an exemption to the

right of access similar to that in paragraph 10 of Schedule 7 of the 1998 Act protecting legal professional privilege.

Charity Commission for England and Wales
10 May 2017