Data Protection Team
Department for Culture, Media & Sport
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BY EMAIL: to
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Dear Sirs,

GDPR and derogations for "*An Active Nation*"

Thank you for the opportunity to respond to the consultation, "Call for view on the General Data Protection Regulation derogations", dated 12 April 2017 (**Consultation**).

Derogations under GDPR

On 25 May 2018, when the new law comes into force, Sport England (and those it funds) will be bound to comply with the new law. Certain provisions in GDPR will be of fundamental importance to determining whether Sport England and these organisations can continue to pursue and implement the strategy, methods and outputs designed to improve participation in sport and physical activity and described in '*Sporting Future*' and '*Towards An Active Nation*'.[1]

In particular, the increased rights afforded to data subjects and disclosure obligations, coupled with the more stringent rules around consents and restrictions on profiling, is likely to prejudice significantly how Sport England maximises funding opportunities and return on investment and public engagement (and, for example, whether it can direct resources to those in society most in need of opportunities to participate in sport and physical activity).

Sport England urges the Department to retain and, where necessary, reinforce and supplement the existing exemptions and derogations to allow Sport England (and others) to carry out profiling of data subjects (subject to any necessary safeguards and proportionality measures to preserve privacy).

In the absence of appropriate and suitably robust derogations, members of the public and, especially, the inactive may lose their opportunity to change their behaviour. This has

[1] Further outline details of these over-arching strategies are set out in Appendix 1 attached.

implications for their physical and mental health and wellbeing. This may have a substantial, adverse effect on the ability of sports governing bodies to offer disadvantaged, vulnerable, infirm or socially excluded sections of society to benefit from the opportunities available by sports participation and physical activity.

In addition, promoting and sharing open data - as *Sporting Future* requires Sport England (and those it funds) to do - will be fruitless. The insight based investment of public funds into promoting sports participation and physical activity and public engagement will also be lost. This would (ironically) undermine the Sports sector and the Department's wider grant funding strategy.

We have set out below the core activities which we feel need to be protected under the new legislation implementing GDPR. This can be achieved either by passing-through the necessary derogations in existing law or introducing a new derogation to enable Sport England and its funding partners to continue to pursue the strategies (and associated legacy) comprised in *Sporting Future* and *Towards An Active Nation*.

<u>Insight is essential to effective funding and investment in Sport and is in the public interest</u>

Sport England has put insight at the heart of its work. If Sport England is to help different audiences change their behaviour, it needs to understand their sporting habits and preferences, as well as their wider lives, needs and wishes. *Sporting Future* emphasises that funding decisions should be based on how best to meet the needs of the customer. Sport England strongly agrees with this principle, and tests the evidence on customer need with particular rigour in all of its investments.

An important first step is deciding what will be included in the extension of its remit to cover more physical activity. The new activities that Sport England plans to measure, influence or directly fund are set out below. The data analysis on which this is based is set out in more detail in a technical note available on our website: www.sportengland.org/activenation.

This Girl Can

Ground-breaking insight into the emotional barriers to getting active that are faced by many women underpinned Sport England's "*This Girl Can*" campaign, and has begun to shape delivery to good effect.

Sport England's "*This Girl Can"* campaign has demonstrated how campaigning can help to nudge people into more sustainable habits. Since its start, the campaign has prompted 2.8 million women to do some or more sport or physical activity (profiling those involved with the campaign has been key to its success, not only in terms of investment but also by way of engagement). A repeated request (in Sport England's consultation when developing its *Towards An Active Nation strategy*) was to create more consumer campaigns which the sector can use, and this will be an important part of its work to encourage growth at scale.

Open Data Standards

The cornerstone of Sporting Future's strategy is to set common data standards, create a common language around data and champion open data sharing across the sector to enhance our collective ability to discover new insights into our audiences and better understand the impact.

In order to coordinate (and understand the impact of) its funding and engage with members to the public to promote sports participation and physical activity Sport England aggregates data from a range of digital and non-digital sources and shares it across the Sports sector for others to analyse.

Research

Sport England is commissioning research to fill in some of the gaps. Sport England is striving to be a centre of innovation and excellence. Sport England needs to conduct research, by using insight to work out what will work for the most relevant audiences, testing whether it does in practice and sharing the results for the sports community.

Whilst understanding that a fair balance needs to be struck between individuals' privacy and pursuing the Sporting Future Strategy so as to encourage sports participation and physical activity, Sport England is particularly concerned by the derogation(s) relating to Themes 5, 7, 12, 13 and 14 in the Consultation.

We have set out in the enclosed, further details of Sport England's specific concerns and proposed solutions in relation to these Themes.

Enc, Schedule 1 - Themes and Specific Derogations, and

Appendix, *Sporting Future* and *Towards An Active Nation*: The foundations of strategy for increasing participation in Sport

Schedule

Sports regulatory bodies (including Sport England), Non-Governmental Bodies and Sports Clubs and Associations who receive funding need a specific, public interest legal basis to process and share personal data for the purposes of: (a) investing or measuring return from public funds or (b) the promotion of sports participation and physical activity for health and social mobility arising from such funds.

We have set out below the relevant Themes set out in the Consultation and, against each, what we consider to be the most pertinent provisions in the current and proposed new data protection law. Whilst we have sought to ensure that the responses below are exhaustive, the recommendations below are non-exhaustive. In any event, we hope that they serve as an indication of Sport England's key concerns; once the Department has had an opportunity to consider the issues raised, we'd welcome an opportunity to discuss the specific derogations further (and, specifically the extent to which this derogation extends to NGBs and sports clubs and associations).

Any exemptions or conditions which rely on consent are of limited use, given that consent may be withdrawn at any time. Therefore Sport England doesn't consider consent is an appropriate legal basis for the processing of personal data for these purposes.

<u>Theme 7 – Sensitive Personal Data; Theme 12 – Processing of Data; Theme 13 - Restrictions</u>

Current law

An organisation may not process data unless, in the case of personal data or sensitive personal data, one of the conditions in Schedule 2 or 3 (respectively) is met. In the case of Schedule 2 (personal data), this is relatively straightforward as an organisation can generally rely on the 'legitimate interests' condition.

Yet, in the case of Schedule 3 (sensitive personal data), there is no applicable, corresponding (and wide) 'legitimate interest' condition upon which Sport England (and the bodies it funds) can rely [other than the existing condition 9 in respect of racial or ethnic origin - see below]. Sensitive personal data may include information denoting racial or ethnic origin or a disability or other medical condition. A person's level of fitness may be considered revealing of medical conditions, such as, for instance, obesity and therefore should be treated as sensitive personal data in many cases.

Schedule 3 (Conditions for processing sensitive personal data)

9(1) The processing—
(a) is of sensitive personal data consisting of information as to racial or ethnic origin,
(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or

ethnic origins, with a view to enabling such equality to be promoted or maintained, and

(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

The Data Protection (Processing of Sensitive Personal Data) Order 2000 (Para 2) and Section 31, DPA allows processing of sensitive personal data for the discharge of certain functions but this derogation may not be relied upon by sports regulatory bodies given that it is intended more for regulators, such as the financial services regulator (it is aimed at dishonesty, malpractice and other serious improper conduct).

GDPR: Special categories of data

In addition, under GDPR, special categories of data [i.e. the previously sensitive personal data category under the existing DPA] include biometric data (under Article 9(1)).

Biometric data may inevitably be increasingly be used for profiling and measuring return on funding investment and sports participation and physical activity. For instance, data created from wearables (such as smartwatches and training wristbands) or facial recognition data may constitute biometric data. Accordingly, for this purpose, it is essential that suitable, proportionate derogations are introduced that cover not only the new definition of 'personal data', but also, 'special categories of data' under GDPR.

GDPR

Article 9(2)(g) (see extract below) provides the Department with an opportunity to include a specific derogation for the purposes of (a) investing or measuring return from public funds or (b) the promotion of sports participation and physical activity for health and social mobility arising from such funds.

Article 9(2)(g): processing is *necessary* for reasons of *substantial public interest*, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

Other exemptions not available

In contrast, other potential conditions for processing special categories of data in GDPR may appear to provide a basis for processing by Sport England and others for these purposes, but neither may adequately be relied upon, given their narrow scope (see extracts below).

Article 9(2)(d): "processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have

regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects.

Article 9(2)(i): "processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy.

Sport England would also like confirmation that the existing condition for processing of sensitive personal data in Schedule 3 (at Paragraph 9(1), DPA, as set out above) is tracked through into GDPR in Article 9 so that it can continue to carry out essential processing for monitoring and maintaining boardroom and employee/volunteer diversity.

Recommendations:

- that an equivalent 'legitimate interests' condition akin to that currently in Schedule 2 is included in Schedule 3, DPA.
- Article 9 – to leverage the condition in Article 9(2)(g) to include an express derogation for processing and sharing data for the purposes of (a) investing or measuring return from public funds or (b) the promotion of sports participation and physical activity for health and social mobility arising from such funds.
- Article 9 – in the alternative, we propose that a similar legitimate interests condition is included in Article 9(2) as a justification for processing special categories of data and that UK law expressly states that processing for the purposes of (a) investing or measuring return from public funds or (b) the promotion of sports participation and physical activity for health and social mobility arising from such funds is a legitimate interest.
- Article 9 – includes a condition equivalent to Paragraph 9(1), DPA so that processing may continue for operational diversity reasons.

Theme 5 – Archiving and Research

Section 33, DPA also provides that organisations may process (and retain indefinitely) personal data for the purposes of research, historical and statistical purposes. And, in turn, also removes the right for individuals to be provided with information containing personal data about them pursuant to a SAR. It is essential that Sport England (and other organisations which it funds) continue to be provided with a specific, new derogation in this regard (to protect their respective, existing rights).

Recommendation:

- Article 89 – please clarify that the processing data for research purposes will continue to be exempt from the duty to respond to SARs under the GDPR (as it does currently under DPA), and that Sport England and organisations it funds will continue to be able to retain such data indefinitely.

Theme 9 – Rights and remedies

In the same way that we require that processing data for research purposes will be exempt from the duty to respond to SARs, we'd also expect a corresponding derogation from the right to erasure (where this relates to research purposes).

It is imperative that Sport England (and the bodies it funds) have an ability to profile users to review, assess and manage investment and measure ROI to improve participation in sports and physical activity (see Theme 12 below).

Recommendation:

- Article 17 – please clarify that the processing of data for research purposes will continue to be exempt from the right to erasure under the GDPR (this is not currently a statutory right under DPA, only a common law right).

Theme 12 – Processing of data

Profiling

Article 21(1): The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1) [*see conditions below*], including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates *compelling* legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

The relevant conditions upon which Sport England may rely for processing for personal data under GDPR are:

Personal data

Article 6(1)(e): processing 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;

Article 6(1)(f): processing is *necessary* for the purposes of the legitimate interests pursued by the controller or by 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, in particular where the data subject is a child.

Accordingly, we seek an express clarification that the investment of public funds and the promotion of sports participation and physical activity is a compelling ground within one or other of the above conditions to process personal data.

In addition, we'd also wish to include a derogation from the need to suspend processing until such time as this compelling interest has been demonstrated. And instead, strongly recommend that it is only when a compelling legitimate ground has not been demonstrated that the processing should be stopped. Otherwise, the suspension in itself will severely hinder Sport England's ability to process data for this purpose whilst it is demonstrating these compelling grounds.

Recommendation:

- Article 6 and/or 21 – to include an express clarification that "compelling grounds" may include the processing and sharing data for the purposes of (a) investing or measuring return from public funds or (b) the promotion of sports participation and physical activity for health and social mobility arising from such funds.
- Article 21 – to state that where the derogation above applies, the right to suspend shall not apply once the objection has been received until the data controller has failed to demonstrate that that specific derogation does not apply and cannot be relied upon

<u>Additional question</u>

We propose the following additional question: "*What steps should the Government take to minimise the cost or burden to business of the GDPR*". We've set out below the benefits of sport in select categories:

Economic impact

The economic value of Sport in terms of health in England is £11.2bn (assessed in 2013).

Health impact

Health and Physical activity, including sport, is linked to reduced risk of over 20 illnesses, including cardiovascular disease and some cancers. Taking part in regular sport can save between £1,750 and £6,900 in healthcare costs per person.

Sport England commissioned research into the costs of physical inactivity, which showed that NHS providers in England spent more than £900m in 2009/10 in treating people with diseases that could be prevented if more people were physically active.

Social and cultural impact

Published studies show the positive effects of sport on education include improved attainment, lower absenteeism and drop-out, and increased progression to higher education. For instance, young people's participation in sport improves their numeracy scores by 8 per cent on average above non-participants.

Other studies have found that sport programmes aimed at youths at risk of criminal behaviour can enhance self-esteem and reduce reoffending.

For further information, see https://www.sportengland.org/research/benefits-of-sport/.

Appendix 1

Sport England's Strategy and Objectives

Sport England's strategy, "*Towards An Active Nation*" is derived directly from the Government's widely welcomed "*Sporting Future: a new Strategy for an Active Nation*".

Sport England seeks to increase the number of people who engage in sport and activity, not for its own sake but for the wider benefits it can bring, in terms of physical and mental wellbeing and individual, community and economic development. Sport England is required to invest where the impact on these wider outcomes will be greatest.

This means changing the balance of its investment to encourage inactive people to become active. So 25 per cent of our resources over the next four years, over £250 million, will be focused on this group – the largest investment in tackling inactivity ever made in England.

Our focus in the future will be on the benefits that sport can bring to people and to society, built around a simple set of outcomes: physical wellbeing, mental wellbeing, individual development, social and community development and economic development. Public funding will be directed to delivering these outcomes and success will be measured against improvements in each of them.

Working with the Sports sector to encourage innovation and share best practice particularly through applying the principles and practical learning of behaviour change. As a result, Sport England's function is determined by the following four terms of reference:

- Investment principles
- Behaviour change
- Partnership
- Insight and evaluation

Sport England is to create a clear 'line of sight' between each investment and the contribution it can make to both the overarching outcomes in Sporting Future and the individual key performance indicators (**KPIs**) it is seeking to deliver. This will allow Sporting England to invest in making a wider impact on people's lives in terms of physical wellbeing, mental wellbeing, individual development, social and community development and economic development, rather than simply driving numbers.

Sport England is developing robust evaluation systems to show the difference an investment makes to the wider outcomes, as well as measuring increased engagement.

Examples of KPIs include:

- KPI 1: Increase in the percentage of the population taking part in sport and physical activity at least twice in the last month

- KPI 2: Decrease in the percentage of people physically inactive (KPI 1 and 2 from '*Active Lives*' survey)

- KPI 3 – Increase in the percentage of adults utilising outdoor space for exercise/ health reasons (MENE survey)

- KPI 4 – Increase in the percentage of children achieving physical literacy standards

- KPI 5 – Increase in the percentage of children achieving swimming proficiency and Bikeability Levels 1-3

- KPI 6 – Increase in the percentage of young people (11-18) with a positive attitude towards sport and being active (KPI 4, 5 and 6 from *Taking Part*)

Sporting Future asks Sport England to make an evidence-based assessment of the scale of change we envisage achieving through our interventions and set targets by early 2017.

Sporting Future

One of the best examples in recent years of how public sector organisations can most effectively support a diverse and competitive market in technology is the model used by Transport for London (**TfL**) which makes a wide range of data available publicly, for free, that developers can then use in their own software in innovative ways. In a similar way, the sport and physical activity sector currently captures a huge range of data, and holds a great deal of information that, in the hands of innovative developers and business has the potential to be harnessed to transform how people engage in sport.

Sport England is exploring the best way to include measures of subjective wellbeing, perceived self-efficacy and levels of social trust in the '*Active Lives*' survey so that these outcomes can be directly compared with data on sporting behaviour. This will build on the existing approach on subjective wellbeing in DCMS's Taking Part survey.

The data that underpin these KPIs will be drawn from a variety of sources including the new Active Lives survey, the Taking Part survey, the Monitor of Engagement with the Natural Environment survey and the Sport Satellite Account as well as being gathered by UK Sport and Sport England through the course of their work.