

**A British Academy and Economic & Social Research Council submission to the
Department of Culture, Media and Sport (DCMS) call for views on the General Data
Protection Regulation derogations**

Summary

1. We welcome the opportunity to submit evidence to the Department of Culture, Media and Sport (DCMS) call for views on the General Data Protection Regulation (GDPR) derogations. We are grateful to Dr David Erdos of the University of Cambridge's Law Faculty for his support in developing this submission.
2. This submission focuses on the GDPR derogations that particularly affect the humanities and social sciences and so explores in particular Themes 5 (Archiving and Research) and 11 (Freedom of Expression in the Media). The response builds on pan-European discussions which have been ongoing since the GDPR was first proposed back in 2012 and were in particular reflected in the Economic and Social Research Council's (ESRC) 2013 position paper.¹
3. As a result of these discussions work in the social sciences and humanities is now protected as "*academic expression*" through the freedom of expression clause (Article 85 (2)) on an equal basis to journalism. This is a mandatory derogation and it is vital that it is fully reflected in UK implementing legislation, not least since it reflects the efforts of considerable UK-based advocacy. Once the threshold in this derogation is met, then its effect is and must be to supersede contrary provisions set down elsewhere including in the research and archival provisions.
4. We recognise that there is an overlap between some social science research and archiving needs to process data in an especially safeguarded fashion (e.g. due a fiduciary relationship with data subjects) and so should continue to be governed by the research and archival provisions. At least as regards publicly interested academic research and archives, derogations here must cover not only those set out in Article 89 also from the prohibition on processing 'sensitive' data (as envisaged under Article 9 (2) (j) and also Article 10) and also the data subject notification provisions (Article 12-14) as permitted in Article 23 (Restrictions). These derogations reflect the fact that such activities would not only otherwise be seriously hindered by the default rules in these areas but also further "*important objectives of general public interest*" (Art. 23 (1) (e)) and represent the exercise of a right or freedom (Art. 23 (1) (i)) - notably "*freedom of the arts and sciences*" as recognised *inter alia* in Article 13 of the *EU Charter*.

Section 1: Aspects of Particular Relevance to Theme 11 – Freedom of Expression in the Media

1A - Humanities and Social Science Work must be protected as Academic Expression as specified in Article 85 (2) of the Regulation

¹See <http://www.esrc.ac.uk/files/about-us/policies-and-standards/esrc-response-to-the-european-commission-s-proposed-european-data-protection-regulation-2013/>.

5. We are concerned that the phrasing found in Theme 5 (Archiving and Research) makes no mention of the new protection for “*academic expression*” alongside that of journalism, literature and art within Article 85 (2) of the GDPR. Whilst such an absence makes sense for biomedical research and perhaps also similar research based on the fiduciary model as well as some archives, it is very problematic for humanities and social sciences which require protection within the free expression balance set down in this in Article 85 (2). Unfortunately, the ambit of Article 85 appears erroneously to have been narrow-cast within the consultation as an issue only concerning “*freedom of expression in the media*”. However, quite apart from the general obligation to ensure a reconciliation between freedom of expression and data protection in Article 85 (1), the scope of protection for special expression as set out Article 85 (2) is importantly considerably broader.

6. During the drafting of the European Data Protection Directive some twenty years ago, there was a widespread understanding that both individuals and organisations investigating the social world and publicly disseminating the results of that investigation (along with associated opinions and ideas) required wide-ranging derogations. Such work was understood to represent the kind of publicly-focused expression which the European Court of Human Rights has consistently recognised should generally be free from legal restriction. This resulted in the protections for journalistic, artistic and literary output within Article 9 of the current Directive. At least as implemented in the UK (primarily through section 32 of the DPA 1998), this provision has generally served the interests of free expression well within the area in which it operates. Unfortunately, however, those investigating society in an academic setting have been generally understood to fall outside the scope of these protections and instead only benefit from the much more restrictive ‘research’ derogations (see in particular section 33 of the DPA 1998).

7. This has proved problematic both from the point of view of principle and also in terms of its practical effects. From the perspective of principle, it is not justifiable that those engaged in essentially the same publicly-focused activity of social investigation and critique should be subject to radically different legal restrictions simply depending on the institutional or educational nexus in which they are placed. It is even more problematic when those subject to uniquely burdensome legal requirements are those whose academic nexus nurtures intrinsic qualities of rigour, system, culmination and precision.²

8. Turning to practical effects, the ‘research’ provisions have their origins in thinking about the needs of biomedical research and continue to focus on situations where data must be especially safeguarded due, for example, to the researcher having a fiduciary relationship to those under study. As a result, these provisions only provide possible derogations as regards very limited aspects of the general data protection and in any case subject their use to preemptory and restrictive tests.³ However, this model is not suited to much work in the humanities and social science. Especially as interpreted by relatively ‘risk-averse’

² Cf. Robert Dingwall, “Confronting the Anti-Democrats”, *Medical Sociology Online* (2008) 51, 54.

³ See DPA 1998, section 33.

institutions, this has resulted in the imposition in many cases of very problematic procedural and substantive restrictions on social science and humanities work including:

- requirements for detailed *ex ante* protocols - problematic since social investigation often depends on an informal ‘soaking and poking’ methodologies;
 - restrictions on the non-anonymous reporting of research results - problematic since identification is often critically linked to questions of agency and accountability in social investigation (e.g. in history, politics or law);
 - prohibitions on the use of deceptive and/or covert methodologies⁴ - whilst deployment of such methodologies does require careful thought and justification, it remains essential for gathering information of manifest public importance including that related to discrimination,⁵ police malpractice⁶ and the activities of far-right groupings.⁷
9. Although the European Commission originally proposal recommended preserving the structural status quo in this area,⁸ these points were recognised during the drafting of GDPR resulting in “academic” expression being protected for the first time alongside and on an equal basis to other forms of special expression, namely journalism, art and literature, in Article 85. This was the result not least of sustained advocacy by UK civil society. This included not only the ESRC 2013 Statement⁹ but also repeated inclusion of the issue in Wellcome Trust submissions (which understandably principally focused on biomedical research). For example, the Wellcome Trust 2015 statement ahead of the final triologue emphasised the need to clearly protect “academic expression” within the freedom of expression derogations “because research in areas such as politics and history is unlikely to be compatible with the research model set out in Article 83 [now Article 89] and may not be permitted otherwise”.¹⁰
10. We strongly recommend that limits to default data protection procedural and substantive standards apply to academic expression on the same basis to other forms of special expression including journalism. In addition, we believe it is imperative that in the drafting it is made unambiguously clear that such limits supersede any contrary provisions in data protection law including the special ‘research and ‘archiving’ provisions set down in Article 89 and in domestic implementation of the GDPR. This is because Article 85 (2) in its totality is a compulsory derogation requiring that all forms of

⁴ See, for example, Hurdley, Rachel. "In the picture or off the wall? Ethical regulation, research habitus, and unpeopled ethnography." *Qualitative Inquiry* (2010). The current default in the DPA 1998 speaks of providing information “so far as practicable” (Part II, para. 2 (1), Sch. 1), a provision which has been relied upon by some institutions to continue to allow such methodologies where necessary. However, such language is entirely absent from the new default as set out in Article 13 of the GDPR.

⁵ D. Sapatkin, “Was This Ethical? Scientists Dare to Decieve”, *The Philadelphia Inquirer* (May 24, 2010).

⁶ S. Holdaway, *Inside the British Police: A Force at Work* (Oxford: Blackwell, 1983).

⁷ N. Fielding, “Observational Research on the National Front”, in M. Bulmer (eds.), *Social Research Ethics: An Examination of the Merits of Covert Participant Observation* (London: Macmillan, 1982).

⁸ See COM (2012) 11 final, art. 80.

⁹ See *supra* note **Error! Bookmark not defined.**.

¹⁰ Wellcome Trust, *Academic research perspective on the European Commission, Parliament and Council texts of the proposal for a General Data Protection Regulation – 2012/0011 (COD)* (2015), 10 (available at <https://wellcome.ac.uk/sites/default/files/research-perspective-data-protecton-regulation-proposal-wellcome-jul15.pdf>).

special expression are equally granted derogations as “*necessary to reconcile the right to the protection of personal data within the freedom of expression and information*”.

1B - The Test Applicable to Special Expression in Article 85 (2)

11. Our principal submission under this Theme is that Article 85 (2) mandates that academic expression be protected equally to other forms of special expression including journalism and that such cognate treatment is also sustained by principled and pragmatic considerations.
12. These derogations are currently specified in section 32 of the DPA 1998.¹¹ Subject to the satisfaction of a public interest and ‘incompatibility’ test (both currently based on a “*reasonable belief*” standard), these derogations disable most of the substantive provisions of data protection legislation with the exception of the ‘security’ provisions. They also significantly curtail (but do not abolish) the regulatory oversight of the Information Commissioner’s Office (ICO) and allow for private law remedies only after rather than prior to publication.
13. Whilst Article 85 (2) undoubtedly requires wide-ranging derogations, there is no reason why these should be identical to those currently specified in the DPA 1998. In this regard, we are aware of Lord Leveson’s recommendation that the derogations be significantly narrowed and that the conditions attached to them also be made more stringent.¹² Alongside the trenchant criticism which greeted these proposals from some quarters (as well as strong support from others), we are also aware of the more nuanced response of the ICO itself, which was supportive of some but not all of the proposed changes. In summary, it found that “*creating more of a balance between articles 8 [respect for private and family life] and 10 [freedom of expression] of the European Convention of Human Rights in section 32 has merits*” (p. 10) and more specifically urged that the procedural restrictions on enforcement by the ICO here should be removed (at p. 12).¹³
14. These considerations plainly must be carefully considered by the Government bearing in mind the requirement in the GDPR that these derogations reconcile and balance competing fundamental rights in this space.¹⁴ However, the precise specification of this balance goes well beyond the regulation of academia and so falls outside the scope of this submission. Nevertheless, we would like to make two technical points:
 - As regards the security provisions, the GDPR (in contrast to the Directive) includes many provisions as regards detail in this area. At the same time, and perhaps in recognition of this, it does not include the same recital stipulating that derogations in the special expressive area “should, not, however, lead Member States to lay down

¹¹ Other relevant provision include ss. 3, 44, 45, 51, 52 and 53.

¹² Lord Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (2012) at pp. 1111-1113.

¹³ Information Commissioner’s Office, *The Information Commissioner’s Response to the Leveson Report on the Culture, Practices and Ethics of the Press* (2012) p. 12 at <https://ico.org.uk/media/about-the-ico/documents/1042562/ico-response-to-leveson-report-012013.pdf>.

¹⁴ See Recital 153, GDPR.

exemptions from the measures to ensure security of processing”.¹⁵ Given this, whilst it seems important to subject special expression to the basic security principle as set down in Article 5 (1) (f) of the GDPR, it would not appear appropriate to subject special expression to an unrestricted application of every security-related detail found elsewhere within the GDPR.

- Secondly, section 32 currently does not provide a formal derogation from the requirement to ensure a registration of processing – a process which is currently to be completed through notification with the ICO. The requirement by law to make a documentation of having engaged in special expression and, furthermore, to contact a state authority in this regard sits in strong tension with the idea that such expression should generally be free from legal restraint. A clear majority of EEA states already provide for a derogation in this area¹⁶ and the requirement to register is far from rigorously enforced even in the UK. In light of this, it is important that the UK takes the opportunity of GDPR implementation to formally extend the special expressive derogation also to the registration (or recording) provisions in Article 30. Moreover, even if we seek to retain the requirement for certain controllers to register directly with ICO through payment of a fee, it is important that processing just for special expressive purposes not be trigger for this.

Section 2 – Aspects of Particular Relevance to Theme 5 – Archiving and Research

2.A: Derogations for Specially ‘Safeguarded’ Public Interested Research and Archives: The Width of the Restrictions

15. Whilst stressing the importance of protecting social science and humanities work under the special expression provisions in Article 85 (see above), we are also conscious that some social science research overlaps with biomedical science or otherwise needs to be specially safeguarded (for example, due to a fiduciary relationship with those under study). These types of activity may continue to be most appropriately governed outside the special expressive purposes. This will similarly be the case for many public interest archives which also depend on specially safeguarding data.¹⁷
16. These forms of research and public interest archiving purposes are in the first place regulated primarily through Article 89 rather than Article 85 of the Regulation. In order to ensure the future vitality of such work, it is vital that the UK takes the opportunity to provide for a derogation covering the entire field specified in Article 89.¹⁸ Moreover, and again as regards issues related to the scope of derogation here, we would like to make the following additional points:

¹⁵ Cf. Directive 95/46, recital 37.

¹⁶ See David Erdos, ‘European Union Data Protection Law and Media Expression: Fundamentally Off Balance’, *International and Comparative Law Quarterly* (Vol. 65 (1)), pp. 139-182) at pp. 170-172.

¹⁷ Recital 153 specifies that “news archives” and “press libraries” should be considered special expression, thereby indicating that at least some forms of archiving will be protected by Article 85 (2). Clearly, however, many forms of archiving will continue to fall outside of this provision.

¹⁸ Namely, the right of access (Article 15), right to rectification (Article 16) right to restriction of processing (Article 18), right to object (Article 21) as well in essence the right of erasure/to be forgotten (Article 17) as a result of the special provision in Article 17 (3) (d). Moreover, as a regards public interest archiving only, Article 89 itself additionally covers the notification obligation set out in Article 19 and the right to data portability set out in Article 20.

- The scope of the Article 89 derogations here does not formally cover the processing of ‘sensitive’ classes of data. However, such data is clearly vital to many types of research and archiving practices. Moreover, a derogation along the same lines as Article 89 is envisaged in Article 9 (2) (j) of the GDPR. This should also apply *mutatis mutandis* to criminal data as specified in Article 10 especially since even the recording of a published criminal court report involving a public figure could amount to criminal data processing. Given this, it is imperative that the research derogations implemented in the UK provide for a legal basis to process ‘sensitive’ data as defined in both Articles 9 and 10. This aspect also relates to Theme 7 (Sensitive personal data and exceptions) and Theme 8 (Criminal Convictions) of this consultation.
- Secondly, it is important to note that the derogations set down in Article 89 also cover at least statistical processing for a purely commercial purpose so long as the specified safeguards are in place. Given that such processing will only further the economic interest of the controller it is, therefore, unsurprising that the derogations permitted are very narrow in scope. However, research which is designed to contribute to the furtherance of public knowledge or which involves public interest archiving furthers “important objectives of general public interest”¹⁹ and is also an exercise of “rights and freedoms”, specifically freedom of the arts and sciences as set down in Article 13 of the *EU Charter*. It should therefore qualify for further restrictions as set down in Article 24 (cf. Theme 13 of the Consultation). These restrictions should in particular cover the detailed data subject transparency provisions especially as specified in Article 13.
- Restrictions from the data subject transparency provisions have particular importance for public interest archiving as well as certain safeguarded research involving records. The records in both these cases will often include information originally collected by the controller from the data subject. For example, a prominent civil society group may decide to make a preservation of records of historical significance to it including material which it originally obtained from its supporters. In so doing it would appear to be repurposing data (i.e. from an ordinary business purpose to a new archival one). Moreover, even if it merely transferring its records to a third party archival organisation, this transfer would appear to constitute “processing”. If the default provisions of Article 13 apply, this would trigger Article 13 (3) which states that “[w]here the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2”. However, provision of such information may be impossible due to the current contact details of the data subject not being known or at least might be clearly disproportionate. But by default, without such notification having been undertaken, holding or transferring such data for such a new purpose would appear to be illegal.
- In light of these considerations, it is imperative that UK implementing legislation deploy Article 24 in order to derogate from the detailed transparency provisions (and

¹⁹ Regulation 2016/679, art. 23 (1) (e).

specifically from Article 13) for publicly interested archiving and publicly interested scientific research subject to the same condition as set down in Article 89.

Finally, it is important that Universities can generally benefit from the “legitimate interests” legal basis for processing set out Article 6 (1) (f). As a result, implementing legislation should clarify that, as regards Article 6 (1), Universities are not “public authorities” performing “tasks”.

2B - Derogations for Specially ‘Safeguarded’ Public Interest Research and Archives: Tests for Derogation

17. The current safeguarded research and archives derogation in Section 33 of the Data Protection Act 1998 currently depends on compliance with fairly detailed, peremptory conditions namely that:
 - (a) *that the data are not processed to support measures or decisions with respect to particular individuals, and*
 - (b) *that the data are not processed in such a way that substantial damage or substantial distress is, or is likely to be, caused to any data subject.*
18. These reflect similarly detailed provisions found in the current Data Protection Directive, namely that “*safeguards must in particular rule out the use of the data in support of measures or decisions regarding any particular individual*”.²⁰
19. Implementation of these peremptory standards has been bedevilled by interpretative challenges and difficulties. Reflecting this, and in contrast to Directive 95/46, the GDPR does not include these stipulations. Instead, it simply stresses the importance of “*respect for the principle of data minimisation*”²¹ and that the derogations should only be deployed in so far as the “*are likely to render impossible or seriously impair the achievement*”²² of the relevant safeguarded archival or research purpose.
20. We believe that, at least for publicly interested safeguarded archiving and research, satisfaction of these tests alone is sufficient. It should be emphasised that such processing is still subject to most of the provisions set down in the GDPR including all of the basic data protection principles specified in Article 5. Alongside compliance with these provisions, satisfaction of these basic tests should provide sufficient “*appropriate safeguards*”²³ in this area.

²⁰ Directive 95/46, recital 29.

²¹ Regulation 2016/679, art. 89 (1).

²² Ibid, art. 89 (2) and 89 (3).

²³ Ibid, art. 89 (1).