

# University of Cambridge

## Registry's Office

### Preliminary guidance on the General Data Protection Regulation and academic research

This is a preliminary guidance note, correct as of its date of issue, which will be supplemented in due course by fuller guidance on both the Research Integrity and Information Compliance webpages.

#### Introduction

1. The General Data Protection Regulation (GDPR)<sup>1</sup> imposes a wide range of default duties on organisations ('data controllers') when they are using and handling ('processing') information ('personal data') about living identifiable individuals ('data subjects'). The GDPR doesn't apply to anonymous information or to information about the deceased. This guidance document sets out the default duties imposed by the GDPR, the exemptions that apply to academic research and how the new law will affect researchers.

#### The GDPR's default duties

2. The default duties apply to all aspects of a data controller's activities unless specific exemptions apply from some or all of the duties with regard to specific types of data processing. These exemptions exist both within the GDPR itself and within the Data Protection Bill (DP Bill)<sup>2</sup> currently passing through Parliament that will supplement the GDPR for UK-based data controllers.
3. The default duties may be summarised as follows:
  - (a) Following the data protection principles,<sup>3</sup> so that personal data are:
    - (i) Processed (i.e. collected, handled, stored, disclosed and destroyed) fairly, lawfully and transparently. As part of this, the data controller needs to identify a valid 'legal basis' for processing an individual's personal data (e.g. they have consented to the processing, or the processing is necessary to operate a contract with them, or the

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>. See too <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr>.

<sup>2</sup> <https://services.parliament.uk/bills/2017-19/dataprotection.html>. References to parts of the Bill in this guidance document are to the latest published version at the time of writing (dated 23 March 2018 as amended in Public Bill Committee; <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0190/18190.pdf>). See too <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/03/ico-publishes-introduction-to-the-data-protection-bill/>.

<sup>3</sup> Article 5 of GDPR.

processing is necessary for the performance of a task carried out in the public interest).<sup>4</sup>

- (ii) Processed only for specified, explicit and legitimate purposes.
- (iii) Adequate, relevant and limited.
- (iv) Accurate (and rectified if inaccurate).
- (v) Not kept for longer than necessary.
- (vi) Processed securely.<sup>5</sup>

(b) Respecting an individual's rights<sup>6</sup> as follows:

- (i) The right to be informed of how their personal data are being used. This right is usually fulfilled by the provision of 'privacy notices' (also known as 'data protection statements') which set out how an organisation plans to use an individual's personal data, who it will be shared with, ways to complain, and numerous other prescribed topics.
- (ii) The right of access to their personal data.
- (iii) The right to have their inaccurate personal data rectified.
- (iv) The right to have their personal data erased where appropriate (right to be forgotten).
- (v) The right to restrict the processing of their personal data pending its verification or correction.
- (vi) The right to receive copies of their personal data in a machine-readable and commonly-used format (right to data portability).
- (vii) The right to object: to processing (including profiling) of their data that proceeds under particular legal bases; to direct marketing; and to processing of their data for research purposes where that research is not in the public interest.
- (viii) The right not to be subject to a decision based solely on automated decision-making using their personal data.

(c) Implementing various accountability requirements, in particular:

- (i) Being subject to regulation by the Information Commissioner's Office (ICO) and the courts.<sup>7</sup>
- (ii) Implementing policies, procedures, processes and training to promote 'data protection by design and by default'.<sup>8</sup>
- (iii) Having appropriate contracts in place when outsourcing functions that involve the processing of personal data, including transferring the personal data outside the EEA.<sup>9</sup>
- (iv) Maintaining records of the data processing that is carried out across the organisation.<sup>10</sup>

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<sup>4</sup> Articles 6 and 9 of GDPR.

<sup>5</sup> See too Article 32 of GDPR.

<sup>6</sup> Articles 13-22 of GDPR. These rights are qualified in various ways.

<sup>7</sup> Articles 31 and 51-59 of GDPR and Parts 5 and 6 of the DP Bill.

<sup>8</sup> Articles 24-25 of GDPR.

<sup>9</sup> Articles 28 and 44-50 of GDPR.

<sup>10</sup> Article 30 of GDPR.

- (v) Documenting and reporting personal data breaches both to the ICO and the affected data subjects.<sup>11</sup>
- (vi) Carrying out Data Protection Impact Assessments (DPIAs) on 'high risk' processing activities.<sup>12</sup>

#### Relevant exemptions in an academic research context

4. The GDPR and the DP Bill provide two broad sets of exemptions from the above default duties which are relevant to personal data processed in academic research contexts.
  - (a) Personal data processed for journalistic, artistic, literary or 'academic purposes'.<sup>13</sup> This set of exemptions is aimed at protecting publicly valuable freedom of expression. It is the relevant set of exemptions if a broadly similar freedom of expression rationale for the academic data processing could be mounted as for journalistic, literary and/or artistic activity. See paragraphs 5-7 below.
  - (b) Personal data processed for 'scientific or historical research purposes', 'statistical purposes' or 'archiving purposes in the public interest'.<sup>14</sup> This set of exemptions is aimed at enabling research in the public interest and protecting the integrity of research datasets. It is the relevant set of exemptions for many forms of research involving human participants. See paragraphs 8-10 below.

#### The freedom of expression exemptions

5. These exemptions apply if all three of the below conditions are met:<sup>15</sup>
  - (a) The data processing is undertaken with a view to the publication of some academic (or journalistic, literary and/or artistic) material.
  - (b) There is a reasonable belief that publication would be in the public interest, bearing in mind the special importance of the public interest in freedom of expression.
  - (c) There is a reasonable belief that compliance with the part of the GDPR that is exempted would be incompatible with the academic purpose.
6. The exemptions are from the following:
  - (a) All the principles in 3(a) above – the principles do not apply.

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<sup>11</sup> Articles 33-34 of GDPR.

<sup>12</sup> Articles 35-36 of GDPR.

<sup>13</sup> Article 85 of GDPR.

<sup>14</sup> Article 89 of GDPR.

<sup>15</sup> Part 5 of Schedule 2 to DP Bill.

- (b) All the rights in 3(b) above (with the exception of the right in 3(b)(viii) above) – the rights do not apply.
- (c) In part, the accountability requirements in 3(c)(i) above – the ICO and courts have limited powers to regulate.
- (d) The accountability requirements in 3(c)(iii) above – the provisions about transfers outside the EEA do not apply.
- (e) In part, the accountability requirements in 3(c)(v) above – the provisions about reporting data breaches to the affected data subjects do not apply.

7. The exemptions do not apply to:

- (a) The other accountability requirements in 3(c) above.

#### The research exemptions

8. These exemptions apply if all four of the below conditions are met:<sup>16</sup>

- (a) Appropriate technical and organisational safeguards exist to protect the personal data e.g. data minimisation, pseudonymisation, or access controls.
- (b) There is no likelihood of substantial damage or distress to the data subjects from the data processing.
- (c) The research will not lead to measures or decisions being taken about individuals (except for ethically approved interventional medical purposes).
- (d) Compliance with the part of the GDPR that is exempted would prevent or seriously impair the research purpose.

9. The exemptions are from the following:

- (a) The principles in 3(a)(ii) and (v) above – personal data collected for other purposes can be used for research ones and can be kept indefinitely.
- (b) In part, the right in 3(b)(ii) above – the right to subject access does not apply if the research results will be made public in a form that does not identify the data subject.
- (c) The rights in 3(b)(iii), (iv), (v) and (vii) above – the rights of rectification, erasure, restriction and objection do not apply.

10. The exemptions do not apply to:

- (a) The principles in 3(a)(i), (iii), (iv) and (vi) above.

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<sup>16</sup> Article 89 of GDPR, Clause 19 of DP Bill and Part 6 of Schedule 2 to DP Bill.

- (b) The rights in 3(b)(i), (vi) and (viii) above – though the rights in 3(b)(vi) and (viii) are unlikely ever to apply.
- (c) All the accountability requirements in 3(c) above.

#### What the exemptions mean in practice: freedom of expression exemptions

11. In practice, most types of academic research at the University that fall under the freedom of expression exemptions can continue as at present. The key aspects of the GDPR simply do not apply: there is no need to follow the principles, to identify a legal basis for processing, to tell the data subjects about the processing, or to respond to their rights requests. While many of the accountability requirements apply in theory, the most likely practical impact will be the need for ethical review for high risk research projects in order to meet the DPIA requirement in 3(c)(vi) above – but such research projects are likely to be subject to a comparable ethical review under current procedures in any case.

#### What the exemptions mean in practice: research exemptions

12. In practice, most types of academic research at the University that fall under the research exemptions largely can continue as they have been doing. But there are some important changes to highlight as follows:
- (a) Researchers will need to identify the appropriate legal basis for data processing for their project in order to meet the lawfulness part of the principle in 3(a)(i) above. In almost all cases, the recommended legal basis for normal personal data is that the data processing is ‘necessary for the performance of a task carried out in the public interest’, and the recommended legal basis for special category (sensitive) personal data is that the processing is necessary for scientific or historical research purposes in the public interest.<sup>17</sup> The recommended legal basis for data processing is **not** consent (or explicit consent), even when you are collecting consent from research participants for ethical reasons.
  - (b) Researchers will need adequate data management plans/arrangements in order to meet the other data handling and security principles in 3(a)(iii), (iv) and (vi) above.
  - (c) Researchers will need to ensure that the information they supply to research participants about how their personal data will be used in the project covers all the topics required in order to fulfil the right in 3(b)(i) above.<sup>18</sup> Further guidance on this is forthcoming, but in essence the University has published a generic statement for research participants which covers all of the ‘static’

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<sup>17</sup> Articles 6 and 9 of GDPR and Paragraph 4 of Schedule 1 to DP Bill. Article 9 defines special category personal data.

<sup>18</sup> Articles 13 and 14 of GDPR.

headings,<sup>19</sup> meaning that participant information forms (or equivalent project documentation) need only to cover those topics that necessarily differ from project to project.

There is a partial exemption from the supply of this information if you have not collected the personal data from the data subjects themselves, and if to supply the information would be impossible or would involve disproportionate effort (e.g. you have no or very limited contact details). In such circumstances you should endeavour to make the relevant information publicly available (e.g. on a website).

- (d) Ethical reviews for high risk research projects will continue to be required. Researchers may need to be prepared to answer more questions about the data protection aspects of their work during these processes in order to fulfil some of the accountability requirements in 3(c)(iv) and (vi) above.

### Conclusion

- 13. It should be stressed that while the GDPR imposes a higher standard of data protection law, academic research activities (whether falling under the freedom of expression exemptions or the research ones) are afforded a protected position and there should not be major repercussions for most ongoing or new research projects.
- 14. In addition, it should be noted that the above guidance is limited to a brief statement of data protection law and its primary repercussions. It does not attempt to address wider ethical issues involved in research projects, the norms of which will vary from discipline to discipline, and project to project therein.

Dr James Knapton  
Information Compliance Officer  
Registry's Office  
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[James.Knapton@admin.cam.ac.uk](mailto:James.Knapton@admin.cam.ac.uk)  
(01223 3)32331

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<sup>19</sup> <https://www.information-compliance.admin.cam.ac.uk/data-protection/research-participant-data>.