

Liberty's Abridged Briefing on the Data Protection Bill 2017: the Immigration Control Exemption

The exemption

The Data Protection Bill (the Bill)¹ applies the EU General Data Protection Regulation (GDPR).² The GDPR enters into force in May 2018 and will remain in force until the UK leaves the EU, after which it will, according to the Government, be incorporated into domestic law. The GDPR allows Member States a margin of appreciation within which to adapt it to national circumstances. In particular, Article 23(1) sets out a number of legitimate aims in the pursuit of which a state may make exemptions to data subjects' rights, such as national security and defence.

Schedule 2, Part 1, paragraph 4 of the Bill (hereafter "the immigration control exemption") creates an exemption from certain provisions of the GDPR on immigration control grounds, even though this ground is not listed at Article 23(1) of the GDPR. Specific rights of data subjects will be restricted where their data is processed for a) the maintenance of effective immigration control,³ or b) the investigation or detection of activities that would interfere with effective immigration control,⁴ to the extent that the fulfilment of their rights would prejudice these activities. The exemption would affect the rights listed at paragraph one of schedule 2,⁵ and set out in full in the GDPR at Articles 13(1)-(3) (right to information), 14(1)-(4) (right to information where data is obtained from a third party), 15(1)-(3) (right of subject access), 16 (right to rectification), 17(1)-(2) (right to erasure), 18(1) (right to restriction of processing), and 20(1)-(2) (right to data portability). The exemption also covers the general principles set out in Article 5 - lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity, confidentiality and accountability - as they apply to these rights.

Sub-paragraphs 2 and 3 of paragraph 4 exempt data controllers that process and share data with a second controller for the purposes of immigration control or investigation of activities that would undermine it from their obligations under GDPR Articles 13(1)-(3), 14(1)-(4), 15(1)-(3) and Article 5, to the extent that the second controller is also exempt from the generally applicable safeguards contained in those GDPR provisions.

Key concerns

Liberty's key concerns with the exemption are summarised below. Our full concerns are set out in our Report Stage briefing.⁶

- 1. The exemption is unlawful.** The Government claims that the GDPR makes express provision for such an exemption. However, the grounds on which an exemption may be made listed at Article 23(1) of the GDPR do not include "immigration control". Exemptions are permitted under Article 23 only when they are necessary, proportionate, and respect the essence of the fundamental rights and freedoms. For the reasons set out below, the exemption fails to fulfil any of these requirements. Even if it did, Article 23(2) sets out certain procedural requirements relating to exemptions. The Government has made no attempt to fulfil these requirements. Thus the exemption is incompatible with the GDPR and risks the future adequacy of the UK's data protection arrangements for the free flow of data between the UK and the EU. The exemption is also incompatible with Articles 8 and 14 of the European Convention on Human Rights, and Articles 7, 8 and 21 of the EU Charter of Fundamental Rights.
- 2. The exemption is worryingly broad.** The Government has not defined "the maintenance of effective immigration control". As such, despite the Government's claims to the contrary,⁷ the exemption is incredibly broad in its scope, giving data controllers worryingly broad latitude in restricting important rights. Moreover, processing by essential public services, charities, corporations and private data brokers may fall under the exemption, in addition to processing by the Home Office, either when the Government outsources immigration control functions to those agencies, or when those agencies transfer data to the Home Office for that purpose. Nor is the exemption limited to any particular category of person. Although non-UK nationals are far more likely to have their data processed for immigration control purposes, the

Government may determine that processing British citizens' data for immigration control purposes is necessary. For example, to ensure that ineligible migrants do not access NHS services, the Government could deem it necessary to check the immigration status of everyone attempting to access health services, and it could set up a data-sharing scheme between NHS Digital and other Government departments to facilitate this. If it did not want the existence of such a scheme to become common knowledge, it could apply the exemption. As such people of all immigration statuses are at risk of losing data protection rights in the name of immigration control, especially where the Government wishes to preserve the secrecy of data-sharing agreements between the Home Office and third parties.

3. **The exemption is unnecessary.** Several activities associated with undocumented people are offences under the criminal law including working,⁸ driving,⁹ or simply overstaying a visa.¹⁰ The Government already invokes the law enforcement exemption at section 29 of the Data Protection Act 1998 to justify the secrecy of the bulk data-sharing agreements that it uses to obtain up-to-date contact details for individuals suspected of committing an immigration offence from trusted sources such as children's school records¹¹ and confidential patient medical records.¹² While it is Liberty's view that these data-sharing schemes are unethical, incompatible with fundamental human rights and must end, and that any law enforcement exemption should exclude its use in relation to breaches of immigration law, the Government would nevertheless retain the power to limit individuals' data protection rights in circumstances where they are suspected of committing a breach of the criminal law by virtue of the law enforcement exemption in Chapter 3 of the Data Protection Bill. As such this freestanding immigration control exemption that may be used to documented migrants and British citizens, untethered from any notion of criminality or wrongdoing, is wholly unnecessary.
4. **The exemption cannot be challenged.** In many circumstances individuals won't know that their rights have been restricted under the exemption. As such it will be impossible for them to appeal the restriction to the Information Commissioners' Office. For example, where individuals' data has been shared for immigration control purposes without their knowledge, individuals will not be able to challenge the removal of their right to know that their data has been shared, or, more gravely, the legal basis for the transfer itself.
5. **The exemption increases the chances of error.** The Government has stated its intention to make significantly greater use of data in its immigration control activities,¹³ including in its processing of the claims of EEA nationals applying for "settled status."¹⁴ A cautionary tale exists not only in the secret bulk-data sharing agreements referenced above, but other Home Office practice. In 2012, the Home Office contracted Capita, a private company, to help it locate undocumented people. In a significantly distressing incident, hundreds of people complained after wrongly being sent texts by Capita telling them to leave the country. More recently, *The Guardian* reported the story of Dr Mohsen Danaie, a research scientist with a valid visa who received a letter from the Home Office that misspelled his name and wrongly advised him that as he had no leave to remain in the country he should make plans to leave.¹⁵ And it has been reported that up to 10% of sampled refusals of bank accounts to individuals on immigration grounds were made in error, again due to poor data quality.¹⁶ It is deeply worrying in light of these errors that at a time when the Home Office is proposing to make increased use of data in its immigration control functions, including through automation, vital data protection rights would be stripped away by this exemption.

For the reasons set out above, Liberty strongly recommends that the Data Protection Bill is amended to remove Schedule 2, Part 1, paragraph 4.

Press

Rob Merrick, "Government 'shamelessly attempting' to give itself power to spy on people's details for 'immigration control'". *The Independent*, 24/11/2017.¹⁷

Diane Abbott, "New Data Laws Declare Open Season On Migrant Rights - It Could Be You Next". *Huffington Post*, 31/10/2017.¹⁸

Martha Spurrier, "Buried in a government bill, an immigration rule strips millions of their data protection". *Politics.co.uk*, 03/11/2017.¹⁹

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December 2017

¹ The Data Protection Bill 2017 (as amended at Committee Stage) is available here:

<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0074/18074.pdf>

² The EU General Data Protection Regulation is available here: http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

³ Data Protection Bill 2017, Schedule 2, Part 1, paragraph 4(1)(a)

⁴ Data Protection Bill 2017, Schedule 2, Part 1, paragraph 4(1)(b)

⁵ Data Protection Bill 2017, Schedule 2, Part 1, paragraph 1(a)-(b)

⁶ Liberty's Report Stage Briefing on the Data Protection Bill 2017, available under 'Data Protection, Privacy and Surveillance' here: <https://www.liberty-human-rights.org.uk/policy/policy-reports-briefings>

⁷ Baroness Williams of Trafford in Data Protection Bill Committee Stage in the House of Lords, 13th November 2017 – Hansard, vol. 785, col.1913

⁸ Immigration Act 2016, Section 34

⁹ Immigration Act 2016, Section 44

¹⁰ Immigration Act 1971, Section 24

¹¹ Damien Gayle, "Pupil data shared with Home Office to 'create hostile environment' for illegal migrants". *The Guardian* 15/12/2016. Available here: <https://www.theguardian.com/uk-news/2016/dec/15/pupil-data-shared-with-home-office-to-identify-illegal-migrants>

¹² Alan Travis, "NHS hands over patient records to Home Office for immigration crackdown". *The Guardian*, 24/01/2017. Available here: <https://www.theguardian.com/uk-news/2017/jan/24/nhs-hands-over-patient-records-to-home-office-for-immigration-crackdown>

¹³ Patsy Wilkinson, Second Permanent Secretary to the Home Office, response to Question 64. Public Accounts Committee, Oral evidence: Brexit and the Borders, HC 558 20/11/2017

¹⁴ TECHNICAL NOTE: CITIZENS' RIGHTS - ADMINISTRATIVE PROCEDURES IN THE UK", HM Government. 7/11/2017 available here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/657694/TECHNICAL_NOTE_CITIZENS_RIGHTS_-_ADMINISTRATIVE_PROCEDURES_IN_THE_UK.pdf

¹⁵ 'Leave UK immediately': scientist is latest victim of Home Office blunder', *The Guardian*. 26/09/2017, available here: <https://www.theguardian.com/uk-news/2017/sep/26/leave-uk-immediately-scientist-is-latest-victim-of-home-office-blunder>

¹⁶ An inspection of the 'hostile environment' measures relating to driving licences and bank accounts' October 2016: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf

¹⁷ <https://www.independent.co.uk/news/uk/politics/personal-information-new-laws-uk-home-office-power-migrants-immigration-control-brexite-government-a8017326.html>

¹⁸ http://www.huffingtonpost.co.uk/diane-abbott/migrants-rights_b_18429082.html

¹⁹ <http://www.politics.co.uk/comment-analysis/2017/11/03/buried-in-a-government-bill-an-immigration-rule-strips-milli>