British Library response to the Department for Culture Media and Sport's
Call for views on the General Data Protection Regulation derogations

May 2017

BRITISH LIBRARY

Introduction:

1. The British Library is the national library of the UK, one of the world's largest libraries holding over 150 million items and welcoming over 1.6 million visitors every year. We are also one of the largest archives in Europe, with many of our collection items being unique and / or unpublished[1].

2. With three diverse sites in St Pancras, London, Boston Spa in Yorkshire and in Stockton on Tees, we have been a vital part of the UK's knowledge economy since our creation in 1973. We build, curate and preserve the UK's national collection of published, written and digital content and a link to business, industry, technology and the sciences is proscribed in our founding Act (British Library Act 1972), in part through our role as a legal deposit library.

3. The British Library's strategy for fulfilling its statutory duties and maximising its impact is set out in *Living Knowledge*, published in 2015. This sets out six core purposes which cover the full span of our activities:

    - **Custodianship:** We build, curate and preserve the UK's national collection of published, written and digital content
    - **Research:** We support and stimulate research of all kinds
    - **Business:** We help businesses to innovate and grow
    - **Culture:** We engage everyone with memorable cultural experiences
    - **Learning:** We inspire young people and learners of all ages
      International: We work with partners around the world to advance knowledge and mutual understanding

4. With between 150 million and 200 million items and over 2 billion pages of UK web content, our custodianship purpose is the single biggest claim on our resources. Our collection is growing all the time; last year we added 597,000 physical items and 199,000 digital items such as e-books and e-journals, demand for our reading rooms rose from 395,000 to 414,000, and visits to our website increased from 18,353,000 to 20,707,000. We are also the largest news archive in the country giving access to over 60 million newspapers, as well as television and radio news – recording over 50 hours of news a day from 23 different channels.

5. The British Library welcomes the opportunity to contribute to the *Call for views on the General Data Protection Regulation derogations***.** Although the General Data Protection Regulation (GDPR) will apply across the range of the Library's curatorial and administrative

[1] For examples of some collection types that contain personal data please see Annex 1.

functions, our response focuses on Theme 5 'Archiving and Research' as this reflects the core function of the British Library.

6. We believe great care should be exercised when applying any conditions to the exercise of individual rights. Equally however there is a strong public interest in preserving the integrity of the historical record given its social, political and therefore democratic importance. Given this we welcome the GDPR as an opportunity to support and improve the legal role and function of UK archives. Subject to how it is implemented, the GDPR potentially offers far more security to an archive than is currently the case under the Data Protection Act 1998. Given increasing public concerns about privacy, particularly online, we believe that this greater protection for archives is very important.

7. In summary, in order to support the activity of archiving in the public interest, we believe the Government should:

    a) In line with Recital 158, introduce UK legislation which provides a legal basis to support public and private archives who are undertaking archiving in the public interest;
    b) Introduce freedom of expression and information related derogations under Art. 85 of the GDPR, *as a minimum* for press libraries, audio-visual and news archives as well as archives with collections of a political nature;
    c) Introduce all the derogations permitted under Art.89(2) (scientific, historical research and statistical purposes) and 89(3) (archiving in the public interest).

In undertaking the above activities, the Government will not only have ensured that we do not lose the exemptions currently available in the UK Data Protection Act, but will also, as envisaged by the GDPR, have protected the freedom of expression and information role of an archive as guardian of the historical record.

The Collections

8. The library acquires routinely many different types of information from different sources including legal deposit, web crawling, and purchase of donation. The Library is also increasingly seeking to digitise and sometimes put online its 20th century collections – recent examples including socio- political journals from the 1970s to the 1990s, newspapers, and archival records from the Gulf. The Library has recently been awarded £10 million from the Heritage Lottery Fund to digitise and put online predominantly unpublished collection items from the British Library Sound Archive, including materials containing sensitive personal data such as oral histories.

9. Most of the post-1916 material held by the Library holds personal data as defined by the Data Protection Act; much of it classed as 'sensitive' under section 2. Whilst a certain amount of that data has been voluntarily put into the public domain by the data subject, in a very large number of cases data subjects will not even be aware that their personal information is being processed by the Library. This is especially the case with unpublished

material such as the archives of politicians, scientists, charities and high-profile individuals; publications like the *Police Gazette*, and those produced by private societies and associations.

10. The Library has a world class collection of literary and political archives. A particular example of the latter is the India Office archive which includes personal correspondence, diaries and, increasingly, email and digital records. Some, particularly in the literary archives would have been assembled with no expectation of public access or permanent preservation. As might be anticipated, the information is often frank, highly sensitive and personal, with data subjects ranging from readily identifiable high-profile individuals to others where identification is very difficult.

11. In cases involving digital records, the quantity of data may mean that the depositor is not even aware of the archive's contents. Even with more conventional archives, it is normal for repositories to acquire information in excess of that which would reasonably be required for an archive, the process of selection and weeding generally occurring post-acquisition.

12. Set alongside the need to protect and respect individual privacy rights, are the growing expectations of researchers for access to publicly-funded collections and pressure from funders, Government and legislation promoting transparency, notably the Freedom of Information Act, Orphan Works Directive and Digital Single Market Directive. These all encourage libraries, archives, museums and public bodies in general to broaden public access, digitise their collections and provide remote online access. In the case of material relating to the history and culture of overseas societies, there is an additional strong ethical imperative to make this available to populations outside the UK.

Existing legal bases for processing personal data – the need for archiving legislation

13. In addition to consent, the legitimate interests of the data controller (which under the GDPR very importantly can no longer be enjoyed by public organisations, like the British Library[2]), one of the main grounds for processing personal data that the British Library currently relies on is that of a legal obligation.

14. In terms of grounds for processing, most of the published and unpublished collections of the British Library are covered by the 1972 British Library Act. However, in common with legislation establishing other national repositories, like the Natural History Museum with its unique scientific archives, it primarily focusses on governance matters, and does not include a definition of 'library' – the term 'archive' is not used - nor does it address the Library's obligations and responsibilities when handling and processing personal information. However recital 41 of the GDPR states that "*such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to a person subject to it…*"

[2] Art 6.1. Lawfulness of Processing: *(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.* ***Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.***(Emphasis added).

15. Intuitively, activities such as acquisition, preservation and cataloguing might be assumed to be implied by the British Library Act, these all being essential to the development and maintenance of a national repository. However, it is not clear whether this would extend to activities associated with the provision of on-site access or digitisation with the intention of putting the materials online. In short we believe, whether the legislation is "clear and precise" is open to challenge hence believing that it is imperative that the Government introduces legislation, outlining the activities of archives, which is common in many European countries.

16. Most UK archive services are provided by educational establishments, charities, commercial entities or private trusts which, unlike the British Library and a handful of other national repositories, do not have any legislation at the moment which defines their status or activities.

17. In conclusion therefore as outlined in recital 158[3], in order to provide private and public archives with the proper and practical grounds for processing personal data, and in turn to allow them to enjoy the archiving exemptions outlined in the GDPR, as well as the non-mandatory Art. 89 exemptions, it is essential the activity of archiving in the public interest has a basis in statute. With this archives will be able to enjoy unequivocal grounds of processing personal data as provided for in Art 6.1.f of the GDPR. As outlined above, clear and precise legislation does not exist for the majority of cultural heritage institutions with archives in this country, and we therefore believe it is imperative for the Government to introduce legislation that outlines the activities of archives that act in the public interest.

Archives and Freedom of Expression and Information

18. The GDPR, like the Data Protection Act, has a broad definition of 'processing'. This encompasses all aspects of collection management, including acquisition, storage, preservation and cataloguing. Any kind of digitisation and then giving access, including publishing the material online, would be considered as processing under the GDPR. The GDPR applies to both unpublished materials (personal archives, oral histories etc), as well as published information bringing newspaper and audio-visual archives, journals and books into scope. The onward processing of any of these types of content by libraries in their physical form, or as digital data many decades later, can, depending on the circumstances, be legally problematic. For example if there is no statutory underpinning for the processing of publications like newspapers, or archives of an important political nature, if the person whose sensitive personal data is made available, did not give permission, processing may run the risk of being deemed incompatible with the law.

19. The UK Data Protection Act does not appear to extend the exemption available for journalistic, academic, artistic or literary processing to archiving activities by organisations

[3] Recital 158. *Where personal data are processed for archiving purposes, this Regulation should also apply to that processing, bearing in mind that this Regulation should not apply to deceased persons.* ***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).

outside the newspaper or media industry. The GDPR however does give Member States the ability to provide wide exemptions for processing that relates to the freedom of expression and information. The GDPR gives examples of audio-visual archives and news archives but allows Member States to go beyond exemptions for these limited categories if they relate to the freedom of expression and information.[4]

20. Although published news material for example will include materials put into the public domain by the data subjects, articles, interviews, broadcasts etc also contain sensitive personal data about third parties who may not have given their consent in many instances. That data, in combination with other information on the internet, may allow readers to discover even more about individuals referred to than would have been realistically possible at the time of making available in a pre-internet era. This raises the question as to whether online publication by a library - as opposed to a newspaper company - of information freely put into the public domain by data subjects, given the passage of time, might nonetheless be construed an unwarranted intrusion of privacy, even for publications previously widely available.

21. Similarly archives hold unpublished information that can be of unique political importance, in regards to which data protection law could be used to prevent or frustrate archives giving access to those records. This could be in spite of them giving unique insights into history and the running of the country at the time. By understanding the past, it also gives us the chance to better understand, in this case, the politics of today and therefore archival access is arguably an important function of a healthy democracy.

22. The British Library therefore believes the Government should duly consider the types of activities that relate to freedom of expression, and implement the appropriate exemptions allowed for under Art.85. As a minimum we believe these wider exemptions should cover the activities of newspaper and audio-visual archives, such as the British Library, as well as archives of an important political nature.

Continuation of current exemptions under the UK Act and full implementation of all GDPR exemptions for organisations archiving in the public interest and undertaking scientific and historical research

23. Assuming that the Government will introduce legislation to allow organisations "archiving in the public interest" to benefit from the Regulation, in addition to the archiving provisions that the Regulation provides, we believe it is essential that the Government also introduces all the derogations allowed for in Art. 89.

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[4] *Art 153. Member States law should reconcile the rules governing freedom of expression and information,* ***including*** *journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation. 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.* (emphasis added)

Namely in the case of archiving, the exemptions referred to in Articles 15, 16, 18, 19, 20 and 21. As a research organisation we also support full implementation of the derogations for scientific or historical research purposes and statistical purposes - Articles 15, 16, 18 and 21. [5]

24. By fully implementing Art 89.3 not only will we preserve exemptions that archives can rely on under the UK's existing data protection Act, but also protect them from the "new" obligations on data controllers that the GDPR introduces.

Conclusion:

25. In summary we believe it is essential for the UK Government to:

    a) introduce UK archive related legislation which provides a legal basis to support public and private archives who are undertaking archiving in the public interest. It is essential this legislation in line with recital 158, provides archives "a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest." This should also include disseminating online, where this would be in the public interest;
    b) Introduce freedom of expression and information related derogations under Art.85 of the GDPR, which apply as a minimum to press libraries, audio-visual and news archives, as well as archives with collections of a political nature;
    c) Introduce all the derogations permitted under Art. 89(2) (scientific, historical research and statistical purposes) and 89(3) (archiving in the public interest).

26. The British Library is undertaking further substantial impact analysis to understand how the GPDR might affect its activities as a world leading cultural heritage institution. We will share this with DCMS colleagues in due course.

27. Given the scale and complexity of the Library's collections and the extensive data contained within, we are keen to remain engaged on the issue of derogations and would welcome any ongoing opportunities to discuss this with DCMS.

28. If you have any further questions on this submission please contact

[5] Please see annex 2 for more information on Articles 15, 18 and 21 and their relationship to the UK Data Protection Act.

Annex 1

Examples of the British Library Collections that contain Personal Data (including sensitive personal data)

Examples of the scale and complexity of our collections, some of which are available online as a result of digitisation, include:

- Over 60 million newspapers in the news archive, including audio-visual materials which grow at a rate of over 50 hours a day.
- annual deposits of paper and digital copies of the unedited UK electoral rolls with details relating to approximately 46 million individuals;
- approximately 33,000 recordings of interviews as part of the National Life Stories and Oral History programmes, which includes an online resource comprising digital recordings of interviews with people discussing their personal life, including interviews with Holocaust survivors.
- the UK Web Archive comprising preserved copies of UK domain web pages, blogs and some social media content collected under recent non-print legal deposit legislation
- Archival records from the Gulf and Middle East, including published and unpublished records from the India Office.

Annex 2

Article 15 Subject Access

Section 33 of the Data Protection Act provides a limited exemption from subject access rights. Given the range and quantity of material held by an archive and limited resources and time within which to respond to a subject access request, derogation in cases where providing access would not be possible or involve disproportionate effort would mirror current legislation and provide a pragmatic and balanced approach.

Article 18: Right to restrict processing

Although there is no specific exemption under section 33 of the Data Protection Act, section.14 decisions to restrict processing would be adjudicated through the courts. Where the data which is subject to a restriction request forms an integral part of a wider archive or sound recording, implementing a request to stop processing , rectify or erase inaccurate data could potentially endanger processing for preservation or security purposes, or compromise the archive as a complete and accurate historical record. Allowing for data to be retained subject to certain safeguards where respecting the right to restriction would be "likely to render impossible or seriously impair the achievement of the objectives of that processing" would provide some protection for the integrity of the historical record.

Article 21 right to object to processing

The right to object to processing under section 10 of the Data Protection Act applies to processing which is likely to cause substantial damage or substantial distress. Although there are no such restrictions around the article 21 GDPR right to object, it does provide for a derogation in Member State law in cases where the exercise of an objection would be "likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes." (Art 89(3)). The implementation of a derogation subject to these limits would help to protect the integrity of the historical record while ensuring adequate safeguards are in place to protect and respect an individual's rights.