National Library of Scotland
Leabharlann Nàiseanta na h-Alba

Call for views on the General Data Protection Regulation derogations

Response from the National Library of Scotland

Submitted to

10 May 2017

1. Background

In the manner of other major European national, university and research libraries, the National Library of Scotland (the Library), and its predecessor body, the Advocates' Library, has always engaged in the selective, but wide-ranging, collection of archives and manuscripts as one of our core functions alongside the collection of other forms of material, such as printed and published texts.

Our archiving activities date from the 1680s and have continued through the formation of the National Library in 1925. Today, the Library is recognised as home to one the largest and most important archival collections in Scotland, within an overall collection of 25 million + items.

Countless forms of material in our collections contain personal data, including business records, photographs, published reports, health records, research data, political papers, and audio and film recordings. Works collected by organisations like the Library are frequently contemporary or current in nature, and are therefore likely to relate to living persons. The ability to process (in the language of the Regulations) these materials is core to the functioning of an archive and library.

Today, our collections are increasingly produced or replicated in digital form ('born digital' or digitised), as is the trend across the collecting sectors. In this sense, works from our collections are increasingly being processed on- and offline, as well as on- and off-site.

As a library and archive, central pillars of our work include collecting, conserving, and providing access to the existing record and existing works. Archival and library collections are vital to the conduct of education and research, the development of business, and the preservation of knowledge and information for future generations.

2. Archiving in the public interest - the need for legal foundations

The General Data Protection Regulation (the Regulations) provides a number of important exemptions in respect of the processing of personal data for 'archiving purposes in the public interest'. These are:

- The ability to undertake onward processing (Article 5(1)(b))
- The ability to operate under the 'public interest' legal basis for processing (Article 6(1)(e))
- The exemption for the processing of 'sensitive' categories of personal data (Article 9(2)(j))
- The exemption to the duty to inform data subjects where data is not received from the subject (Article 14(5)(b))
- The exemption from the application of the right of erasure (Article 17(3)(d))

- The derogations allowed for under Article 89(3) (see part 3 of this response)

All of the exemptions that relate to archiving in the public interest - those provided directly in the Regulations and those that may be derogated by Member States - are essential for the proper functioning of the Library and the UK's archival sectors.

The Regulations require that the processing of personal data for archiving purposes under these exemptions must be by authorities that have a 'legal obligation' to undertake such processing. Recital 158 to the Regulations states:

> *'Public authorities or public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have a* ***legal obligation*** *to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest'*
> (emphasis added)

Recommendation 1: **There is a need for the UK administrations to specify clear legislative foundations to archiving in the public interest, perhaps through straightforward archiving regulations.**

These should outline what archiving in the public interest is, specify a 'legal obligation' for services such as the Library to undertake archiving in the public interest, and provide archiving services like the Library with the clear and precise legal foundations to process personal data for these purposes. These grounds would need clearly to cover the archiving of both official records (for example, court records) and unofficial records (for example, private papers and archives), as well as the activities of the full range of bodies that undertake these activities in the public interest.

The Library functions in particular under the National Library of Scotland Act 2012. Section 2(2) of that Act states that the Library has the particular functions of:

> *(a) preserving, conserving and developing its collections,*
> *(b) making the collections accessible to the public and to persons wishing to carry out study and research,*
> *(c) exhibiting and interpreting objects in the collections*

The 2012 Act may ensure that we have the appropriate legal obligation and grounds to process personal data for archiving purposes as required by the Regulations. However, we are not convinced of this. Furthermore, we are aware that we benefit from a particularly modern piece foundation legislation, and that many, if not most, comparable services that undertake archiving in the public interest do not benefit from such clear and contemporary legislative foundations.

Without clear legislative foundations, archival services may not be able securely to benefit from the relevant archiving in the public interest exemptions. We are not certain that the 2012 Act will be sufficient for our activities and we are of the view that the sector more widely will require further legislative foundations.

For example, Article 5(1)(b) states that the 'further processing' of personal data for 'archiving purposes in the public interest' shall 'not be considered to be incompatible with the initial purpose'. Exemptions such as this one are vital to the functioning of public interest archives. This exemption will ensure that records and documents of enduring interest and value may be collected and preserved by archive services such as the Library. Naturally, the records that archives collect and maintain are not produced with the primary purpose of being managed by an archive; therefore any personal data incorporated within a record will not have been initially processed for the purpose of archiving in the public interest. This is precisely why the Regulations have been careful to provide certain allowances, such as under Article 5(1)(b), that will enable public interest archives to continue functioning. In order for relevant services to benefit from these vital exemptions, however, there needs to be a legislative foundation that clarifies the nature of 'archiving in the public interest', in accordance particularly with Recital 158.

As well as enabling archives to benefit from relevant exemptions, this legislative foundation is necessary to ensure that archiving in the public interest constitutes processing that is 'necessary for the performance of a task carried out in the public interest' (Art. 6(1)(e)). Article 6(3) is clear that, in order for a controller to rely on Article 6(1)(e) as the basis for processing personal data, the basis for this processing must be laid down in EU or Member State law.

Legislative foundations for archiving in the public interest, such as clear archiving regulations, would ensure that the legitimate processing activities of public interest archives constitute processing for the performance of a public task specified in law. The need for public authorities like the Library to rely on Article 6(1)(e) in relation to archiving activities is all the more pressing under the Regulations, because, contrary to the current Data Protection Act 1998, we will no longer be able to lawfully process personal data in respect of public functions on the grounds of legitimate interests (Article 6(1)(f)).

Recital 41 to the Regulations states that a legal or legislative measure as the basis for processing under Article 6 should be '***clear and precise*** *and its application should be foreseeable to persons subject to it*' (emphasis added). Such clear and precise foundations should be derived from legislative foundations, for example through archiving regulations as proposed here. We are not confident that the 2012 Act or other regulations provide such clear and precise grounds for the Library. Furthermore, these legislative grounds must be sufficiently encompassing in terms of the organisations and forms of material

covered, in order to satisfy the requirements of Recital 41 in respect of application of the legislation being 'foreseeable to persons subject to it'. This will be particularly pertinent, for example, in relation to material beyond formal or official records, which nevertheless are of historical, social, or other significance warranting archival collection and preservation, such as the contents of personal or political archives. It is essential that we and other archiving services are able lawfully to process personal data for archiving in the public interest, and, especially given that we will no longer be able to rely on the grounds of legitimate interests, it is vital that we can rely on the basis set out in Article 6(1)(e) and explained through Recital 41.

3. Derogations: Archiving in the public interest

Article 89(3) enables Member States to provide derogations to the following rights where data are processed for archiving purposes in the public interest:

- Right of access (Article 15)
- Right to rectification (Article 16)
- Right to restriction of processing (Article 18)
- Notification related to rectification, erasure, or restriction (Article 19)
- Right of portability (Article 20)
- Right to object (Article 21)

Recommendation 2: **The UK should legislate exemptions to all of these rights, in accordance with Article 89, in respect of processing undertaken for archiving purposes in the public interest.**

We make this recommendation in particular in consideration of:

- the conditions and safeguards set out in Article 89(1), to which derogations must be subject, and
- the exemptions provided by the Regulations in respect of archiving in the public interest, namely Article 17(3)(d) and Article 14(5)(b), which indicate a logical trend towards ensuring that the proper functioning of public archives may be maintained.

The six exemptions allowed for under Article 89(3), like the exemptions listed under Part 2 of this response, are essential for ensuring the proper functioning of the Library as an archive service and the functioning of other UK archive services. The Regulations should protect the rights and freedoms of individuals, but should not otherwise inhibit the proper functioning of archiving in the public interest. The safeguards set out in Article 89(1) should be sufficient to ensure that appropriate protection is provided alongside these exemptions.

Without these exemptions, achievement of the functions of the Library as an archive service will be rendered impossible or will be seriously impaired. This is particularly the case as the Library, along with comparable organisations, increasingly collects, preserves, and processes digital archival material. In large

part, such impairment is self-evident: archiving in the public interest simply cannot operate if, for example, data subjects retain the right to rectification as set out in Article 16, because this would serve to nullify the record-keeping objectives of archiving.

4. Derogations: research

Article 89(2) enables Member States to provide derogations to the following rights where data are processed for scientific or historical research purposes or statistical purposes:

- Right of access (Article 15)
- Right to rectification (Article 16)
- Right to restriction of processing (Article 18)
- Right to object (Article 21)

Recommendation 3: **The UK should legislate exemptions to all of these rights, in accordance with Article 89, in respect of processing undertaken for scientific or historical research purposes or statistical purposes.**

We make this recommendation in particular in consideration of the conditions and safeguards set out in Article 89(1), to which derogations must be subject

The proper conduct of research must be protected, with appropriate balance afforded to the rights and freedoms of individuals. We feel that such rights and freedoms will be sufficiently protected through the safeguards set out in Article 89(1) that must be in place along with the exemptions. These exemptions will help to ensure that the records and other works contained in our collections and in the collections of other organisations may continue to be used properly and safely, subject to reasonable conditions, for the purposes of advancing knowledge and conducting research.

5. Derogations: freedom of expression and information

Article 85 states that Member States '*shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information*' and shall to the extent necessary provide derogations to the following portions of the Regulations where data are processed for journalistic purposes or for the purposes of academic, artistic, or literary expression:

- Chapter II (principles)
- Chapter III (rights of the data subject)
- Chapter IV (controller and processor)
- Chapter V (transfer to third countries)
- Chapter VI (supervisory authorities)
- Chapter VII (cooperation and consistency)
- Chapter IX (specific processing situations)

Recommendation 4: **The UK should legislate for exemptions under Article 85 and should ensure that exemptions enacted through these derogations cover the processing activities of archives.**

Recital 153 to the Regulations states:

> *'The processing of personal data solely for* ***journalistic*** *purposes, or for the purposes of* ***academic, artistic or literary expression*** *should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply* ***in particular to the processing of personal data in the audiovisual field and in news archives and press libraries****. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights.'*
> (emphasis added)

Article 11 of the Charter provides that everyone has the right 'to receive and impart information and ideas without interference by public authority'. Archival and collecting organisations have a fundamental role in preserving and providing access to information and in enabling collections to be maintained and accessed for journalistic, academic, artistic, and literary expression. It is essential, particularly in respect of Article 11 of the Charter and Recital 153 and Article 89 of the Regulations, that balance is maintained between the right to freedom of expression and information and the rights of individuals under the Regulations.

The Library holds considerable collections of audiovisual, news, and press material, as do comparable collecting organisations. Likewise, core functions of organisations like the Library revolve around ensuring that everyone may exercise their right to information. As stated above, the work of organisations like the Library increasingly involves making collections and materials available digitally and online. We feel it is particularly important that exemptions enacted in the UK under Article 85 apply to such archival processing activities.

6. Derogations: Administrative fines

Article 83(7) of the Regulations permits Member States to '*lay down the rules on whether and to what extent administrative fines may be imposed on public authorities*'. Recital 150 to the Regulations clarifies '*It should be for the Member States to determine whether and to which extent public authorities should be subject to administrative fines*'.

Recommendation 5: **The UK should exempt public authorities from the administrative fines set out in the Regulations, or should significantly curtail**

the scale of the potential fines that public authorities may be subject to under the Regulations.

We acknowledge that the administrative fines set out in the Regulations serve an important role in terms of enforcement. However, we also note the further range of enforcement mechanisms available to supervisory authorities, like the Information Commissioner's Office, under Article 58, which shall apply regardless.

The levying of very substantial financial penalties against public authorities, as could be permissible under the Regulations, would not be conducive to their proper functioning. Such fines would represent the shift of significant amounts of public money from one portion of the public sector to another. Our view is that this would not help public authorities, which are already facing highly constrained or contracting budgets, to best utilise limited resources in order to comply with the Regulations. Indeed, such fines could simply erode the ability of a public authority to properly fund such compliance. The significant range of practical enforcement mechanisms otherwise set out in the Regulations constitutes the correct set of tools for supporting and enforcing compliance across the public sector.

7. Summary of recommendations

1. There is a need for the UK administrations to specify clear legislative foundations to archiving in the public interest, perhaps through straightforward archiving regulations.
2. The UK should legislate exemptions to all of these rights, in accordance with Article 89, in respect of processing undertaken for archiving purposes in the public interest.
3. The UK should legislate exemptions to all of these rights, in accordance with Article 89, in respect of processing undertaken for scientific or historical research purposes or statistical purposes.
4. The UK should legislate for exemptions under Article 85 and should ensure that exemptions enacted through these derogations cover the processing activities of archives.
5. The UK should exempt public authorities from the administrative fines set out in the Regulations, or should significantly curtail the scale of the potential fines that public authorities may be subject to under the Regulations.

8. Contact details

For further information please contact: