

Response to the Welsh Government Consultation: *School workforce data collection in Wales*

Background to the Information Commissioner's Office

The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations (EIR) and the Privacy and Electronic Communications Regulations. She upholds information rights in the public interest, promotes openness by public bodies and data privacy for individuals. She does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken. The opportunity to respond to this consultation is therefore welcomed but comments will only be made in respect of matters relevant to the scope of her responsibilities.

A) Privacy / Data Protection Impact Assessment (PIA / DPIA)

The Information Commissioner notes that Para 3.5 of the Explanatory Memorandum sets out that a PIA will be undertaken to ensure compliance with The Data Protection Act 1998 (DPA). Whilst this is to be welcomed, there are a couple of issues that she would like to raise.

In May 2018 the DPA will be replaced by the General Data Protection Regulation (GDPR), so it may make sense to plan and assess the data protection compliance of the project against GDPR, particularly as the proposed processing will not begin until 2019.

The GDPR emphasises the importance of a privacy by design approach, and makes DPIAs a legal requirement for any large scale processing of special category data (the definition of "special category data" is similar to "sensitive data" under DPA), which it refers to as "high risk processing". As this project proposes using health and ethnicity data, it is likely that it will fall within that definition and that a DPIA will be a legal requirement.

The GDPR sets some parameters for what a DPIA is expected to contain:

- A description of the processing operations and the purposes, including, where applicable, the legitimate interests pursued by the data controller.

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- An assessment of the necessity and proportionality of the processing in relation to the purpose.
- An assessment of risk to the individuals.
- The measures in place to address risk, including security and to demonstrate compliance.

The current statutory [Code of Practice on Conducting PIAs](#) is available on the ICO's website. In addition, the EU's Article 29 Working Party will be producing GDPR guidance on High Risk Processing and DPIAs during 2017.

Having the DPIA available as part of this consultation would have been very helpful to stakeholders when considering the arguments set out for and against the 5 options. The impacts on the various organisations involved in collecting and using school workforce data are explored in the Regulatory Impact Assessment, but there is only passing reference to the impact on the individual data subjects and their right to privacy. A DPIA covering the issues in the bullet points above would enable a much rounder consideration of the proposals.

In addition to enabling the policy makers and consultees to consider the impact of the proposals on individuals an early DPIA would help to shape the further development of the project – supporting a privacy by design approach (as required by GDPR), rather than risking a situation where mitigations to address privacy must be retrofitted to an otherwise complete proposal.

B) Purpose and legal basis of processing

Throughout the documents the purpose of the processing is broadly described in relation to matters of workforce management, particularly at national level. This suggests that information will be used to generate statistics and other anonymised data sets to support policy making. However, the document does not rule out using the data in a way that could have significant impact on the individual, and the ability to share pre-employment / pre-training place information with school proprietors suggests that some processing may indeed impact significantly on individuals. Under GDPR the definition of statistical purposes implies that neither the aggregated output nor the underlying personal data are “used in support of measures or decisions regarding any particular natural person” (GDPR Recital 162).

Clarity of purpose will therefore be important when identifying which of the lawful conditions for processing will be applicable to the project. Under GDPR these must be identified, documented and set out in Fair Processing Notices as they impact on the rights of the individual.

In GDPR, the conditions for lawful processing of personal data are set out in Article 6, and those for lawful processing of special categories of data are set out in Article 9. They are similar - but not identical to - the DPA conditions for processing and will require some consideration at an early stage of the project.

The GDPR includes research and statistics amongst the many derogated topics – these are the topics on which Member States can bring forward nationally appropriate legislation in relation to exemptions and other detail. In the UK, the Department for Culture, Media and Sport is leading this work.

C) Anonymisation / Pseudonymisation

A question that the DPIA should address is at what point the personal data could be pseudonymised or anonymised to significantly decrease the impact on data subjects' privacy without compromising the purpose of the project. Under GDPR Article 89 (processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes), measures that no longer permit the identification of individuals from the data must be used wherever the purpose of the processing can be achieved in that manner.

This will be a relevant consideration both to the core purposes of the proposals, and also in relation to any requests to share data, for example with researchers.

C) Individual's rights

The rights of the individual are strengthened under GDPR, and need to be given thorough consideration. As noted above, the individual's rights vary depending on the lawful basis for the processing.

Two examples of how the enhanced individual's rights are likely to impact on this proposed project are set out below.

- **The right to be informed.** The Information Commissioner welcomes the reference at paragraph 4.19 of the Regulatory Impact Assessment that Welsh Government will issue a Fair Processing Notice to all members of the school workforce covered by the implementation of the regulation. GDPR Articles 12-14 set out the requirements on data controllers to inform data subjects, including specific criteria for the information that will need to be included in these notices, as well as requiring that they are straightforward

for the intended audience to read. Guidance on [Privacy Notices under the GDPR](#) can be found on the ICO's website.

- **The right to rectification.** Article 16 of GDPR sets out that data subjects are entitled to have their personal data rectified through application to the data controller if it is inaccurate or incomplete. If that data has been disclosed to third parties, the data controller will be required to inform data subjects of the rectification wherever possible. Data Controllers must also inform data subjects about the third parties to whom the data has been disclosed where appropriate. If the data controller fails to respond appropriately to a request for rectification, the data subject will be able to complain to the Information Commissioner, and / or seek judicial remedy.

Please contact Helen Thomas at the ICO's Cardiff Office on 01625 545298 if you would like to discuss any aspect of the above response.

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