Department for Culture, Media & Sport 'Call for Views' on GDPR Derogations: National Records of Scotland Response

National Records of Scotland (NRS) is providing a response on Theme 5 – Archiving and Research.

We support the views that will be provided by the Scottish Government on the Article 89 safeguards and derogations relating to statistical purposes as well as on all other themes.

Theme 5 – Archiving and Research

Article 89(3) states that where personal data are processed for archiving purposes in the public interest, member state law may provide for derogations from the rights referred to in Articles 15, 16, 18, 19, 20 and 21 subject to conditions and safeguards in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

NRS interprets 'archiving purposes in the public interest' to be the custodial function of acquiring, preserving and providing access to personal data in archives carried out to the benefit of the public. Archiving purposes carried out across the public, private and voluntary sectors can all serve the public interest. The Universal Declaration on Archives, adopted by UNESCO in 2011, states that:

"Archives record decisions, actions and memories. Archives are a unique and irreplaceable heritage passed from one generation to another. Archives are managed from creation to preserve their value and meaning. They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens' rights and enhances the quality of life."

The Declaration further recognises that archives are a unique and irreplaceable heritage and the "vital necessity of archives for supporting business efficiency, accountability and transparency, the rights of citizens, for establishing individual and collective memory, for understanding the past, and for documenting the present to guide future actions" and it acknowledges "the collective responsibility of all – citizens, public administrators and decision-makers, owners or holders of public or private archives, and archivists and other information specialists – in the management of archives."

The primary duty of archivists is to protect the integrity of archival material and thus guarantee that it continues to be reliable evidence of the past. For records to retain their value they must be managed and preserved in ways that ensure their authenticity, reliability, integrity and usability. Archives should be made accessible to all, while respecting the laws and the rights of individuals.

We note that the UK Information Commissioner has stated her belief that the right to personal privacy should be balanced with the fundamental right to know, that archives have an important role to play in providing the public with access to information, and that the GDPR can be applied in a way that respects both personal privacy and archiving.

Recital 158 states that "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." Many archives in the UK may not have a formal legal basis or obligation to operate as an archive. NRS believes UK Ministers should seek to ensure that all public and private archives can continue to operate and benefit from the derogations under Article 89(3).

We believe that an adequacy of protections at least equivalent to that provided by section 33 (research, history and statistics) of the Data Protection Act 1998 (DPA) is required for archives which are processed for archiving in the public interest, and that UK Ministers should provide for derogations accordingly.

Our views on the derogations required from provisions made under specific articles of the GDPR are outlined below.

Article 15 – Right of access by the data subject

Article 15 provides data subjects with a right of access to their personal data, to obtain a copy of their data, and to information about how it is being used and disclosed.

Archives services hold archives from multiple sources in multiple formats. Many records are paper based and un-indexed. To enable archives services to carry out efficient and effective searches they will need to be able to continue to seek clarification about the information sought and to place a request on hold until that clarification is provided. A cost limit should also continue to apply to subject access requests relating to unstructured personal data which is being processed for archiving purposes in the public interest. A derogation equivalent to the provisions under section 7(3) and 9A(3)-(4) of the DPA is therefore needed.

Article 15(3) also requires that where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form. As the majority of archives are held in physical formats this would place a disproportionate burden on archives services. NRS requests a derogation that does not require archives services to digitise data in order to supply it in electronic form regardless of the means by which the request was made.

Article 16 – Right to rectification

Article 16 gives data subjects the right to have inaccurate personal data rectified and incomplete personal data completed. NRS opposes this provision being applied to

archives and requests that a derogation be provided for archives which are processed for archiving in the public interest. It is vital that the integrity and authenticity of archives are protected and the evidential value of historical records is upheld. Providing data subjects with the right to correct inaccurate personal data or complete incomplete personal data would compromise the authenticity of archival information. Archives are evidence of decisions and events and even if they can be shown to contain inaccurate or incomplete information they should not be altered as they represent an authentic record at the time of their creation. A right to rectification would undermine the integrity of historical records and people's right to know the truth about past events. Data subjects should have the right to request that finding aids to archives which contain inaccurate or incomplete information are rectified, but where finding aids are amended to correct inaccuracies or complete information, sufficient information must be retained to enable understanding and interpretation of the original record. Removing all of the information in a finding aid which has provided context to a record may compromise its integrity. NRS therefore believes that a derogation from this provision should extend to finding aids of archives to limit full rectification where this would undermine future interpretation of the record.

Article 18 – Right to restriction of processing

Article 18 provides data subjects with the right to obtain restriction of processing in certain circumstances. NRS holds the view that this right should not interfere with the storage and preservation of data for archiving purposes in the public interest. The privacy rights of data subjects must be respected and they should have the right to request that records containing their personal data are withdrawn from public access where they can demonstrate that continued access would interfere with their rights and interests and cause substantial damage and distress. Data subjects should not have an universal right to request the closure of any personal data held in archives. Information which falls within the GDPR's special categories of personal data should usually be closed to public access. However, personal information which has no sensitivity and in which there is a public interest in access should remain open. For example public records commonly contain the names of officials, but a named official should not have the right to request restrictions on access to records solely because their name appears in the record. Providing data subjects with a right to request that all of their personal data be withdrawn from public access without any assessment as to whether their rights and interests would be affected by continued access could potentially result in the unwarranted closure of archives and undermine public accountability and transparency. A derogation is required which takes these considerations into effect.

Article 19 - Notification obligation regarding rectification or erasure of personal data or restriction of processing

Article 19 requires communication of any rectification or erasure of personal data or restriction of processing to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. Article 17(3)(d) provides an exemption from the right to erasure for processing necessary for archiving purposes in the public interest. A derogation from Article 16 would provide an exemption from the right to rectification. NRS does not believe that individual notification of restriction of processing would be reasonable. Should

personal data be withdrawn from public access then NRS considers that updating the public catalogue to the archives will serve as sufficient notification of restriction of processing. NRS currently follows this procedure when reclosing archives. Individual notification would involve disproportionate effort and be unduly burdensome. We believe that a derogation which provides clarity on this issue and relieves archives of an unnecessary burden is required.

Article 20 – Right to data portability

NRS considers that this right is not relevant to archives which are processed for archiving in the public interest and that a full derogation from the article is required. A data subject has a right of access to a copy of their personal data under Article 15, but the original data cannot be removed from the archives and transmitted.

Article 21 – Right to object

NRS considers that the right to object to the processing of personal data should be limited to the right to request that archives containing personal data are withdrawn from public access, where the data subject can demonstrate that continued access would interfere with their rights and interests and cause substantial damage and distress. The right to object should not interfere with the storage and preservation of data for archiving purposes in the public interest. A derogation is required to this effect.

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