Call for views on the General Data Protection Regulation derogations

Joint response from Universities UK and the Council for Advancement and Support of Education

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1. This response is submitted jointly by Universities UK and the Council for Advancement and Support of Education Europe (CASE). The first part of the response sets out the need for universities to be considered as hybrid bodies for the purpose of the GDPR. The second part details views gathered on the specific derogations.

2. This submission has been compiled with the support and input from the Association of University Legal Practitioners, the Association of Heads of University Administration and the University of Cambridge.

Defining public authorities

3. Higher education providers recognise and strongly support the need to ensure that any processing of personal data is fair and lawful. Our members understand that the GDPR represents a change from current requirements, and are therefore preparing for the implementation of the GDPR in May 2018. However, to prepare properly they need clarity on whether higher education providers will be defined as public authorities for the purpose of the GDPR, as this has significant implications for the legal bases upon which they can process personal data. The definition of a public authority under the GDPR is to be determined by national law.

4. For the purpose of the GDPR, classifying higher education as public authorities without any further derogations will be very problematic for their operation and create unnecessary legal challenges. Higher education providers themselves are not 'public bodies', rather they are autonomous bodies, typically established as charities, that carry out certain public functions. In some cases higher education providers may be regarded as public authorities, such as the Freedom of Information Act. Or they may be defined as hybrid bodies, such as under the Human Rights Act.

5. Our understanding is that under the GDPR public authorities should not rely on 'legitimate interests' as the legal basis for processing personal data because they should have an alternative basis to process the data necessary to carry out their public duties set out in national legislation[1]. Universities process personal data on the basis of legitimate interests in a number of areas important to their operation. Under current circumstances, if universities are regarded as public authorities consent would be the only lawful basis for processing data not explicitly described as a public task. This would be problematic as relying on consent when not appropriate would be burdensome and confusing for both institutions and individuals. This would

[1] Recital 47 of the GDPR, which specifies when "legitimate interests" may be a basis for processing personal data, states: "given that it is for the legislator to provide by law for the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks."

unintentionally hinder valuable and reasonable data processing by higher education providers.

6. Particular concerns have been raised regarding the implications of being unable to use “legitimate interests’ as legal basis for processing data for alumni advancement work. Alumni advancement helps universities engage alumni in the life of their institutions as volunteers, advocates and supporters. This is a valuable to universities in many ways, including:
    - enhancing the experience of current students,
    - promoting the institution to prospective students,
    - engaging with community members, business leaders, government officials and others,
    - securing philanthropic donations to support the mission of the institution.

7. There are several measures that could be taken to resolve this issue. In particular universities should be recognised as a hybrid body rather than a public authority. We detail below (under our response to theme 12) that Article 6(2) should define ‘tasks carried out in the public interest’ with regard to universities, and clarify that the processing of personal data in pursuit of all other tasks should not be excluded from Article 6(1)(f). This would ensure that the legal basis under Article 6(1)(f) remains available for higher education providers’ activities not captured under Article6(1)(e).

Implications for research

8. We strongly welcome the additional protections that the GDPR allows for research. Measures should be taken to ensure that researchers in the UK are able to benefit from these derogations. This is particularly important given the increased research interest in longitudinal studies and large data sets, and in the context of international collaboration. Our response under theme 5 emphasises the steps that we think should be taken to achieve this. In particular:
    - Exempting data processing for research purposes from the requirement to fulfil the rights of access, rectification, restriction or objection, as permitted under Article 89(2).
    - A further derogation to permit a request for correction, restriction or deletion to be treated instead as a request for anonymization or pseudonymisation where appropriate.

Theme 2 – Sanctions

8. Under Article 36(5) we propose that no further requirements are introduced for data controllers to consult with the ICO following a Data Protection Impact Assessment.

9. Under Article 83(7), public authorities or hybrid bodies should not be subject to administrative fines or any fines should at least be proportionately reduced. In our view this is appropriate considering the additional corrective powers granted to the ICO under Article 58(2).

10. If the ICO is permitted to introduce additional sanctions pursuant to Article 84, these must be applied subject to the same range of factors set out in Article 83.

Theme 5 – Archiving and Research

11. Protections are offered to data processing for archiving and research (articles 5, 9, 14,17 and 21) provided that "appropriate safeguards" are put in place (article 89(1)). We would welcome further consultation on these safeguards when they are set out in legislation or statutory guidance. Researchers must have the guidance necessary to ensure that the right safeguards are met for them to benefit from the derogations as appropriate.

12. Furthermore, it is important to recognise that research projects can transfer from one institution to another, and any safeguards should therefore enable research data to be transferred from one research institution to another in those circumstances, subject to appropriate safeguards. It must also be considered that research is becoming increasingly international in nature, and that supporting international collaboration is important.

13. Processing for research purposes should be exempt from the requirement to fulfil the rights of access, rectification, restriction or objection, as permitted under Article 89(2) to ensure that research projects may be conducted properly and without prejudice, particularly as research (particularly health research) moves to more longitudinal studies and large data sets.

14. Where the derogations relating to research are relied upon, there should be a further derogation to permit a request for correction, restriction or deletion to be treated instead as a request for anonymization or pseudonymisation, where to do otherwise would in the reasonable view of the university affect the integrity of the dataset.

15. It is also vital that the derogation provides a *vires* to process sensitive data as specified in Articles 9 and 10. Academic expression processing must be protected under freedom of expression.

Theme 6 – Third Country Transfers

8. Article 49(1)(d) permits a third country transfer for important reasons of public interest which, by virtue of Article 49(4), should be recognised in Member State law. We consider that several university activities potentially involving third country transfers should be considered as in the public interest and hence benefit from derogations under Article 49(1)(d). Many universities do not have offices in third countries, but do recruit students and staff from abroad. Furthermore, university may travel overseas for research or teaching purposes.

Theme 7 – Sensitive personal data and exceptions

16. We suggest that additional legal bases for processing special category personal data should reflect those currently set out in the Data Protection Order 2000 to enable processing required in the public interest (as far as is permissible under article 9).

17. Clarification would be welcomed on whether CCTV recording may be considered to contain sensitive personal data, and what the legal basis of data processing in this way may be.

Theme 8 – Criminal Convictions

18. We suggest that additional legal bases for processing personal data relating to criminal convictions should reflect those currently set out in the Data Protection Order 2000 (as far as is permissible under article 10)

Theme 9 – Rights and Remedies

19. One of the key charitable functions of Universities is the awarding of a degrees for which records must be kept indefinitely in order to protect the public interest in the integrity of awards. Our understanding is that under Article 17(3)(b) the task of retaining indefinitely proper records of HE providers' current and former students and accordingly processing for this purpose should be exempt from the right to erasure.

Theme 10 – Processing of Children's Personal Data by Online Services

20. The ICO's 'GDPR: 12 Steps to Take Now' guidance suggests that the UK is likely to lower the threshold in Article(8)(1) to 13 years, and we would agree that this seems to be a suitable age.

Theme 11 – Freedom of Expression in the Media

21. Universities have a statutory obligation to uphold academic freedom and freedom of speech. As a result, any restrictions would place universities in an impossible position. Processing that falls under Article 85 should be granted similar exemptions from the GDPR as those granted under section 32 of the DPA to processing for the special purposes as defined in section 3 of that Act.

Theme 12 – Processing of Data

22. Universities should be treated as hybrid bodies under the GDPR. If universities are regarded as public authorities without any specific derogations, they will lack a suitable legal basis for processing personal data for many of their key tasks, particularly alumni engagement work.

23. To solve this problem, we suggest that Article 6(2) should define 'tasks carried out in the public interest' with regard to universities, and clarify that the processing of personal data in pursuit of all other tasks should not be excluded from the use of the 'legitimate interests basis' (Article 6(1)(f)). This would ensure that the legal basis under Article 6(1)(f) remains available for higher education providers' activities not

captured under Article6(1)(e). In our view Article6(1)(f) should be available for data processing for university direct marketing and fundraising purposes.

24. Any legislation introduced under Article 88 should be mindful of the need of employers to process their employees' data for the range of purposes listed in that Article without the need for consent.

25. Without the clarity that would be created by such legislation, we consider that this fundamental aspect of the GDPR will attract numerous costly, burdensome and unnecessary legal challenges. This clarity would be particularly useful for the processing of alumni data since, for different reasons, the legal basis for a University processing such personal data could be their legitimate interest or a task carried out in the public interest or the exercise of their official authority. This includes the requirement to process data for government initiatives such as the Destination of Leavers from Higher Education (DLHE) survey. In all cases the processing of alumni data is crucial in order to maintain the life-long relationship alumni have with their alma mater and to deliver charitable activities in the public interest.

26. Any legislation introduced under Article 88 should be mindful of the need of employers to process their employees' data for the range of purposes listed in that Article without the need for consent (noting that to seek such consents in any event is unlikely to be lawful given the wording of Recital 43).

Theme 13 – Restrictions

27. Insofar as each is permissible under the terms of Article 23, a range of exemptions from the data subject rights (including the right to receive privacy notices) should be introduced to mirror those currently set out in Part IV of, and Schedule 7 to, the DPA. The Government should take a broad view of the 'public interest' in Article 23(1)(e) and include amongst such activities those of management planning, negotiations the fair and proper operation of examination processes (as already allowed for under paragraphs 5, 6, 8 and 9 of Schedule 7 to the DPA),and the processing data for compliance with government initiatives, such as the DLHE survey . This will prevent the exercise of the rights by data subjects impinging on the fundamental matters of public interest listed.