
DATA PROTECTION AND DIGITAL INFORMATION BILL: BRIEFING NOTE

Academic research

Summary: Increasing the benefits from data-driven scientific research was one of the key objectives cited by the Government in bringing forward the Data Protection and Digital Information Bill (the 'Bill')¹. However, the changes risk heavily favouring controllers who already hold a lot of personal data – like social media companies – extending opt-outs and exemptions to their commercial activity. At the same time the Bill does nothing to overcome one of the main barriers to data-driven research; the fact that those large controllers have no reason to share the data they hold with academic researchers. The Bill does not therefore meet this core objective of facilitating researcher access to data.

Excessively broad definition of research

1. s.2 of the Bill inserts a new definition of 'scientific research into Article 4 UK GDPR:

“any research that can reasonably be described as scientific, whether publicly or privately funded, and whether carried out as a commercial or non-commercial activity. Such references include processing for the purposes of technological development or demonstration[...]” (emphasis added).

2. Whilst Recital 159 UK GDPR stated that research should be interpreted *‘in a broad manner’*, the Bill goes further, creating an unconstrained and subjective definition on which controllers can rely, widened further in the most recent iteration of the Bill. This approach creates two problems (i) less certainty for controllers and (ii) potential harms for individuals.

¹ *“We will simplify the legal requirements around research so scientists can work to their strengths.”* - <https://www.gov.uk/government/consultations/data-a-new-direction/outcome/data-a-new-direction-government-response-to-consultation>

Updated to take account of the version of the Bill published March 2023

3. The UK GDPR already gives controllers significant exemptions and freedoms where their processing is for scientific research, and these are expanded by the Bill. They include:
 - i. The ability to collect unspecified consent (s.3 of the Bill and Article 4 UK GDPR)².
 - ii. The ability to conduct further processing for new, scientific research, purposes (s. 6 of the Bill and new Article 8A UK GDPR).
 - iii. Exemptions from providing transparency information about further processing for new, scientific research, purposes (s.9 of the Bill and Article 13 UK GDPR).
 - iv. Longer retention periods (Article 5(1)(e) UK GDPR).
 - v. Exemptions in some cases from the right to erasure (Article 17 UK GDPR).
 - vi. Exemptions in some cases from the right to object (Article 21 UK GDPR).
4. The relaxation of GDPR provisions can be justified for genuinely scientific research with a degree of public benefit. This excessively broad definition, however, risks extending that relaxation to 'scientific research' processing by commercial controllers primarily for their own private benefit – e.g., for product development. It could lead to a significant expansion of processing for such commercial purposes whilst providing exemptions from fundamental data subject rights, making such practices effectively hidden from data subjects.
5. The Bill could be improved by a more considered definition of scientific research, for example requiring a consideration of its purpose, the field of enquiry, the type of controller carrying it out, and the methodological and ethical standards used. An example of how this has been attempted in the EU GDPR context is available from the European Digital Media Observatory, which has promulgated a draft

² s,3(3) of the Bill inserts new paras (7) and (8) into the UK GDPR, which provide that consent meets the definition in the GDPR if it is for scientific research purposes, and those purposes are not fully identified when the consent is collected, subject to complying with ethical standards in research.

code of conduct under Article 40 GDPR, intended to govern academic researcher access to data held by social media platforms³.

6. s.22 of the Bill incorporates safeguards controllers are required to have in place when processing for scientific research purposes. This is largely uncontroversial, though the new Articles 84B(2) and (3) UK GDPR appear to be redundant, since processing ‘*which does not permit the identification of a living individual*’ would not be processing of personal data and would therefore fall outside the scope of the UK GDPR.
7. Note that the Bill makes separate provision for research in the area of public health and approved medical research.

Failure to incentivise *sharing* of data for research

8. The Bill’s provisions on scientific research do not grapple with the principle current barrier to research processing in the GDPR: that it creates no incentive or obligation on the part of controllers to share data with third parties for scientific research. Given the risks (even if they are only notional) of sharing personal data with third party researchers, controllers with large amounts of data useful to researchers (such as social media platforms) have little reason to do so currently. This dynamic has been articulated in a report by the European Digital Media Observatory⁴, which both Meta/Facebook and Twitter themselves supported.
9. The Bill therefore gives greater freedom to *existing* controllers of large amounts of personal data to use their own data, without actively facilitating access to that data by independent researchers or other innovators. This puts a key objective of the Bill – to drive scientific research⁵ - at serious risk.

³ <https://edmo.eu/wp-content/uploads/2022/02/Report-of-the-European-Digital-Media-Observatorys-Working-Group-on-Platform-to-Researcher-Data-Access-2022.pdf>

⁴ *Ibid*

⁵ <https://www.gov.uk/government/consultations/data-a-new-direction/outcome/data-a-new-direction-government-response-to-consultation>

Potential barrier to platform research through purpose limitation

10. New Article 8A (inserted by clause 6 of the Bill) generally *loosens* the provisions on purpose limitation, providing at Article 8A(3) for a range of situations in which new processing will be treated as compatible with the original purpose.
11. However, Article 8A(4), provides a carve-out where the personal data were originally collected in reliance on consent. The result is that, where data are collected in reliance on consent, any new *research* processing will *not* be consistent with purpose limitation (i.e. will be unlawful) unless further consent is collected. This holds even if collecting further consent would be very difficult or disproportionate.
12. The Bill (and existing UK GDPR provisions) allows controllers to obtain relatively broad consent to research at the point of data collection⁶. And many research datasets are collected using other lawful bases. However, Article 8A(4) would still leave a significant gap where it becomes unlawful to carry out research processing using certain datasets. This could be a particular issue in the context of research into platform harms to the extent that platforms place greater reliance on consent over time, which they may do in response to recent European Data Protection Board rulings on Meta's use of the 'contractual necessity' basis⁷.
13. Importantly, this is a change from the current position. It will become *harder* to carry out research in some circumstances under the Bill's provisions than it is now.
14. The Bill could be improved by:
 - i. the inclusion of an incentive or obligation on certain specified types of data controller to make personal data available to independent researchers for public interest scientific research, as is contained in Article 40 of the EU Digital Services Act (the 'DSA'). That Article creates a regime for very large online platforms and search engines to be required to provide access to data to vetted

⁶ See e.g. clause 3 of the Bill.

⁷ Binding decisions 3, 4 and 5/2022 of the European Data Protection Board.

researchers (meeting requirements in the DSA for academic research into systemic risks in the EU.

- ii. Clarification that where data was originally collected in reliance on consent, further processing for research purposes may be compatible with the principle of purpose limitation in at least some circumstances, without the need to obtain further consent.