

# Response to the European Commission's proposed European Data Protection Regulation (COM (2012) 11 final)<sup>1</sup>

**21 February 2013**

The Economic and Social Research Council (ESRC) supports the statements submitted by: the [Wellcome Trust](#); the [Federation of European Academies of Medicine](#) (FEAM). There are further articles and amendments that impact on social science research which are not addressed in the above statements, and this ESRC submission is informed by the statements made by experts within academia. We call for further amendments to the draft Regulation in order to protect highly valued and vital research in the social sciences.<sup>2</sup>

## **Lay overview of the issues for social science**

The European Commission published new Legislative proposals for Data Protection on 25 January 2012. The proposed regulation replaces the old 1995 Data Protection Directive and focuses on the protection of individuals' privacy in relation to the use of personal data. Our main areas of concern relate to Article 80 (*processing of personal data and freedom of expression*), Article 81 (*processing of personal data concerning health*), and Article 83 (*processing for historical, statistical and scientific research purposes*) of the regulation which deal with provisions relating to specific data processing situations.

There are serious concerns expressed by the social science and humanities research community that the proposed European Data Protection Regulation may have a serious impact on the publication of socially important research, the researcher's freedom of expression, and social science research processes unless further amendments are sought. The amendments proposed to the draft would cause further difficulties if implemented.

In particular:

- The exclusion of researchers (historical or otherwise) from the exemptions in place in Article 80 which relate to the protection of freedom of expression may have a serious impact on a researcher's ability to freely publish even the most innocuous data.
- Well-established processes which protect the rights of citizens in social science research have not been recognised by the draft regulation or the proposed amendments.

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<sup>1</sup> The proposed Regulation: [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf) and suggested amendments: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/pr/922/922387/922387en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf)

<sup>2</sup> This response has been prepared by the ESRC office. As is standard procedure for responses to inquiries and consultations it is a statement based on ESRC interpretation of the regulations and the proposed amendments, informed by consultation with a number of more expert academics. It is not based on legal advice.

Typically these processes will cover situations where consent cannot be obtained or might not be appropriate.

- The amendments include restrictive proposals which require the explicit consent of data subject for historical, statistical, or scientific research purposes. Controls and processes are already established and rigorously applied to protect individuals who act as data subjects for research applications. The proposition that the consent of the data subject is pre-requisite for much scientific research should be subject to proportionality and applied in light of the controls and processes already in place through the scientific and statistical research processes. It should also be stressed that whilst the impact of disclosure cannot easily be mitigated, the risk and likelihood of it can be mitigated by a number of techniques.

## **Specific concerns with the Commission's proposed Regulation**

### **Proposal for a regulation Article 80 - paragraph 1**

In the Commission's proposal, Article 80 does not protect the freedom of expression of researchers (historical or otherwise). This is because, whilst Article 80 does allow for (balanced) derogations from most of the Regulation, Articles 83 and 81 are excluded from this.

Academic social science research is orientated towards the dissemination to the public of 'information, opinions or ideas' (European Court of Justice in *Satamedia* (2008) ECR I-9831). Moreover, the special concern of such research to investigate genuinely important issues whilst upholding the qualities of rigour, culmination and precision means that such activity generally constitutes 'high-value' publicly interested speech, which the European Court of Human Rights has correctly stated should generally be free from legal restriction. A historian or social investigator working in an academic context should not be treated less favourably by the law than a historian or social investigator writing in a non-academic context. But without the protections of Article 80, academic work would be subject to forms of restriction far in excess of restrictions on photos and articles which often appear in the Press. This would seriously impact on the production of valuable and informative material by academics. It is therefore essential that the work of academic social science researchers be brought within the ambit of Article 80.

- **We would seek appropriate amendments to the Article 80 to protect freedom of expression for researchers.**

### **Proposal for a regulation Article 83 – paragraph 2 - point b**

The original draft regulation states:

- (b) The publication of personal data is necessary to present research findings or to facilitate research insofar as the interests or the fundamental rights or freedoms of the data subject do not override these interests.

It is essential that the regulation reconciles the right to the protection of personal data with the importance of freedom of academic inquiry. However, it is proposed in the amendments that this text is deleted. It is of the utmost importance that, where the publication of research findings is concerned, the importance of freedom of expression and the public interest in the research findings is considered. Empirical social science provides the evidence base for improvements in society, and where appropriate controls are in place, the most valuable research can take place.

- **We would seek that this paragraph is protected and that the proposal to delete this is rejected.**

## **Specific concerns with the proposed amendments**

### **Amendment 27 - Proposal for a regulation Recital 42**

The original text includes derogation for historical, statistical and scientific research purposes. In the proposed amendments, this derogation has been deleted. We objected to this deletion as there is absolutely no evidence to suggest that the processing of personal data for 'historical, statistical and scientific research purposes' is not as compelling or as urgent as that for public health or social protection.

- **We would seek that amendment 27 is rejected.**

### **Amendment 31 - Proposal for a regulation Recital 50**

The original text includes the proposal that '... it is not necessary to impose this obligation where... the provision of information to the data subject proves impossible or would involve disproportionate efforts.' It continues with '*The latter could be particularly the case where processing is for historical, statistical or scientific research purposes; in this regard the number of data subjects, the age of the data, and any compensatory measures adopted may be taken into consideration.*'

The amendments proposed to delete the latter part of the text (italicised above) due to the potential for it to be misunderstood as promoting a lower level of protection for certain kinds of data processing.

There is no evidence to suggest that the wording which is proposed to be removed could be misunderstood. If there was evidence to suggest this then the addition of clarifying text such as 'This does not mean that there is a lower level of protection for certain kinds of data processing rather that there may be a lower requirement for protection when personal data is of a certain age' could be appropriate.

- **We would seek that amendment 31 is rejected.**

## **Amendment 112, Proposal for a regulation Article 9 – paragraph 1**

The draft regulation states that:

Processing of personal data, revealing race or ethnic origin, political opinions, religion or **philosophical** beliefs, **sexual orientation or gender identity**, trade-union membership **and activities**, and the processing of genetic data or data concerning health or sex life or criminal convictions, or related security measures shall be prohibited.

But that this shall not apply where;

- (a) the data subject has given consent to the processing of those personal data; ...
- (d) the processing relates to personal data which are manifestly made public by the data subject;
- (h) processing of data concerning health is necessary for health purposes and subject to the conditions and safeguards referred to in Article 81;
- (i) processing is necessary for historical, statistical or scientific research purposes subject to the conditions and safeguards referred to in Article 83.

It is often through the delicate analysis of personal data relating to sexual orientation, political beliefs, and race etc. that the prejudice against diversity in society can be eradicated. This is often dependent on using the data in an identifiable form and citing and publishing analyses of already published court judgments, for example, which contain identifying details such as those listed in article 9 paragraph 1 but have not been put into the public domain by the data subject themselves. If the exemptions above are not protected the regulation will restrict and hinder highly valued research in subjects such as law, contemporary history, sociology and political science.

- **We would seek to ensure that exclusions remain in place via Article 83**

## **Amendment 327 Proposal for a regulation Article 81 - paragraph 2**

The original draft regulation states:

Processing of personal data concerning health which is necessary for historical, statistical or scientific research purposes, such as patient registries set up for improving diagnoses and differentiating between similar types of diseases and preparing studies for therapies, is subject to the conditions and safeguards referred to in Article 83.

The amendment being proposed states:

Processing of personal data concerning health which is necessary for historical, statistical or scientific research purposes, **shall be permitted only with the consent of the data subject, and shall be** subject to the conditions and safeguards referred to in Article 83.

The protection of personal data, through a combination of consent, access protocols and disclosure controls, which are currently rigorously implemented within the research environment, already sufficiently safeguard the individual with regard to the processing of their personal data, and there has been no breach of personal information from the UK's social and economic research data infrastructure in over 40 years.

- **We would seek that amendment 327 is rejected.**

#### **Amendment 336 Proposal for a regulation Article 83 – paragraph 1 a (new)**

The draft text in the amendment was not included within the original draft regulations. The amendment being proposed states:

Subject to the exception in paragraph 1b, data falling within the categories of data covered by Articles 8 and 9 may be processed for historical, statistical or scientific research only with the consent of the data subjects.

As stated in the rejection of amendment 327, there are personal data protection and consent processes already rigorously implemented which are appropriate within the scientific processes, and it is not always appropriate or practical for the consent of the data subject to be sought for historical, statistical or scientific research purposes.

- **We would seek that amendment 336 is rejected.**

#### **Amendment 339 Proposal for a regulation Article 83 – paragraph 2 - point b**

The original draft regulation states:

(b) The publication of personal data is necessary to present research findings or to facilitate research insofar as the interests or the fundamental rights or freedoms of the data subject do not override these interests.

It is proposed in the amendments that this text is deleted. It is essential that the regulation reconciles the right to the protection of personal data with the importance of freedom of academic inquiry. The amendment would, as a consequence of the remaining points in paragraph 2, prohibit the publication of any information relating to any individual in identifiable form unless the individual themselves placed the information into the public domain, or gave specific, informed, and rescindable consent to such information use. It would seriously impede contemporary historical research and other social science research.

- **We would seek that this amendment 339 is rejected.**

#### **Amendment 341 Proposal for a regulation Article 83 – paragraph 3**

The deletion of the original draft text would prevent the European Commission issuing delegating legislation to allow the use of covert methods in the conduct of social scientific

research. However, such methods have been essential to the effective investigation of sensitive or contentious topics, such as corruption in public service.

- **We would seek that this amendment 34I is rejected.**

## **Summary**

In its current state, we consider that the Regulation and particularly a number of the proposed amendments, take an unbalanced approach towards historical, statistical, or scientific research, and must reconcile the rights of the individual with the essential value of personal data for research in order to provide the evidence base for improvements in society. We call on the EU institutions and Member States to maintain the Commission's approach towards Article 83, but to make amendments to ensure that humanities and social science research is accommodated. The proposed amendments identified above must be rejected or at least modified to avoid the detrimental effect that they would have on socially important research if kept in their current form.