



FAO House of Commons Public Bill
Committee: Data Protection [Lords] Bill
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19 March 2018
URGENT

Dear Sirs

Data Protection [Lords] Bill

This written evidence is submitted to the House of Commons Public Bill Committee on behalf of the Media Lawyers Association (the 'MLA'), an association of in-house media lawyers from many of the UK's leading newspapers, broadcasters, book publishers, magazines, and representative bodies (such as the News Media Association, which is the voice of national, regional and local news media organisations across the UK) who publish information in the UK, EU and worldwide. The MLA's purpose is to promote and protect the fundamental right to freedom of expression and the right of everyone to impart and receive information, ideas and opinions. These organisations have significant experience of seeking to comply with data protection laws, as well as dealing with complaints and litigation in relation to alleged compliance failures. While the MLA is primarily concerned with "the media" and journalism, the provisions of The Data Protection [Lords] Bill (the 'Bill') will affect not just the media but also those processing personal data in the context of theatre, film and the arts, as well as other organisations investigating and disseminating information in the public interest.

The GDPR mandates that Member States must implement such exemptions and derogations as are necessary to reconcile the right to protection of personal data with rights to freedom of expression and information. The Data Protection [Lords] Bill (the 'Bill') seeks to reconcile these competing rights in a way which does not provide a blanket exemption for processing for the special purposes of journalism, art or literature, and academic purposes but instead provides a qualified exemption applicable in circumstances where compliance with the provisions of the Bill would be incompatible with the special purposes, with a mechanism for providing particular protection to the period prior to publication if certain conditions are complied with; this is broadly consistent with the existing provisions of the Data Protection Act 1998.

Aside from being a matter of substantial public interest that robust protection is provided for processing for the special purposes, it is in the interests of both data controllers and data subjects that there is clarity about the circumstances in which the exemption may be relied upon;

uncertainty will itself chill freedom of expression and information, and will lead to litigation which distracts from and reduces the resources available for the delivery of public interest journalism.

The provisions of the Bill do not provide clear protection for processing for the purposes of journalism, art or literature in certain circumstances, and there is consensus among broadcasters and the press alike that a number of amendments introduced to the Bill in the House of Lords have the potential to seriously inhibit media freedom. The Media Lawyers Association:

- strongly supports the inclusion of the exemption for processing for the special purposes as set out at Schedule 2 Part 5 of the Bill;
- strongly supports the inclusion of the journalistic defences to the offences at clauses 170 – 173;
- calls for the stay provisions at clauses 174 and 176 to be amended in line with the journalistic exemption, to ensure that effective protection is provided for public interest journalism, and strongly objects to any expansion of the Information Commissioner's powers in relation to the period prior to publication;
- welcomes the commitment of the Government and Opposition to ensuring effective protection for processing for the special purposes in the context of media archives;
- strongly objects to the inclusion of clause 142, which provides for an inquiry into issues arising from data protection breaches by news publishers, and welcomes the Government's commitment to the removal of this clause;
- strongly objects to the inclusion of clauses 168-169 and 205(2)(b), which create an expectation that news publishers will bear the cost of data protection claims brought against them, regardless of the public interest in the publication complained of or the merits of the complaint, unless the publisher is a member of an approved regulator.

The Media Lawyers Association endorses the written evidence submitted by the News Media Association and the Opinion of Antony White QC included therein.

Exemption for processing for the special purposes of journalism, art or literature and academic purposes

The exemption for processing for the special purposes is set out at Schedule 2 Part 5 and provides that where processing is (i) for the special purposes, (ii) with a view to the publication of journalistic, artistic, literary or academic material, (iii) the data controller reasonably believes that publication of the material would be in the public interest (taking into account the special importance of the public interest in the freedom of expression and information and any relevant code of practice, such as the Ofcom Broadcasting Code), and (iv) the controller reasonably believes that the application of the listed provisions of the GDPR would be incompatible with the special purposes, then the controller is not obliged to comply with the relevant provisions.

The exemption as drafted is imperative to achieving the aims expressed by Lord Williams of Mostyn when introducing the Bill which led to the current Data Protection Act 1998 of ensuring that the legislation did not result in media organisations being *"inhibited or prevented by individuals attempting to use its provisions to re-write history or prevent the responsible discussion of historical subjects and documentaries which are an important part of the media's role in informing, educating and stimulating public discussion. Equally, it is*

*part of the British tradition of freedom of expression that entertainment programmes, such as arts programmes, comedy, satire or dramas, can refer to real events and people*¹.

As the GDPR has introduced new data subject rights and obligations on data controllers, so the scope of the provisions to which the exemption may apply (subject to compliance with the relevant conditions) has expanded.

Clauses 174 & 176: Stay provisions

The exemption is supplemented with provisions relating to the resolution of legal claims arising prior to or within 24 hours of the first publication of personal data. These provisions are intended to complement the existing legal provisions and long-standing decisions which serve to protect those processing for the special purposes from prior restraint² and avoid placing the courts in the position of a censor.

The provisions of the Bill are not reflective of the exemption, however, in that while the exemption is potentially applicable to processing for the special purposes, the stay provision at clause 176(1)(a) is proposed to be applicable where processing is "only" for the special purposes. This places the Information Commissioner's Office in the position of being required to determine whether, and to what extent, processing is being carried out for the special purposes prior to publication. Any such exercise, necessarily being carried out prior to publication, would inevitably create a distraction for media organisations from the journalistic process, and would be open to abuse by the targets of investigations as a technique to disrupt or delay legitimate publications.

While the concept of 'journalism' is required to be interpreted broadly to ensure proper protection for the special purposes, the Information Commissioner's Office's approach and decisions in this regard have, regrettably, not been beyond reproach. In the case of *Steinmetz and others v Global Witness Limited*, a claim brought against the Nobel-prize nominated NGO Global Witness by four individuals reportedly associated with BSG Resources Limited ("BSGR"), a mining conglomerate whose interests include 50% of the Simandou iron ore reserve in Guinea, the ICO was required to determine whether Global Witness was processing the Claimants' personal data for the purposes of journalism. Global Witness investigates and reports on natural-resource related conflict and corruption around the world and since November 2012, has reported allegations that BSGR's share in the Simandou reserve, one of the largest and most valuable in the world, was obtained by corruption. The Information Commissioner's Office initially reached the view that Global Witness was not processing personal data for the special purposes, which would have had serious implications for Global Witness' ongoing investigation and required it to engage in litigation prior to publication. While the Information Commissioner's Office subsequently reversed its decision, the episode gives cause for concern as to its approach to such determinations.

Furthermore, the clauses as currently drafted leave the stay provisions open to abuse. For example, if the subject of an investigation were to complain to police that personal data had been knowingly obtained by a journalist without the consent of a data controller, an offence under the Bill, and the police were then to commence an investigation and seek to interview the journalist, the personal data held by the media organisation in the context of its public interest journalistic investigation may not be considered to be held only for the special purposes, which would prevent it from taking advantage of the stay provisions. Such manipulation would have a detrimental impact on processing for the special purposes in relation to journalism of the utmost public interest.

¹ Hansard, House of Lords Debate, 02 February 1998, Volume 585 cc436-55, 442

² See s12(3) Human Rights Act 1998 and *Bonnard v Perryman* [1891] 2 Ch 269

In a further example of the potential impact of such provisions, it has recently been argued on behalf of Mr Max Mosley that, contrary to the view ultimately reached by the Information Commissioner's Office in the Steinmetz case, campaigning journalism involves processing which is not only for the special purposes. If that contention were correct, the inability to rely on the stay provision would have a significant impact on consumer journalism of the type conducted by Which? and on other public interest campaigns, particularly those carried out by the press calling for action by public bodies. This could include, for example, the campaign by The Mail to secure justice for Stephen Lawrence, which was cited by Jacob Rees-Mogg MP on the Second Reading of the Bill on 05 March, or the campaign for Sarah's Law.

It is therefore proposed that clauses 174 and 176 be amended consistently with the exemption for processing for the special purposes by removing the word "only" from clauses 174(3)(a) and 176(1)(a) respectively.

It should be emphasised that the consequence of these amendments would not be to prevent the Information Commissioner's Office from investigating a complaint, or taking enforcement action, nor would they prevent a data subject from bringing a claim and recovering damages, if that were appropriate. What they would ensure, is that those processing for the special purposes would be afforded the space in which to conduct their investigations, make editorial judgements and effect publication, and they would then be subject to the full force of the law. We note that the European Court of Human Rights has previously held that the balance of rights achieved by the law of England and Wales, in drawing a distinction between pre- and post-publication activity, *"fully corresponded to the resolutions of the Parliamentary Assembly of the Council of Europe on media and privacy"*³, and therefore consider that there could be no legitimate suggestion that such provisions would undermine any assessment of the UK's adequacy in complying with the GDPR.

We are aware that the Information Commissioner has called to expand the scope of her powers prior to publication from what is in the existing Data Protection Act 1998 on the basis of what she refers to as a *"drafting defect"*. As the Commissioner ought to be aware, far from being a *"drafting defect"*, the stay provisions in the Data Protection Act 1998 were the result of a deliberate and considered balance of the right to protection of personal data against the fundamental right to freedom of expression. This was expressed by Lord Williams of Mostyn, the Minister with responsibility for the Bill which became the Data Protection Act 1998, who stated that *"We have included in the Bill an exemption which I believe meets the legitimate expectations and requirements of those engaged in journalism, artistic and literary activity... This ensures that provided that certain criteria are met, before publication – I stress 'before' – there can be no challenge on data protection grounds to the processing of personal data for the special purposes"*⁴. He went on to state that *"it is notorious that some public figures... have used their financial ability to silence, to stifle at birth almost, legitimate media inquiries into their malpractice. The examples are too notorious for me to mention. Here, we are deliberately avoiding the opportunity for those whose activities are being legitimately scrutinised from stifling any proper journalistic investigative activity"*⁵. The Information Commissioner has not established any necessity for the expansion of her powers in this regard – we do not recognise the supposed *"Catch 22"* or circumstances identified by the Information Commissioner in her evidence, given that the stay on court proceedings can only apply where the relevant personal data has not previously been published by the data controller (see clause 176(1)(c)). As set out above, it is not clear what, if any, expertise the Information Commissioner's Office has either in relation to the determination of whether personal data is processed for the special

³ Mosley v. the United Kingdom (application no. 48009/08)

⁴ Hansard, House of Lords Debate, 02 February 1998, Volume 585 cc436-55, 442

⁵ Hansard, House of Lords Debate, 25 February 1998, Volume 586 cc65-134GC, 95GC

purposes, or to second-guess editorial decision making, which would be the effect of her proposals. The scope of the Information Commissioner's powers ought not to be expanded in this regard.

Clause 19: Archiving

The Media Lawyers Association welcomes the commitment of Government and the Opposition, as expressed during the Bill Committee debate on 13 March 2018, to ensuring the protection of media archives.

The provision of such protection is an explicit requirement of the GDPR itself, which provides at Recital 153 that the protection for freedom of expression should extend to *"news archives and press libraries"*.

In its current form, the Bill provides for the protection of media archives through reliance on the journalism exemption and compliance with the conditions therein.

The archiving provisions currently set out at clause 19 of the Bill would not be applicable to media archives. This is because, as set out at Recital 158 of the GDPR, the provisions relating to archiving in the public interest appear to be intended to relate to processing by *"Public authorities or public or private bodies that hold records of public interest... 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"*. While this could potentially apply to, for example, the British Film Institute archive, the additional requirements of the archive exemption render it of little practical relevance. This is because under clause 19(2) as it currently stands, organisations would be prevented from relying on the exemption in relation to the archiving of content in the public interest where that would be likely to cause substantial damage or distress to an individual. This could obviously apply to archived documentary content or to satire or drama.

The Media Lawyers Association would therefore welcome additional protections for special purposes archives, over and above the provisions of the existing exemption, which would be applicable to both internal journalistic libraries of material held for research and republication, as well as to published online archives – the modern day equivalent of the newspaper microfiche open for examination on demand – and the likes of the BFI's archive.

The Media Lawyers Association would welcome the opportunity to engage with the Committee in relation to the terms of an amendment which might secure such protection.

Clause 142: A statutory Inquiry

The new statutory inquiry proposed under clause 142 would affect all news publishers, whether print, broadcast or online. This would include, for example, the BBC and other organisations against whom no allegations of wrongdoing have been levelled.

A £43.7 million police investigation has already taken place into the historic practices of a number of publishers. The Leveson Inquiry cost £5.4 million. Ongoing civil proceedings against a number of newspapers have led to significant compensation payments to hundreds of victims of press abuse. The legal costs of the ongoing civil cases run to tens of millions of pounds.

It cannot be disputed that traditional news broadcasters and publishers still have a very important role to play in today's society. At a time where broadcasters and newspapers are facing fierce competition for readers from internet giants of the likes of Google and

Facebook, the requirement for all media organisations to allocate significant resource to another costly Inquiry does nothing for the pluralism of the UK's news media. The past abuses of the press have been laid bare and the press (and, indeed, all news publishers) are subject to significant law and regulation, which continues to be successfully enforced in appropriate cases. The public interest is not served by another backwards facing Inquiry.

Clause 142 should be removed and the Media Lawyers Association welcomes the Government's commitment to doing so.

Clause 168 and 169: Costs shifting in data protection litigation

Clauses 168 and 169 would require certain publishers who were not members of IMPRESS to pay the costs of data protection litigation. This costs shifting regime would apply even if a publisher successfully defended the claim against them, and no matter the public interest in the underlying publication. These clauses mimic section 40 of the Crime and Courts Act 2013, which has not been commenced, for data protection purposes. Clauses 168 and 169 are punitive provisions designed to penalise both national and local publishers for refusing to submit to state regulation. This is contrary to Articles 10 and 14 of the European Convention on Human Rights. We note that the Supreme Court recently held that the conditional fee agreement regime, which permits lawyers acting for claimants in certain media-related cases to recover additional liabilities of up to an additional 100% of the costs properly incurred, engaged the Article 10 rights of media organisations and that the Court considered that there was a very powerful argument for concluding that there is a general rule that, where a claim against a publisher involves a restriction on freedom of expression, as a matter of domestic law it would normally infringe the defendant's Article 10 rights to require it to pay additional liabilities incurred by a successful claimant pursuant to the Access to Justice Act 1999⁶. The proposed regime under clauses 168-169 is no better.

The vice in this costs shifting regime is clear. Such a system would mean that publishers would have to pay the costs of data protection litigation whatever the outcome. The economics of the industry at present (and the currently low value of most data protection claims) are such that it would be a brave publisher who defended a data protection claim all the way to trial, even if their processing was wholly compliant. The potential for using litigation, or the threat of it, as a form of censorship is clear and examples of this are already emerging.

IMPRESS has been unsuccessful in becoming an established press regulator and recently a number of its ever dwindling membership has left to join the more established independent regulator IPSO, which regulates 2600 print and online titles. Founder members of IMPRESS have left over concerns about the 'transparency and openness' of the state backed regulator following an internal review. IPSO now undoubtedly provides the most effective and robust overview of the industry. Publishers should not be penalised for choosing to reject IMPRESS and instead being part of an effective regime of press regulation, or choosing to self-regulate.

Clauses 168 and 169 should be removed, and the Media Lawyers Association welcomes the Government's commitment to doing so.

The MLA's membership believes the amendments detailed above are necessary in the interests of securing the values of freedom of expression and access to information and the retention of a vibrant broadcast and publishing media in the UK. The Data Protection Bill must not be permitted to be hijacked to curtail these fundamental rights.

⁶ See *Times Newspapers Ltd v Flood*; *Miller v Associated Newspapers Ltd*; and, *Frost and others v MGN Ltd* [2017] UKSC 33

Yours faithfully

A handwritten signature in black ink, appearing to read 'Nicola Cain', with a stylized, cursive script.

Nicola Cain

Legal Director, RPC

For and on behalf of the Media Lawyers Association