



Bar Council response to the Call for views on the General Data Protection regulation derogations

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Culture Media & Sport Call for views on the General Data Protection regulation derogations.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Preliminary

4. The Call for views does not identify any details of proposals for the derogations. As such, this interim response must necessarily be without prejudice to any future Bar Council response to the consultation which it is assumed will follow prior to the adoption of any derogations. This response cannot, given the limited timeframe for responses, provide complete responses to all the Themes nor can anything but a high level response be provided to highlight certain matters which should be taken into account. Failure to address a Theme or part thereof does not indicate that the Bar

¹ Department for Culture Media & Sport, 12 April 2017. Call for Views on the General Data Protection Regulation derogations.

Council will not communicate a position on those matters during a consultation or in any other appropriate manner.

Responses

Theme 1: Supervisory Authority

Art. 58(1)(e) & (f) and Art. 90

5. The Powers of the Supervisory Authority to have access to information and systems of data controllers should be limited where the data controller is a legal professional such as a barrister² or otherwise subject to the requirements of client confidentiality and/or Legal Professional Privilege (“LPP”) (see by analogy the exceptions in Schedule 4 paragraph 5 to the Data Protection Act 1998 (“DPA”). LPP cannot be waived by the barrister (this is matter for the client), who may be holding such information as a processor for a client or as a controller for their own purpose, but subject to contractual or LPP restrictions. In such circumstances, the Supervisory Authority should not have power to access such information in the absence of client consent, as this would conflict with the barrister’s obligation of professional secrecy and the Bar Code of Conduct and place the barrister in breach of those obligations and potentially in conflict with their contracts with their clients. LPP is a fundamental human right which should not be abrogated by a failure to adopt an appropriate derogation.

Theme 2: Sanctions

Arts. 58 (see Theme 1 above) 83, 84

6. These Articles do not take account of the fact that legal professionals may be restricted in providing information to the Supervisory Authority in respect of their processing which are the subject of LPP or an equitable or contractual obligation of confidentiality, compliance with the Bar Code of Conduct or Rules or Orders of the Court. The derogation should provide for the fact that disclosure of information (in mitigation or explanation for a breach of the GDPR provisions) could place the barrister in breach of professional conduct rules or other obligations. A similar problem arises where it is not possible to obtain consent for processing e.g. former clients, minors and clients who are mentally incapable of providing consent. Accordingly, compliance with the profession’s rules and/or confidentiality and/or LPP obligations may expose the barrister to a higher penalty, as a result of an inability to support mitigation for a breach, which would be unfair.

²The Bar Council’s response is focused on barristers, but the derogations referred to in this submission apply equally to other legal professionals who are subject to similar regulatory regimes and professional secrecy obligations.

Theme 4: Data Protection Officers (“DPO”)

7. There are 2 ways this could affect legal professionals - by the potential requirement to have a DPO for a Chambers and for legal professionals who are designated as DPOs within their organisation or chambers. This will be particularly important post-Brexit where, as it presently stands the GDPR requires every data controller outside the EU to appoint a DPO. It is currently unclear whether processing carried out in a barristers’ chambers (especially where the core work is criminal or family) or an equivalent ABS would fall within the scope of “large scale processing” which would require a controller/processor in Art. 37(1) to have a DPO.

8. The derogation should clearly state that processing for the purpose of providing legal services does not give rise to requirement for a DPO.

9. In any event, there should be a derogation to provide that a barrister is not required to disclose confidential or privileged material to a DPO, who may be an employee of a third party.

Theme 6: Third Country Transfers

10. Article 49(1)(e) provides for a derogation in the case where transfer is necessary for the establishment, exercise or defence of legal claims. If this derogation was to be construed too narrowly it may exclude a transfer which was necessary for the provision of legal advice, which was not at that stage involved in contentious proceedings.

11. It is proposed that the wider exception set out in Schedule 4 paragraph 5 DPA should be adopted for third party transfers. This would enable legal services to continue to be provided both inside and outside the territory of the Member State and the Union.

12. The position should be made clear explicitly in order to ensure that there is no implication that the wording of the GDPR was intended to be narrower, and in order to avoid the need for controllers to obtain specialist legal advice.

Theme 7: Sensitive personal data and exceptions

13. The derogations currently contained in Schedule 3 paragraph 6 DPA should be adopted in relation to Art. 9 GDPR.

14. The position should be made clear explicitly in order to ensure that there is no implication that the wording of the GDPR was intended to be narrower, and in order to avoid the need for controllers to obtain specialist legal advice.

15. A derogation is also required in order to preserve the position of publishers and users of printed law reports, online legal databases, legal text books and other educational materials. Section 8(7) of the Rehabilitation of Offenders Act 1974 ("RoA 1974") provides a helpful starting point, but as this pre-dates the Internet, more precise language should be used to ensure that such information services are included, for the avoidance of doubt.

16. Section 8(7) says, in relation to defamation actions and spent convictions:

Subsection (3) above shall apply without the qualifications imposed by subsection (6) above in relation to—

(a) *any report of judicial proceedings contained in any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, and*

(b) *any report or account of judicial proceedings published for bona fide educational, scientific or professional purposes, or given in the course of any lecture, class or discussion given or held for any of those purposes.*

17. The derogation will need to take account of the following points:

- a. The permitted legal bases for processing need to include processing for the purpose of legal research using law reports, online databases of decisions of courts and tribunals (e.g. BAILII, Lexis, Westlaw), and reports or accounts of judicial proceedings published for bona fide educational, scientific or professional purposes, or given in the course of any lecture, class or discussion given or held for any of those purposes.
- b. RoA 1974 says "solely of reports of proceedings in courts of law" and "judicial proceedings". To avoid any doubt about whether this includes tribunals, then any reference to "courts" will need to say "courts and tribunals" and any reference to "judicial proceedings" will need to use language wide enough to include tribunals.
- c. The derogation should avoid language which might imply that online databases do not already fall within section 8(7) of ROA 1974.

Theme 8: Criminal convictions (Art. 10)

18. Provision should be made for the processing by barristers of criminal convictions for the purpose of providing legal advice and in the conduct of legal proceedings which is not subject to "official authority". Criminal convictions of third parties are relevant in the defence of alleged criminal allegations, in family and child protection

proceedings and also in civil proceedings. It would be inappropriate for an “official authority” to seek to control such processing, which must necessarily be conducted secretly as it is subject to LPP and could lead to conflicts of interest.

Theme 9: Rights and remedies

Art. 17: right to be forgotten.

19. The derogation in Art. 17(3)(b) may need to include a provision permitting retention of court records by a prosecuting authority or a court after a case has finished. Alternatively a wide interpretation of the derogation (e) for enforcing or defending legal rights will be necessary (see paragraph 10 above).

Art. 26: determination of the responsibilities of joint controllers.

20. It has never been entirely clear what the delineation could be for joint controllers. In determining what the responsibilities might be clear and transparent rules and guidance would be required. Consultation on any proposed rules and guidance should be carried out with sector specific experts.

Art. 80(2): Right of representation.

21. In designating a body, organisation or association to exercise the rights of representation in Art. 80(1), the government should have regard for the necessity that such organisation has achieved and maintains the appropriate regulated and professional standards required for the conduct of legal proceedings and legal representation or is required to use the services of regulated legal professionals in legal proceedings. To do otherwise would create a competitive imbalance in the provision of legal services and potentially expose consumers to the disadvantages of unregulated providers.

Theme 10: Processing of Children’s data by Online Services

Art.8

22. The only derogation permitted under this article is the designation of the age at which a child’s data is deemed lawful. The limits within which this derogation can be exercised are 13 – 16 years of age.

23. Other UK legal provisions determine that a person does not reach adulthood until the age of 18, whereas consent for certain activities, in particular sexual activities (“the age of consent”) is 16. Many information society service (“ISS”) providers set the limit for use of their activities as 13, but parents permit younger children to operate such services.

24. It would appear from Art. 8 that the holder of parental responsibility cannot consent to ISS being provided directly to a child younger than 13.

25. It would seem appropriate for evidence to be obtained of the likely risks at the different age points to make such a judgment. The provision also does not appear to take account of the requirement for specific circumstances by, for example, a Court in making provision for the exercise of free will by a minor.

Theme 11: Freedom of Expression in the media (Art. 85.)

26. The current DPA provisions address this Theme. This is an opportunity to reconsider the effectiveness of those provisions and to make new provisions. Regard should be had to the extensive consideration of those provisions during the Leveson enquiry.

Theme 12: Processing of data

Arts. 6 and 18.

27. Specific provisions are required to ensure that processing of the personal data of data subjects other than the barrister's client, which arises in the context of the provision of legal services and which is therefore confidential and/or the subject of LPP is lawful. Such processing is required to give effect to the human right to consult a lawyer which is in the public interest.

28. Such processing cannot be subject to the same right to restriction of processing where third parties are concerned as this has the potential to give rise to satellite litigation where the third party seeks to restrict the data processed about them or seeks to interfere in the relationship between the legal professional and the client using the provisions of the GDPR.

29. A derogation to Article 6 equivalent to Schedule 2 paragraph 5(a) DPA is required. This can be based on Article 23 (1)(i) and (j).

Art. 28.

30. The mechanism for appointment of a processor should not be complex or provide barriers to compliance. A simple pro forma mechanism should be provided for by which a controller can appoint a processor. A contract is not always the appropriate mechanism for such matters especially where consideration is absent.

Art. 35

31. Similar issues arise here as under Theme 4 in relation to DPOs. There is no clear guidance as to whether barristers' chambers could fall within the scope of this requirement. Accordingly, the applicability of this Article to barristers' chambers is uncertain. If it could be clearly stated that processing for the purpose of providing legal services are excluded pursuant to Art. 35(10) and the provisions of Art. 35(1) - (7) do not apply, there would be no need for a DPIA. There are adequate and necessary protections for confidentiality in the Professional code of conduct for all barristers, compliance with which is mandatory. On a sectoral level the issues are the same and can be addressed by a sectoral impact assessment rather than a specific impact assessment.

Art. 37

32. This is the same issue as under Theme 4 in relation to DPOs. There is no clear guidance as to whether barristers' chambers could fall within the scope of this requirement. Accordingly, the applicability of this Article to barristers' chambers is uncertain. There should be derogation which clearly states that processing for the purpose of providing legal services does not give rise to a requirement for a DPO.

Art. 86

33. The Civil Procedure Rules and the Family Procedure Rules make provision for access to court documents. These provisions work in practice and enable the protection of important and confidential information, where justified. Any rules under the GDPR should maintain this position.

Art. 87

34. The debate over national identity "cards" has been revisited a number of times. This provision does not mandate the adoption of national identity numbers and should not be treated as an invitation to change the current position by introducing such a requirement.

Art. 88

35. The existing provisions in the DPA should be included.

Theme 13: Restrictions (Art. 23)

36. Derogations equivalent to section 35, Schedule 2 paragraph 5(a), Schedule 3 paragraphs 6 (to apply expressly to Art. 6 as well as Arts. 9 and 10) and 7(a), Schedule

4 paragraph 5, and Schedule 8 paragraph 10 DPA are required. These can all be based on Art. 23(1)(i) and (j).

37. Derogations to (at the least) Articles 5, 17 and 18 equivalent to the current derogations in DPA are required. This includes a derogation to Art. 5 equivalent to section 35 DPA.

38. A derogation to Art. 15 is required equivalent to Schedule 7 paragraph 10 DPA, in order to make clear that legal representatives are not required to provide legally privileged material in response to a subject access request.

Additional question: cost impact

39. There is no distinction in the GDPR between large data controllers and SME or micro enterprises or sole traders. However, the burden on such businesses of the increased administration associated with the GDPR will be disproportionately high unless some account is taken of the increased obligations.

40. For example, the £10 fee did nothing to cover the actual costs of compliance with a subject access request but did act as a disincentive for frequent or repetitive requests. That requirement has now disappeared.

41. Provision could be made to exclude the application of some aspects of the GDPR to such enterprises or to moderate the impact of the more expensive aspects such as requirements for DPO or DPIAs.

42. Also there is a question about practicality of the ICO guidance on the transparency provisions - specifically the requirement to identify and name each processor for the purpose of obtaining informed consent. The effects would seem to be that every time a processor is changed, which could be a frequent event if competition in the market for processor services increases, every ds would need to be informed and asked again to provide specific consent for that change, e.g. if a micro business changes their IT services provider. It is unlikely that any data subject cares about the name of the processor, but the ICO guidance suggest that this is what seems to be required. The effect is likely to be that processors will not ask for consent and find a different lawfulness basis and this will lead to a decrease in transparency.

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