



19 January 2018 - The following comments are pursuant to the Article 29 Data Protection Working Party (“WP29”) draft guidance entitled “Guidelines on Consent under Regulation 2016/679” (“Draft Guidance”). The Draft Guidance is intended to be helpful to controllers that must comply with the General Data Protection Regulation (“GDPR”). It is not intended to be secondary regulation. The Information Accountability Foundation (“IAF”) welcomes the opportunity to file comments on this important regulatory process.

IAF Background

The Information Accountability Foundation (“IAF”) is a non-profit organisation whose charitable purpose is research and education. It was founded in 2013 to further the work of the Global Accountability Dialogue that formulated the Essential Elements of Accountability. The IAF has a global mission and has been active in Europe since its founding. These comments have been developed by staff strategists and do not necessarily reflect the views of the IAF board of trustees or funders. The IAF team has more than 100 years of data protection experience that they bring to their analysis of the Draft Guidance.

Consent Part of a Framework of Six Bases for Lawful Processing

The GDPR requires consent to be unambiguous, specific and explicit when sensitive data is being processed, and the Draft Guidance makes this clear. The GDPR also requires organisations to use the appropriate legal basis when processing data. The specificity of consent required by the GDPR and annotated in the Draft Guidance is implementable in part because of the flexibility that comes from Article 6 that describes the six legal bases for processing personal data. If the consent requirements described in the GDPR were taken to an environment where consent was the only lawful basis for processing personal data, the specificity required by the Draft Guidance would be problematic. The WP29 is defining guidance for the GDPR, but it is also creating precedent for legislation that might follow, such as the proposed ePrivacy Regulation. One might say that the clarity in the Draft Guidance creates cautionary advice for policymakers.

Consent Within the Context of a Broader Business Relationship

The plain language of the GDPR is clear, consent must be specific and not bundled into more general terms and conditions. However, those broader terms and conditions must still be presented and executed by the individual. So, an organisation will need to present the following to customers:

- separate consent for certain activities,
- notification of processing that makes use of legal bases other than consent, and
- terms and conditions.

Experience from businesses that have complex relationships with customers that are exercised primarily online is that developing an approach that requires numerous notifications and separate consents requires a large cross functional team of product developers, designers, usability testers, data protection experts and lawyers. These cross functional teams are the exception not the rule at many organisations. This staffing approach means the resources required by organisations to execute on the Draft Guidance will be a challenge for most and certainly for smaller ones.

The IAF, as a think tank, has been focused on the legal, fair and just data uses that enhance the full range of fundamental rights. As one begins to review the draft and completed guidance, the execution of the legal requirements of the GDPR, in the manner suggested by the collective guidance, will pull resources from the core role of comprehensive data protection impact assessments as the assurance vehicle for legal, fair and just. This raises concerns the IAF believes the WP29 should consider.

Scientific research

While the stated purpose for the Draft Guidance is to provide direction for consent, the document includes a significant section on scientific research. The GDPR states in Article 5(1)(b) “. . . further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, . . . , not be considered incompatible with the initial purposes.”

The Draft Guidance quotes GDPR Recital 159 that states “For the purposes of this Regulation, the processing of personal data for scientific research purposes should be interpreted in a broad manner.” The Draft Guidance goes on to say, “however the WP29 considers the notion may not be stretched beyond its common meaning and understanding that ‘scientific research’ in this context means a research project set up in accordance with relevant sector-related methodology and ethical standards.

The words “should be interpreted in a broad manner” links to the full range of fundamental rights and interests articulated by the various European Union treaties and the European Union strategy for one digital market that is an engine for employment and economic growth. The GDPR is intended to create both legal certainty and a platform for the free flow of data in a suitably protected manner. This strategy is responsive to all the stakeholder rights and interests articulated in the treaties that have established the European Union. In short, the flexibility built into the GDPR for research and related activities should not be prematurely limited by the draft guidance.

The IAF does agree that forward looking data uses should be assessed in an appropriate manner. In many industries, the sector guidance referenced in the Draft Guidance does not yet exist. In order to protect these rights and freedoms and encourage scientific research, IAF believes that appropriate safeguards and protections should be in place. The question remains what are those safeguards? The IAF has endeavored to start answering that question with research beginning with the “Unified Ethical Frame for Big Data Analysis” and extending through “Artificial Intelligence, Ethics and Advanced Data Stewardship.” In fact, [IAF 2016 research](#)¹ looked at how codes of conduct might be useful in the research setting. These research projects are intended to inform the creation of frameworks necessary to balance interests, protect people, and create the mechanisms to demonstrate the implementation of those safeguards.

¹ “Enforcing Big Data Assessment Processes”

Closing

Thank you for the opportunity to comment. Any questions should be directed to Martin Abrams at mabrams@informationaccountability.org.