REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Data Protection Team
Department for Culture, Media & Sport
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Submitted via Web Form:
https://dcms.eu.qualtrics.com/jfe5/form/SV_b43QBMl2wUBo4g5

Re: General Data Protection Regulation ("GDPR")

To Whom It May Concern:

The Reporters Committee for Freedom of the Press appreciates this opportunity to comment on the GDPR, which will become effective in the United Kingdom on May 25, 2018. The Reporters Committee is an unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. We have provided assistance to journalists in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee has previously participated in similar matters. In 2015, we wrote a letter to French privacy regulators expressing concerns about their interpretation of the "right to be forgotten."[1] In 2016, we filed a brief on behalf of 29 news organizations in the French courts involving the extraterritorial enforcement of that right.[2] In our submission, we argued that forcing Google to de-list information on its servers worldwide had immense potential to harm freedom expression and the right to receive information around the globe.[3]

We write today to address Articles 17 and 85 and express our concern that the "right to be forgotten" under the GDPR may have profound negative effects on freedom of expression online and the right to receive information.

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[1] Letter from Intervenors to President Isabelle Falque-Pierrotin (Sept. 14, 2015), *available at* https://www.rcfp.org/sites/default/files/RCFP_CNIL_Sept14-English.pdf.

[2] Brief of Reporters Committee and 28 news organizations, *La société Google Inc. v. La Commission nationale informatique et libertés*, No. 399.922 (Conseil d'Etat filed Nov. 4, 2016), *available at* https://www.rcfp.org/sites/default/files/20161104-Google-v-CNIL.pdf.

[3] *Id.*

I. Extending Article 17's Right To Be Forgotten Requirement To Online Platforms Threatens Obligations Under International Law To Protect Freedom of Information.

Since the *Google Spain* decision in 2014, "right to be forgotten" obligations have applied to search engines such as Google or Bing, but have not been extended to Online Service Providers ("OSPs") such as Facebook or Twitter. Under the GDPR, individual EU Member States are required to implement derogation policies to reconcile free expression interests with privacy concerns. When considering this balance and implementing their own policies, Member States should recognize that applying the "erasure" obligations of Article 17 to digital platforms will directly affect the ability of the news media to report on newsworthy events. By extension, the public's interest in receiving newsworthy information will be curtailed. In order to respect obligations under international law, Article 17 should not be extended to these platforms.

International law has long afforded robust protections for journalists, news organizations, and the global public against the suppression of the free flow of information. Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") and Article 19 of the Universal Declaration of Human Rights ("UDHR") recognize a fundamental right to freedom of opinion and expression, including the "freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media." UDHR, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171. The UDHR and the ICCPR both protect not only a journalist's right to speak and publish, but also the public's right to "receive . . . information and ideas through any media and regardless of frontiers." UDHR, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (emphasis added); ICCPR art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

Today, hosting platforms such as Twitter and Facebook have become among the most important tools at the disposal of news organizations to seek, receive, and impart information and ideas. For example, these online platform companies are one of the primary means through which the public seeks out the news.[4] Indeed, a majority of American adults obtain news or discover links to news articles through social media platforms.[5] Moreover, internet platforms such as Facebook and Twitter have become

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[4] *See, e.g.*, Michael Barthel et. al, *The Evolving Role of News on Twitter and Facebook*, PEW RESEARCH CENTER, Jul. 14, 2015, http://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook/ (stating that "The share of Americans for whom Twitter and Facebook serve as a source of news is continuing to rise"); Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms*, PEW RESEARCH CENTER, May 26, 2016, http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/ (stating "A majority of U.S. adults – 62% – get news on social media").

[5] *Id.*

profoundly important to journalists as a major mechanism for newsgathering and a source of connections between journalists and their readers.[6]

To protect freedom of expression and the right to receive information, Member States should not extend Article 17's requirements to hosting platforms.

II. Member States Should Apply Article 85 Broadly To Defend International Principles Protecting The Flow Of Information To The Public.

Article 85 of the GDPR 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[.]" Art. 85.1. Following this principle, Article 85 requires Member States to create special exemptions for journalistic purposes "if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information." Art. 85.2. These concepts are vitally important but Article 85 does not elaborate on them. Member States must therefore give this language the broadest possible interpretation so that it may serve its intended purpose.

First, to uphold substantive international principles protecting the flow of information to the public, Member States should interpret "journalistic purposes" expansively and create derogations that allow the news media to gather and report the news freely. This approach is necessary because the GDPR's "lack of clarity about the scope and substance of exceptions" endangers protections for the news media.[7] While the GDPR carefully details the interests of data protection, it leaves individual EU Member States to reconcile the right to freedom of expression and to determine what qualifies as "journalistic purposes" under Article 85.1. The law's vagueness risks limiting the scope of this vital exception. For example, under this cursory provision, a Member State may determine that a "blog post" does not obtain protection.[8] This body must apply Article 85 to avoid such an outcome.

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[6] Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley reengineered journalism*, TOW CENTER, Mar. 29, 2017 ("The influence of social media platforms and technology companies is having a greater effect on American journalism than even the shift from print to digital").

[7] Joris van Hoboken, *The Proposed Right to be Forgotten Seen from the Perspective of Our Right to Remember, Freedom of Expression Safeguards in a Converging Information Environment*, 29 (2013), http://www.law.nyu.edu/sites/default/files/upload_documents/VanHoboken_RightTo%20Be%20Forgotten_Manuscript_2013.pdf.

[8] Daphne Keller, *The Right Tools: Europe's Intermediary Liability Law and the 2016 General Data Protection Regulation*, BERK. T. L. J. at 52 (forthcoming 2017).

Second, the language of Article 85 also leaves open questions about what exemptions would be "necessary" to protect the right of free expression. While the GDPR imposes clear penalties and incentivizes protections for data protection, it potentially leaves protection for journalistic purposes to be imposed only in special circumstances. In determining what derogations are "necessary," Member States should recognize that any data restriction that interferes with expression or the receipt of newsworthy information will have a substantial negative effect on public knowledge, and in such instances, an exemption will be necessary. To ensure effective newsgathering and dissemination of information which is necessary for "open [and] informed debate" crucial to democracy,[9] it is imperative that Member States adopt broad exemptions under Article 85 for freedom of expression.

Sincerely,

The Reporters Committee for Freedom of the Press

[9] International standard: Right to information, ARTICLE 19 (Apr. 5, 2012), https://perma.cc/7Y88-V2VZ.