Cultural Heritage Institutions Privacy Alliance

The Cultural Heritage Institutions Privacy Alliance, an alliance of individuals who work in the university and cultural heritage sector, welcomes the opportunity to respond to the Government's consultation on the implementation of the General Data Protection Regulation.

Cultural heritage institutions (CHIs), both public and private, in the UK hold many different types of collections that contain personal data ranging from published and broadcast news collections, oral histories, photographs, and research data through to personal and organisational archives. These collections are hugely important from social, medical and often political perspectives, and therefore ensuring that the historical record is accurately maintained for current and future generations has an important freedom of expression driver underlying it.

In 2017 not only are these collections used (or, using data protection terminology, "processed"), by individuals on the premises of CHIs, but increasingly collections are being digitised and made available online as well.

1. Background and the Data Protection Act 1998

When undertaking day-to-day activities of providing offline and online access to collections, the cultural heritage sector currently faces a number of problems when considering grounds for processing personal data and relevant exemptions under the existing 1998 Act.

These issues include:

1. Whether public bodies have the relevant legal underpinning for establishing valid grounds for processing. We believe that, other than the National Archives, CHIs, including national organisations like the British Library and the British Museum etc., have, at best, very slim statute based grounds for processing personal data. Certainly there are no explicit grounds in pieces of legislation such as the British Library Act or British Museum Act that refer to the processing of individuals' personal information or using it, for example, in digitised form on the premises or on the internet. This is a major issue given that the GDPR requires that any legislative base for processing personal data must be clear and precise. (Recital 41).
2. Whether digitisation and online availability of 20th century materials may be viewed as falling under the "legitimate interests" grounds for processing. (Please note that the legitimate interests basis for processing personal data will no longer be enjoyable by public organisations under the GDPR which is problematic given the current lack of statutory underpinning of many processing activities by CHIs.)
3. Whether CHIs, such as libraries and archives, can enjoy the special interest exemptions relating to journalism, literature and art (s.32), given that such organisations are keepers of the historical record and therefore are essential in terms of protecting freedom of expression in a wide sense.
4. The lack of applicability of the s.33 exemption (for research, history, statistics) to modern research undertaken online as part of digitisation by cultural heritage organisations, or even research undertaken on the premises of CHIs involving access to digitised materials through dedicated terminals as otherwise enabled by the UK Government's 2014 changes to copyright law.

5. The lack of clarity as to what 'research' means in the context of data protection legislation – the Information Commissioner's Office (ICO) has taken an inadequate and limited interpretation as to what the term means, constraining its understanding to research in the public interest or research related to a "pressing social need".

2. Archiving in the Public Interest – The need for legislation defining what an archive is

In addition to the requirement under Recital 41 of the General Data Protection Regulation that legal bases and legislative measures must be "clear and precise"[1], Recital 158 further specifies what is required in order for controllers to enjoy the exemptions relating to archiving in the public interest.

*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).*

As pointed out above, we believe that other than the National Archives, no publicly funded organisation with archival collections has a compelling statute-based grounds for processing personal data that would satisfy these requirements. Furthermore, there are also many important privately funded archives in the UK, for example the Wellcome Trust and its unique medical archives, which also lack any statutory-based grounds for processing.

Recital 41 asserts that statutory bases for processing personal data must be 'clear and precise'. Again, citing our comments above, we do not feel that current legislation provides sufficient clarity and precision in terms of the personal data processing and archiving activities of public and private archives. Under the new Regulations, public bodies, including many UK archives and other CHIs, will no longer be able to rely on the "legitimate interests" grounds for processing, which makes the need for 'clear and precise' statutory-based grounds all the more pressing.

Recommendation: In order to protect the activities of public and private organisations that undertake archiving activities (including putting materials online), the UK government should pass a law, as is the case in most civil law countries we are aware of, to define what an archive is.

3. Implementing the exemptions related to archiving in the public interest

Assuming, therefore, that the government has created the legislative foundation for archiving in the public interest, for example through an Archiving Act, the following sections of GDPR can underpin the activities of public interest archiving:

- The ability to undertake onward processing (Article 5(1)(b))
- The ability to operate under the 'public interest' legal basis for processing (Article 6(1)(e))
- The exemption for the processing of 'sensitive' categories of personal data (Article 9(2)(j))

[1] Recital 41: Where this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union (the 'Court of Justice') and the European Court of Human Rights.

- The exemption to the duty to inform data subjects where data is not received from the subject (Article 14(5)(b))
- The exemption from the application of the right of erasure (right to be forgotten) (Article 17(3)(d))

In addition to putting UK archives in a position where they can enjoy the exemptions for archives that are "hard boiled" into the GDPR, we also call on the government to introduce the non-mandatory research and archiving exemptions in Art 89. The derogations under Article 89 regarding archiving are:

- Right of access (Article 15)
- Right to rectification (Article 16)
- Right to restriction of processing (Article 18)
- Notification related to rectification, erasure, or restriction (Article 19)
- Right of portability (Article 20)
- Right to object (Article 21)

Recommendation: In order to protect the activities of public and private organisations that undertake archiving activities (including putting materials online), the UK government should ensure that organisations archiving in the public interest enjoy **all** the exemptions that the GDPR provides for, as listed above. If any limitation is to be put on the activity of cultural heritage institutions in this respect, it should only be where unwarranted damage or distress could have been foreseen at the time the material was made available.

4. <u>Freedom of Expression – Libraries and Archives</u>

A fundamentally important exemption to the many obligations put on data controllers by the GDPR are those that relate to freedom of expression and information (in relation to Article 11 of the Charter of Fundamental Rights of the European Union and Article 19 of the Universal Declaration of Human Rights).

Recital 153 (emphasis added):

*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**. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights.*

Because cultural heritage institutions are not only keepers of the historical record (keeping records of huge social, economic and political importance), but also institutions which, like newspaper publishers, broadcasters, and so on, are putting their materials online for the public to access, we believe that freedom of expression exemptions should also apply to cultural heritage institutions.

Even focusing narrowly on the explicit wording of the Regulation, many public and private libraries and archives hold important audiovisual and news archives. More broadly, material of a political nature is held in cultural heritage institutions, and this also should be protected from subsequent change and interference by individuals under the guise of data protection. This may be achieved by applying the widest freedom of expression exemptions that can be employed under the Regulations, namely:

- Chapter II (Principles)
- Chapter III (Rights of Data Subject)
- Chapter IV (Data Controller and Data Processor)
- Chapter V (transfer of personal data to third countries or international organisations)
- Chapter VI (independent supervisory authorities)
- Chapter VII (cooperation and consistency)
- Chapter IX (specific data processing situations

Recommendation: As we understand is the intention in the Netherlands, in order to protect the important freedom of expression roles that historical archives play, by often holding material of a political or public interest nature, we believe that the same exemptions for news publishers should apply to archives, particularly when archives give access to their collections electronically, including by publishing their collections online.

5. **Administrative fines**

The GDPR allows Member States to define certain parameters related to the considerable administrative fines set out in Article 83.

Article 83(7) (emphasis added):

Without prejudice to the corrective powers of supervisory authorities pursuant to Article 58(2), each Member State may lay down the rules on ***whether and to what extent administrative fines may be imposed on public authorities*** *and bodies established in that Member State.*

We believe that it is important for the UK Government to set out its rules in relation to these administrative fines, and in so doing to take careful consideration of public authorities. The allowance that the GDPR makes in terms of permitting Member States to decide 'whether and to what extent' the fines may apply to public authorities seems appropriate in consideration of the stretched financial nature of the public sector. Additionally, the payment of very high fines by one public authority to another (in the case of the UK, the ICO) would, we feel, not be a compelling way to ensure that organisations are compliant. Public authorities, irrespective of the fines, will be subject to the other 'corrective powers' set out in Article 58. We feel these will be appropriate for enforcing compliance within the public sector.

Recommendation: In order to support their proper functioning, we recommend that public authorities are exempt from the GDPR's possible administrative fines or, as a minimum that the potential fines faced by public authorities are capped at a far lower and more pragmatic level.

6. **Clarification**

We are concerned that Art 89.1 contains an apparent contradiction between archiving (which entails protecting the historical record from change and alteration) and the explicit reference to the need to respect the principle of data minimisation. We are concerned that these two requirements are mutually exclusive irrespective of the wording in the Regulation.

In summary we therefore call on the government to:

1. Introduce legislation to define “archiving in the public interest”;
2. Ensure that archives and the historical record are protected from interference by implementing the widest freedom of expression exemptions possible, in particular to ensure archives with collections of a political, audiovisual and newspaper nature are able to protect and share the historical record;
3. Implement the Article 89 exemptions into UK law;
4. Exempt public authorities from the administrative fines.