The Information Commissioner’s written evidence to the Joint Committee on Human Rights inquiry on “What are the human rights implications of Brexit?”

1. The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (“DPA”), the Freedom of Information Act 2000 (“FOIA”), the Environmental Information Regulations (“EIR”) and the Privacy and Electronic Communications Regulations 2003 (“PECR”). She is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

2. The Information Commissioner wishes to address the issue of the potential impact of withdrawal from the EU on human rights protected by EU law.

3. The Information Commissioner is a regulator for information rights legislation, rather than for human rights more broadly. Nevertheless, information rights, and in a particular data protection, should be seen in the context of human rights and are underpinned by them. This connection is reflected in the current EU Data Protection Directive, which the UK’s Data Protection Act (DPA) implements; for example, Recital 10 of the Directive notes that the object of national laws on the processing of personal data is to protect the right to privacy recognised in Article 8 of the European Convention on Human Rights (the Convention).

4. The EU Charter of Fundamental Rights (the Charter) includes the right to respect for private and family life in Article 7 (which mirrors the right to privacy in the Convention), and it specifically includes the right to the protection of personal data in Article 8. Under this Article of the Charter, personal data must be processed fairly for specified purposes and on the basis of consent or another legitimate process laid down by law; individuals have the right of access to their data and to have it rectified; and there must be an independent authority to regulate compliance. However, the scope of the Charter is in effect limited by Article 51 and by the UK Protocol; the Charter only applies to Member States in so far as they are implementing EU law and it cannot be used to interpret the meaning of what is purely UK national law.

5. This nevertheless means that the Charter needs to be taken into account when considering information rights cases to do with the implementation of EU law, and in particular the DPA. It is notable that
national courts are beginning to refer to the Charter in information rights cases. For example, in the significant judgment in *Google Inc v Vidal-Hall* [2015] EWCA Civ 311, the Court of Appeal addressed section 13(2) of the DPA. This section specifies that in order to obtain compensation for a contravention of the Act, an individual has to suffer damage as well as distress. The Court of Appeal found that this section was incompatible with the provisions of the Charter and should be disapplied. In the Upper Tribunal case of *The Attorney General for the Prince of Wales v the Information Commissioner and Michael Bruton* [2016] UKUT 0154 (AAC), which concerned the Environmental Information Regulations (EIR), the Tribunal said that the Regulations (and the EU Directive which they implement) have to be construed with regard to the privacy rights of individuals under both the Convention and the Charter; this was a factor in their finding on the extent to which an individual (in this case the Duke of Cornwall) may also be a public authority under the EIR.

6. The link between data protection and the fundamental rights set out in the Charter is made explicit in the new EU General Data Protection regulation (GDPR) which is due to apply from 25 May 2018. The first Recital of the GDPR states that “the protection of natural persons in relation to the processing of personal data is a fundamental right” and it refers to the right to the protection of personal data in the Charter, and in the Treaty on the Functioning of the European Union.

7. A UK Court may disapply an Act of Parliament that implements EU legislation, if it finds that the Act is inconsistent with a Charter right. This gives the courts a stronger power in relation to privacy rights in the Charter than the Human Rights Act (HRA) does in relation to the corresponding rights in the Convention, since the HRA only allows for a declaration of incompatibility.

8. The Charter is therefore important, in so far as it applies, in providing a distinct basis for the protection of personal data in a system of fundamental rights and principles. This reflects the increased importance of informational privacy to society in a world where personal details have become increasingly central to the digital economy and delivery of public services with the attendant risk to individuals that may pose. If UK law is no longer implementing EU law, following the UK’s departure from the EU, the Charter will no longer apply, and the linkage to the rights and principles it contains will fall away. Furthermore, if the GDPR ceases to apply in the UK, the explicit link it contains to Charter rights will also disappear.

9. The effect of this would be mitigated to some extent by the fact that the HRA, and the Convention Rights which it enshrines, would continue to apply; courts would still have to take account of Convention rights
and the actions of public authorities would still have to be compatible with those rights. Also, the UK would still be a signatory to the Council of Europe Convention 108 on the automatic processing of personal data, which relates data protection to Convention Rights.

10. However a specific articulated right to data protection will be lost, and the Commissioner considers that it is important that the specific rights of individuals in any future data protection legislation are linked to, and based on fundamental human rights to privacy. It would not be helpful if the effect of removing Charter rights was a weakening of the linkage to human rights. Following withdrawal from the EU the UK will continue to require a progressive and robust data protection regime which safeguards individuals’ fundamental rights while facilitating the increasingly sophisticated use of personal data by business and government as well as cross-border data flows. Our research shows that building trust between individuals and organisations using their data is an increasingly critical issue and is central to the continued growth and success of the digital economy. Grounding data protection in a framework of rights assists in safeguarding that trust.

Information Commissioner’s Office
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