Call for views on the General Data Protection Regulation derogations

Written submission to DCMS consultation

Introduction

This written submission is in response to the call for views from the Department for Culture, Media and Sport (DCMS) on the General Data Protection Regulation (GDPR) derogations. The focus of our response is on theme 8 (criminal convictions) and theme 9 (rights and remedies); these were highlighted in the call for views as derogations (exemptions) within the GDPR where the UK can exercise direction over how the provisions will apply.

The call for views was limited in its detail, and therefore this submission outlines only our preliminary views. We would welcome the opportunity to work with DCMS on implementation of these themes.

About Unlock

Unlock is an independent, award-winning charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record. We help people to move on positively with their lives by empowering them with information, advice and support to overcome the stigma of their previous convictions. We also seek to promote a fairer and more inclusive society by challenging discriminatory practices and promoting socially just alternatives.

Theme 8 – Criminal convictions

The derogations related to criminal convictions includes Article 10 - Processing of personal data relating to criminal convictions and offences.

Under the Data Protection Act 1998, data relating to criminal convictions is treated as sensitive personal data. The main issue in terms of GDPR is that criminal convictions will no longer have this status. We are therefore concerned about the safeguards that will be in place to ensure that the measures safeguarding the collection of criminal convictions are sufficient. Research we have carried out shows that, in comparison to other European countries, there is a vast array of organisations that ask for and process details of criminal records. These include employers, insurance companies, housing providers, education institutions, volunteering organisations and television game show production companies.

Although there is legislation (for example, the Rehabilitation of Offenders Act 1974) that governs how individuals can answer questions put to them about criminal records (for example, when applying for employment), there's generally no express legislation that governs whether (and if so, how) these questions should be asked in the first place and what safeguards there are in terms of data protections.

In our experience, we regularly come across organisations that are asking about criminal records inappropriately and/or asking misleading questions that suggest, in particular, that spent convictions need to be disclosed.

It would be concerning if the protections for individuals surrounding organisations asking for criminal record disclosure were not strengthened as a result of implementing GDPR. There is an opportunity to be more prescriptive in setting out how organisations should approach this.

It is also important to be clear about what constitutes "control of official authority" and "comprehensive register of criminal convictions". Although the Police National Computer is the main source of criminal convictions, the PNC also includes details of cautions, warnings, reprimands and other disposals like Penalty Notices for Disorder.

Furthermore, it will be important to identify what the consequences are when relying on unofficial registers of criminal convictions (such as information available online), and the sharing of information between organisations (such as employers requesting information about new employees from their former employer).

Theme 9 – Rights and remedies

The derogations related to rights and remedies includes Article 17 - Right to erasure ('right to be forgotten'); this will be the focus of our submission. We will also touch on Article 80 – Representation of data subjects.

Article 17 allows member states to lay down "legal obligations" to require data to be erased in certain circumstances.

Information online – Previously a "right to be forgotten"

On a broad level, this has been quite popular since the Google Spain ruling. In the UK, there were 60,000 requests in the first 5 months. Google's transparency report is updated regularly and shows that (as of 3rd January 2017) in the UK Google has received 101,508 requests, with 39.3% of applications accepted and 78,807 URL's being removed (as some requests involve more than one URL). Around 30% of the refusals from Google are because the requests "concerns your professional activity" (Google, 2017).

In their transparency report, Google include a case where they have removed a link due to the conviction being spent:

> 'A man asked that we remove a link to a news summary of a local magistrate's decisions that included the man's guilty verdict. Under the UK Rehabilitation of Offenders Act, this conviction has been spent. We have removed the page from search results for his name.' (Google, 2017)

However, in the same report, there is an example where it is unclear whether the conviction is spent or not:

> 'An individual asked us to remove links to articles on the internet that reference his dismissal for sexual crimes committed on the job. We did not remove the pages from search results.' (Google, 2017)

Unsuccessful applicants can refer the matter to the Information Commissioner's Office (ICO) as a formal complaint, or bring proceedings under the Data Protection Act. The number of cases the ICO has dealt with is low, but steadily increasing. There were 120 complaints in in the first year, and in the 2015-16 annual report, the ICO reported that more than 370 people sought help after search engines refused to remove results about them under the right to be forgotten (ICO, 2016). Of the ICO's 370 cases in 2015/16, about a third of these contacts related to criminal convictions.

We have dealt with cases where search engines have refused to de-list results that link to spent convictions. Search engines often rely on "public interest" as the reason for refusing to de-list. Where complaints have been made to the ICO, the ICO have, in some cases, refused to back the individual.

Article 17 potentially removes the "public interest" justification – as reasons of public interest are limited to the area of public health. Article 19(3)(a) potentially provides an exemption for "freedom of expression and information", but this seems to reverse the burden of proof; it would be for the companies who publish the content online to prove that the data cannot be deleted because it is still needed or still relevant. Given that employers would potentially be entitled to obtain the information through official criminal record checks, it should be difficult for search engines to rely on this exemption to continue to publish information about criminal convictions online once they are spent.

If this is the case, then data controllers should implement measures to ensure that criminal convictions are deleted once they become spent. There would need to be strong enforcement mechanisms to ensure compliance. There would also need to be exceptions, including for employers that have people employed in roles that are exempt from the Rehabilitation of Offenders Act 1974.

Information held by organisations

In relation to criminal convictions, the right of erasure should apply to organisations that collect details of criminal records. For example, employers often ask applicants to disclose criminal convictions as part of the recruitment process. Insurance companies and housing authorities often ask for criminal records as part of the application process.

The right of erasure should therefore oblige these organisations to delete this information once it becomes spent, unless it is necessary for them to retain it (for example, for job roles that are exempt from the Rehabilitation of Offenders Act 1974).

Representation of data subjects

Article 80(2) permits groups like Unlock to independently represent the public in complaints about data protection law. Without it, organisations like ourselves, Open Rights Group or Liberty would instead have to rely on individuals to bring a complaint.

Individuals do not always have the knowledge, expertise or time. By ensuring Article 80(2) is enforced, privacy advocates will be free to directly address the Information Commissioner when organisations exploit personal data. It makes little sense to rely on individuals to complain alone.

More information

Written	May 2017
Contact	Christopher Stacey | Co-director, Unlock
	07557 676433 | christopher.stacey@unlock.org.uk
Address	Maidstone Community Support Centre, 39-48 Marsham Street, Maidstone, Kent, ME14 1HH
Web	www.unlock.org.uk | @unlock2000

What we do

We help

- We support people with convictions by providing information, advice and support through our websites and helpline
- We help practitioners who support people with convictions by providing criminal record disclosure training and useful resources
- We recruit and train people with convictions as volunteers to help support the information and advice we provide
- We support employers in the fair treatment of people with criminal records

We listen and learn

- Our helpline and forum provide an ear to ground on the problems that people face as a result of their criminal record
- We collect evidence and undertake research into the barriers caused by criminal convictions

We take action

- We challenge bad practice by employers and push for improvements to the way that criminal record checks operate
- We advocate for a fairer and more inclusive society by working at a policy level with Government, employers and others