GDPR - DCMS CONSULTATION PAPER ON DEROGATIONS – ARA FINAL DRAFT RESPONSE

THEME 1 – SUPERVISORY AUTHORITY

The derogations that Archives and Records Association (UK & Ireland) proposes are connected to both THEME 1 and THEME 4, specifically the **secrecy and confidentiality obligations of the Data Protection Officer at Article 38(5)**. We are concerned that a data protection officer responding to the ICO's exercising of its powers under Article 58(1) paragraphs (a) and (e) might put himself/herself in breach of the secrecy and confidentiality obligations owed to the controller (the employer) and to the data subject.

Article 58(4)-(6) enables Member State law dealing with the exercising of ICO's powers. **ARA recommends a derogation to ensure that providing information about the controller and/or the personal data to ICO when ICO has used its powers to request or require them would not be considered a breach of Article 38(5).**

Article 90(1) is another example relation to Article 58(1) paragraph (e) of the possibility that a data protection officer responding to the ICO's exercising of its powers could put himself or herself in breach of his/her confidentiality obligations.

THEME 2 – SANCTIONS

Article 83(7) allows Member States to lay down rules for administrative fines to be paid by public authorities and Article 84(1) allows them to lay down rules for penalties not covered by Article 83. It is possible, but unlikely, that an archive service – whether public or private – might be subject to a penalty under either of these Articles as a result of a mistake when processing for archiving purposes in the public interest.

However, most archive services are small units or functions within a larger organisation such as a university, a local authority or a FTSE 100 business. If a fine becomes payable because of a mistake by such a service, any financial or other penalty should not be assessed against the turnover of the archive service's parent body, but against its own budget.

All archives, public or private, operate in the public interest. A large fine payable by a major organisation because of a mistake by the archive function could act as a deterrent to large organisations maintaining an archive service and have the unintended consequence of private organisations deciding to shut down their archives rather than run the risk of a large potential fine down at some future point. There is a difference here between organisations that mishandle their current records (eg of clients, patients or suppliers) and an error concerning non-current records now deposited in an archive.

The Archives and Records Association (UK & Ireland) recommends **a derogation to allow the UK authorities to take a flexible, proportionate approach to assessing fines and/or other penalties arising from processing of records for archiving purposes in the public interest (most of which is undertaken by archive services).**

THEME 3 – DEMONSTRATING COMPLIANCE

Article 40 Codes of conduct

Article 42 Certification

Article 43 Certification bodies

The Archives and Records Association (UK & Ireland) interprets these articles to mean that professional bodies (like ours) will have the right/responsibility to draw up our own codes of conduct, code of practice and certification, as we have done under earlier versions of data protection legislation. However, the GDPR does not specifically mention codes of practice, an important omission for the UK profession. We have already seen unfortunate moves in other parts of the European Union to draw up compulsory codes (under Article 89) that their authors intend to all member states.

We therefore recommend a derogation that **makes clear that these articles will not require independent professional membership bodies in member states to work to codes of conduct and practice and certification that have no practical relevance to our operational environment.**

THEME 4 – DATA PROTECTION OFFICERS

Article 38(5) imposes confidentiality obligations on the Data Protection Officer:

> '*The data protection officer shall be bound by secrecy or confidentiality concerning the performance of his or her tasks, in accordance with Union or Member State law*'.

However, it is <u>not clear whether the confidentiality is owed to the controller or the data subject, or both</u>. <u>Nor is it clear whether the duty applies to the personal data as well as to information about the controller's operations</u>.

The Archives and Records Association (UK & Ireland) – whose members deal routinely with data protection matters in the public, private and voluntary sectors - is concerned that a Data Protection Officer dealing with an order from the UK ICO to provide

> '*any information it requires for the performance of its tasks*' (Article 58(1) paragraph (a)) or '*access to all personal data and to all information necessary for the performance of its tasks*' – as set out in (Article 58(1), paragraph (e) –

might find that compliance puts them in breach of the confidentiality obligations at Article 38(5).

Article 39(1) paragraph (d) requires the Data Protection Officer to co-operate with the supervisory authority. But it appears to be the case that that 'cooperation' could result in the data protection officer also being in breach of the Regulation. The Archives and Records Association (UK & Ireland) believes that <u>the duty of data protection officers to respond to the ICO's exercise of its powers overrides the confidentiality obligation to data subjects</u>, and that information and personal data requested by the ICO should be handed over. However,

it is essential to make clear that this is the case and make clear that there will be no repercussions for data protection officers for so doing.

The Archives and Records Association (UK & Ireland) has also addressed this issue under THEME 1 (to which it is related). We restate here our recommendation for a derogation that makes clear that data protection officers will face no penalties for complying with an ICO request, under Article 58(4)-(6).

With regard to the issue of whether providing personal data to the data subject might breach confidentiality owed to a controller, **The Archives and Records Association (UK & Ireland) recommends a derogation that specifies that disclosing personal data to a data subject who has exercised rights under Articles 13-15 does not constitute a breach of Article 38(5)**.

THEME 5 – ARCHIVING AND RESEARCH

Article 89(3) lists six other Articles from which derogations can be provided by Member States. The Archives and Records Association (UK & Ireland) sets out below what it believes to be the minimum required for each of the six Articles.

Our intention is to achieve **maximum continuity between provisions that apply to current legislation as they apply to archive services in the public, private and voluntary sectors**. These current provisions have worked well and recognise the rights of data subjects; carrying them forward as far as is possible will enable existing arrangements to be maintained as far as possible while recognising the new rights enshrined in the GDPR.

1. Article 15: data subject right of access

This Article gives data subjects the right to obtain information about how 'their' data is being used and disclosed, and also to obtain a copy of the data.

Archive services and the records management profession currently benefit from three provisions under the 1998 Data Protection Act that should be retained in the GDPR through derogations. These are:

i) Section 7(3) of the 1998 UK Data Protection Act allows a controller **to seek further information required to locate the requested personal data**. Under the 1998 Act, the data controller is not obliged to comply with the request unless he is supplied with that further information.

It is essential to maintain this provision. It allows an archivist or records manager to ask an applicant questions as **a starting point for what could be an extensive, resource-intensive and time-consuming search involving their data**. Archives are unusual in that they hold material from multiple sources (some of which they may own and some which they don't). Many are also paper-based - files, registers, etc. Such indexes as may exist are usually linked to particular sets of records or are internal to the record, e.g. within each register.

At minimum, to have any hope of finding personal data, archives staff and records managers need the authority to ask the data subject whether s/he has had previous dealings with the archive service or records provider – in which case its own systems and current/recent records will need searching – or whether data relating to them may be in material received from other bodies (and, if so, which ones and when they might date from). **Without a starting point and a defined scope, finding personal data is like searching for one needle in multiple haystacks. The Archives and Records Association (UK & Ireland) therefore recommends a derogation containing wording similar to s 7(3) of the 1998 Act.**

ii) Section 33(4) of the 1998 Act exempts subject access requests if the relevant archives are not available for public access, e.g. are currently 'closed'. (The 1998 exemption applies if processing is for research purposes, is in compliance with conditions at s 33(1) and the results of the research do not identify the data subject – which of course is the case with closed archives.)

Many archives – eg those relating to prominent people that are still alive – are currently closed but will open to researchers at some future point and therefore operate in the public interest. **The Archives and Records Association (UK & Ireland) therefore recommends a specific derogation to apply to processing for archiving purposes in the public interest of archives not available for public access. Similar language to that at s 33(4) of the 1998 Act would work, but it should specify processing for archiving purposes in the public interest, not research purposes.**

iii) Section 9A(3)-(4) of the 1998 Act applies to unstructured manual records (category (e) personal data) and allows a cost limit to be applied to subject access requests.

The Archives and Records Association (UK & Ireland) recommends that the current cost limit should continue to apply to requests for category (e) data (if that data is considered subject to the GDPR); and, moreover, that the cost limit should apply to all subject access requests where the data is in manual records and is being processed for archiving purposes in the public interest.

The Archives and Records Association (UK & Ireland) recommends a derogation that adds a further provision to enable archive services and records managers to manage responding to subject access requests. This concerns:

iv) GDPR Article 15(3) has a new requirement, that if a data subject requests a copy of his/her personal data by electronic means, the copy is to be provided in electronic form. **Most personal data within archive services (and some held by records managers) is not held electronically**, and any obligation on them to digitise material so as to supply digital copies could impose (for many in the private and voluntary sector) a significant additional and unjustifiable cost to operations.

The Archives and Records Association (UK & Ireland) recommends a derogation from the obligation to digitise personal data, even if the request was received by email. This

recommendation also relates to the additional question (cost to business) in the DCMS consultation.

2. Article 16, Right to rectification

Article 16 of the GDPR gives data subjects the right to have **inaccurate data 'corrected' and incomplete personal data 'completed'**. The Archives and Records Association (UK & Ireland) is opposed to this provision applying to archives.

A key priority for archive services is protection of the integrity and authenticity of the historical record. This underpins a number of basic rights, notably free expression and accountability (envisaged in part by Article 85 of the GDPR). Archive services preserve the evidence of decisions made in the past and the reasons for those decisions. Even incomplete or erroneous data may be important factors in helping understand why a decision was reached. Even if it can be shown subsequently that a decision was based on inaccurate or incomplete personal data, archive services should not be obliged to rewrite history by changing the record of it, as this would seriously compromise the evidential value of the archives as an authentic record. And researchers should not be subjected to legal action for quoting from material that is held in an archive.

It must be remembered that the archives are what they are – the product of a body or institution's interaction with the data subject. The fact that some of their contents may be inaccurate or incomplete (or embarrassing) from a data subject's point of view does not mean they are wrong or should be changed. **The Archives and Records Association (UK & Ireland) therefore recommends that a derogation from Article 16 be provided to apply when processing is for archiving purposes in the public interest**.

3. Article 18, Right to restriction of processing

Article 18 of the GDPR gives data subjects the **right to restrict processing** in some circumstances. The Archives and Records Association (UK & Ireland) believes that when processing is for archiving purposes in the public interest, this right should be limited to the right to request data be removed from public access. The right should not prevent the continued storage and preservation of the data until such time as it ceases to be personal data (through the death of the data subject) or for other reasons can later be made accessible. In this way, the integrity of the archives is maintained but the privacy rights of the data subject are not harmed. **The Archives and Records Association (UK & Ireland) recommends that a derogation be provided to this effect, to apply when processing is for archiving purposes in the public interest.**

4. Article 19, Notification obligation re rectification or erasure

Article 19 of GDPR requires **notification of rectification, erasure or restriction of processing** to those to whom the personal data has been disclosed.

Erasure should not be a concern for archive services because of the exemption at Article 17(3) paragraph (d) in the GDPR. But rectification could be a problem unless the derogation recommended under Article 16 (at 2, above) is in place.

The Archives and Records Association (UK & Ireland) also believes that individual notifications each time personal data has been disclosed would create disproportionate effort and burdens for archive services. If personal data is withdrawn from public access under an Article 18 derogation (at 3, above), we believe that it may be sufficient in some cases to annotate the catalogue that contains the personal data or metadata to that effect. But not in all cases. **The Archives and Records Association (UK & Ireland) recommends a simple, specific derogation in order to provide absolute clarity on this question, to avoid the risk of multiple legal challenges, to apply when processing is for archiving purposes in the public interest.**

5. Article 20, Right to data portability

Article 20 of the GDPR gives data subjects the **right to have 'their' data provided in machine-readable format and to transmit it to another controller**. This Article should not apply to processing for archiving purposes in the public interest because, while a copy may be provided to the data subject on request, the original data itself is not being transmitted to another controller as envisaged, i.e. the data is not actually leaving the archive service.

The Archives and Records Association (UK & Ireland) therefore recommends a derogation to make it clear that this Article does not apply when processing is for archiving purposes in the public interest.

6. Article 21, Right to object & automated individual decision-making

Article 21(1) of the GDPR gives the data subject a **right to object to processing of personal data**, based on paragraph (e) or (f) of Article 6(1) – the paragraphs most likely to be used by archive services.

Article 21(6) provides an exemption, where the data is being processed for research purposes under Article 89(1). But, unfortunately, the exemption does not also refer to 'archiving purposes in the public interest', which is also covered in Article 89(1). This oversight needs correcting.

As with respect to Article 18 above, **The Archives and Records Association (UK & Ireland) recommends that this 'right to object' be limited to the right to request that data be removed from public access, and should not prevent the continued storage and preservation of that data, either in a specific derogation to this effect or a general derogation on the basis that the data subject's rights are already catered for at Article 18, to apply when processing is for archiving purposes in the public interest**.

Finally under THEME 5, the Archives and Records Association (UK & Ireland) is concerned about the implications of extending the scope of GDPR to **unstructured manual data (currently identified as 'category (e) data' in the 1998 Data Protection Act)**.

Section 33A of the1998 Act disapplies the first, second, third, fifth, seventh and eighth principles to category (e) data. It also partly disapplies the sixth principle, and certain other sections of the 1998 Act. **We therefore recommend a derogation that enables the disapplications in section 33A be carried forward in the GDPR.**

THEME 6 – THIRD COUNTRY TRANSFERS

Article 49 Derogations for specific situations

Many archive services and records managers have successful international partnerships beyond the EU, for example the sharing or sub-contracting of digitised data. Paragraph 1(d) of the GDPR enables transfers to take place where there are *'important reasons of public interest.'* But it is not clear which body will decide what constitutes 'important.'

The Archives and Records Association (UK & Ireland) recommends a broad derogation to ensure that regular and routine transfers to third countries is permitted for archiving purposes in the public interest, so that such processing is not disrupted unnecessarily.

THEME 7 – SENSITIVE PERSONAL DATA AND EXCEPTIONS

Article 9(2) paragraph (j) of the GDPR allows processing of sensitive personal data for archiving purposes in the public interest

> '*in accordance with Article 89(1) based on 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 interests of the data subject*'.

The Archives and Records Association (UK & Ireland) welcomes the fact that the EU envisages archiving of sensitive personal data, but recommends certainty that current arrangements in this regard, that have worked well, can be maintained.

There is currently provision at paragraph 9 of SI 2000 No. 417 (The Data Protection (Processing of Sensitive Personal Data) Order 2000) which we would like carried forward. (It refers to 'research purposes' but has also been used by archive services) Paragraph 9 reads:

> *The processing –*
>
> *(a) Is in the substantial public interest;*
> *(b) Is necessary for research purposes (which expression shall have the same meaning as in section 33 of the Act);*
> *(c) Does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and*

(d) *Does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.*

The Archives and Records Association (UK & Ireland) recommends a derogation that allows a similar provision to Paragraph 9 of SI 2000 No. 417, to apply when processing is for archiving purposes in the public interest.

THEME 8 – CRIMINAL CONVICTIONS

Article 10 of the GDPR requires processing of personal data relating to criminal convictions and offences to be '*under the control of official authority*'. The Archives and Records Association (UK & Ireland) cannot be sure whether this processing obligation applies to all archive services that exist in the public sector, or whether the term 'official authority' here has a narrow legal meaning.

Certainly archive services, particularly (but not exclusively) those in local government records offices, hold archives containing this type of personal data, e.g. Crown court records, coroners' records and prison records. Many, but not all, of these archives are public records under the Public Records Act 1958.

The Archives and Records Association (UK & Ireland) recommends a derogation that recognises the role of all archive services that hold records of criminal convictions and other personal data relating to offences, including those appointed to hold public records under section 4(1) of the Public Records Act 1958, so that all can continue to accept custody of them and to preserve them.

THEME 9 – RIGHTS AND REMEDIES

Article 17 Right to erasure (right to be forgotten)

Article 22 Automated individual decision-making, including profiling

Article 26 Joint controllers

Article 80 Representation of data subjects

No response. Archives covered by exemption under Article 17(3).

THEME 10 – PROCESSING OF CHILDREN'S PERSONAL DATA BY ONLINE SERVICES

Article 8 Conditions applicable to child's consent in relation to information services

No response.

THEME 11 – FREEDOM OF EXPRESSION IN THE MEDIA

Article 85 Processing and freedom of expression and information

The Archives and Records Association (UK & Ireland) believes that there may be exceptional cases, for example major public enquiries in the public interest, where freedom of expression rights may require that journalists be permitted to have access to personal data. **We therefore recommend reference to Article 85 when seeking a derogation that may apply in exceptional cases.**

THEME 12 – PROCESSING OF DATA

Article 6 (Lawfulness of processing) of the GDPR **makes no explicit provision for processing for archiving purposes in the public interest**. This is a major oversight that creates problems for archive services processing data for archiving purposes in the public interest. The paragraph in this Article that is most likely to be relevant to archive services is Article 6(1) paragraph (e), which reads

> '*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*'.

However, under Article 6(3), the basis for processing using paragraph 1(e) must be laid down in Union or Member State law. This should cause no problem for national archives in the UK (which have their own legislation) and possibly also for local authorities (which may be able to rely on the Local Government (Records) Act 1962 and similar legislation in Scotland) – although this is unclear.

However, the Article 6(3) provisions certainly do NOT cover UK universities, community archives, charitable bodies and businesses, i.e. the vast majority of archive services (numbering thousands) that operate in the UK, which have no basis in the permissive UK common law.

The Archives and Records Association (UK & Ireland) notes that Article 6(2) allows Member States to introduce more specific provisions to adapt application of the rules of the Regulation with regard to processing for compliance with paragraph 1(e), and refers to specific processing situations (of which processing for archiving purposes in the public interest is one), **but that they must be laid down in Member State law under Article 6(3) paragraph (b)**. We note that Recital 41 recognises that not all law is statute law, although it still expects the law to be

> '*clear and precise and its application should be foreseeable to persons subject to it*.'

For archive services, foreseeability in essence means publicising what archive services are, what they hold and what they do with it – which they can do. However, it would be most uncharacteristic of the common law to **require** private and charitable bodies to maintain archive services. It would also result in excessive costs and bureaucracy and it is not something we would seek. **It is also essential here to avoid unintended consequences**.

Without certainty that all archives operate in the public interest and are doing so lawfully, it is likely that a number may choose simply to suspend their operation or shut down entirely if they believe that they may be breaching the law just by existing.

The Archives and Records Association (UK & Ireland) therefore proposes a derogation to allow the Secretary of State to issue clear guidance on archiving purposes in the public interest (and by extension clear language in any UK implementing GDPR legislation) to ensure that all archive services can – with confidence – continue operating in the knowledge that they are doing so lawfully.

THEME 13 - RESTRICTIONS

Article 23 Restrictions

The Archives and Records Association (UK & Ireland) has covered its concerns in relation to restrictions in its recommendations concerning Article 89.

THEME 14 – RULES SURROUNDING CHURCHES AND RELIGIOUS ASSOCIATIONS

Article 91 Existing data protection rules of churches and religious associations.

Freedom of religion is a fundamental right and related to freedom of expression and the UN Charter. The Archives and Records Association (UK & Ireland) believes that any obligations on religious archives under the GDPR should reconcile with the provisions of Article 85 of the GDPR.

ADDITIONAL QUESTION – COST IMPACT

In the context of these derogations, what steps should the Government take to minimise the cost or burden to business of the GDPR

The Archives and Records Association (UK & Ireland) has referenced this issue in comments and recommendations on THEMES 1,2,4,5,6,11 and 12.