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Response to the Government's public consultation on reforms to the UK's data protection regime

Bates Wells is a UK law firm that provides specialist data protection advice to a range of commercial, public sector and charity clients. We have the largest dedicated Charity and Social Enterprise team in the UK, and we act for more UK charities in the top 3,000 (by size) than any other law firm. We regularly advise on data protection law, as the vast majority of our clients are impacted by it.

The Government launched a consultation entitled "Data: a new direction" on 10 September 2021.[1] We welcome the opportunity to respond to this consultation. Our response draws upon our extensive experience in advising on all data protection issues that our clients require. We have focused on those areas that we think are most relevant to our clients, in particular, those in the charity and non-profit sectors.

We have sought the views of our clients via a roundtable discussion we hosted, to discuss how the changes may impact on charities, and through an online survey of the proposals for subject access requests which was sent to clients of our employment law team. We have used this feedback to inform our responses and have also included the survey results at Appendix 1.

We would like to address the following questions contained within the Government's consultation document:

1. Legitimate interests (Q1.4.1 – 1.4.3)

Q1.4.1. To what extent do you agree with the proposal to create a limited, exhaustive list of legitimate interests for which organisations can use personal data without applying the balancing test?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible.

1.1 We strongly agree with the proposal to create a list of legitimate interests for which organisations can use personal data without applying the balancing test. Several of our charity clients regularly process supporter data for a range of purposes including receiving

[1] https://www.gov.uk/government/consultations/data-a-new-direction

and administering donations, processing gift aid declarations, sending fundraising materials by post and undertaking research on potential major donor prospects. When relying on legitimate interests as a lawful basis for processing, charities must currently undertake a 'balancing exercise' and complete a Legitimate Interest Assessment for each of these processing activities which can be time consuming and use up limited charity resources, particularly when most of these activities are routine and do not present significant privacy risks.

1.2 In our experience, clients often assume that consent is required to process all personal data and do not feel comfortable relying on legitimate interests as a valid legal basis, mainly due to ambiguity about whether the balancing test is met or not. Having a list of processing activities for which the balancing test does not need to be applied, will hopefully provide charities and all organisations with greater confidence in relying on legitimate interests as opposed to consent, which as mentioned in the consultation, is not always the most appropriate legal basis to use.

Q1.4.2. To what extent do you agree with the suggested list of activities where the legitimate interests balancing test would not be required?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, indicating whether and why you would remove any activities listed above or add further activities to this list.

1.3 We agree with the list of suggested activities where the legitimate interests balancing test would not be required, but we also believe that a specific condition for charities should be added to enable them to process and administer donations and send fundraising/marketing materials. The latter is explicitly referenced as an activity to which legitimate interests applies in Recital 47 UK GDPR.

Q1.4.3. What, if any, additional safeguards do you think would need to be put in place?

1.4 We do not think that additional safeguards will be needed for routine processing operations which are in an individual's reasonable expectations and set out in the organisation's privacy notice. Individuals will still be able exercise their rights under the UK GDPR, including to object to processing undertaken based on legitimate interests.

2. **Soft opt-in (Q2.4.9)**

Q2.4.9. To what extent do you agree that the soft opt-in should be extended to non-commercial organisations?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible.

2.1 We very strongly agree that the soft opt-in should be extended to non-commercial organisations. We believe that this was a key omission from the Privacy and Electronic Communications Regulations 2003 and that it is illogical and indeed unfair for commercial organisations to be able to rely on the soft opt-in but not non-commercial organisations, who

are often heavily reliant on voluntary income and on the need to contact supporters for donations.

2.2 Non-commercial organisations, including charities, currently must seek consent from their supporters to send them fundraising and marketing materials by e-mail and text. Since the introduction of the new definition of consent under the UK GDPR several charities have had to seek revised consents from their supporters which has resulted in a reduction in the number of individuals that they can contact, which in turn, has impacted on their ability to raise funds. The extension of the soft opt-in would therefore be hugely beneficial to charities and their ability to fundraise as they could contact supporters who have donated to them or otherwise engaged with the charity e.g., become a member, attended an event, or signed up to a campaign.

2.3 Donors are often long-standing supporters of charities and are keen to hear from them about their work and what their donations are funding. Charities are restricted from contacting them by e-mail and text unless they have UK GDPR compliant consent which can often be difficult to obtain and maintain. Unless they have consent charities also must be very careful when sending 'thank you' and gift aid communications to donors given that anything that promotes the work of the charity constitutes direct marketing. The extension of the rule would therefore make keeping in touch with donors and supporters much easier to administer. It is also likely to reduce communication costs for charities (and be better for the environment) as they would be less reliant on postal communications.

2.4 Charities are already under an obligation to give individuals a chance to opt-out when contact details are first collected and in every subsequent marketing communication they send under sections 3.5.4 and 3.5.9 of the Fundraising Regulator's Code of Fundraising Practice.[2]

2.5 We therefore believe that compliance with the rules relating to the soft opt-in will be high as charities are already providing ways to opt-put in every communication.

2.6 Clarity will be needed on what constitutes the same or similar communications e.g., could a charity contact a supporter that has made donations in the past with information about fundraising events? Guidance from the ICO or Fundraising Regulator would be needed on the scope of the soft opt-in in a charity context to ensure that it is not administratively burdensome for charities to manage their marketing communications and that supporters are not being contacted about items they don't want to hear about.

3. **Substantial public interest condition (Q4.4.1 – 4.4.7)**

Q4.4.4. To what extent do you agree there are any situations involving the processing of sensitive data that are not adequately covered by the current list of activities in Schedule 1 to the Data Protection Act 2018?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer and provide supporting evidence where possible, including on:

[2] https://www.fundraisingregulator.org.uk/code/all-fundraising/processing-personal-data

3.1 We believe that there are situations where charities need to process special category data to protect beneficiaries and supporters, which are not adequately covered in the list of activities in Schedule 1 to the Data Protection Act 2018 ("**DPA 2018**").

○ ***What, if any, situations are not adequately covered by existing provisions***

3.2 When our clients engage in fundraising activities, they may come across individuals who lack capacity to make a decision to donate, or are vulnerable due to some other circumstance (e.g., mental health issues, other health issues, recent bereavement). Our clients wish to record data relating to this. This might be for a number of reasons:

(a) to prevent that individual being contacted directly in the future;

(b) to make a note that they should not be contacted for a set period of time; and/or

(c) to make any future communications more sensitive and appropriately tailored to the supporter (e.g., noting that they are hard of hearing or require material in a larger font).

3.3 Charities also have legal and regulatory obligations in respect of the way that they treat and deal with vulnerable supporters. Charities should not accept and must return donations from individuals who lack mental capacity. The Code of Fundraising Practice also requires fundraising charities to take all reasonable steps to treat a donor fairly, which includes taking into account the needs of a potential donor who may be in a vulnerable circumstance. In addition, the Charities (Protection and Social Investment) Act 2016 introduced requirements for charities to have contractual provisions in place to govern the treatment of vulnerable individuals by companies that fundraise on their behalf and to report on how the charity complied with these obligations in its annual report.

3.4 As such, it is important that charities (and organisations that fundraise on their behalf) can record information about whether a supporter is vulnerable to ensure that the charity can adequately protect its supporters, comply with relevant law and regulation and ensure that it is not accepting donations from individuals who lack capacity to make them or are in a vulnerable circumstance.

3.5 We have examined the Article 29 Working Party Guidance and take the view that because 'health data' has been interpreted broadly, simply recording somebody as a vulnerable individual could constitute 'health data' due to the fact that in the majority (but not all) of cases, vulnerability is caused by or linked to a physical or mental condition.

3.6 'Health data' falls under the special categories of data under Article 9 UK GDPR. Article 9 prohibits special categories of data from being processed unless one of the provisions in Article 9(2) applies, e.g., the explicit consent of the individual. It is our view that explicit consent would not be appropriate in this case. This is because Article 4(11) UK GDPR requires that consent must be both informed and freely given. This might not be possible to obtain from an individual who lacks mental capacity. In circumstances where someone is vulnerable, but has capacity, it may not be appropriate, and could cause additional distress to the individual, if the charity asks them to provide explicit consent to record data about their vulnerability. We believe that an alternative lawful basis for processing this data would be the substantial public interest condition under Article 9(2)(g) UK GDPR.

3.7 Section 16 of Schedule 1 Part 2 of the Data Protection Act 2018 does list 'Support for individuals with a particular disability or medical condition' as being a substantial public

interest condition, but this only applies to individuals that are members of the not-for -profit organisation that is undertaking the processing. Most charity supporters and donors are not formal 'members' of charities and so this condition cannot be relied upon for the activities described above. It is possible that section 19 could also apply to the protection of vulnerable individuals ('Safeguarding of economic well-being of certain individuals'), but there is no case law or guidance on its application. It would therefore be a risk for charities to process special category health data about vulnerable donors in reliance on it.

○ ***What, if any, further safeguards or limitations may be needed for any new situations***

3.8 The requirements of transparency under Articles 13 and 14 UK GDPR should still be complied with and charities should ensure that information about how special category data may be processed in these circumstances is clearly set out in their privacy notices so that individuals can exercise their data privacy rights in respect of such data.

Q4.4.5. To what extent do you agree with the following statement: 'It may be difficult to distinguish processing that is in the substantial public interest from processing in the public interest'?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible.

3.9 Given that there is no definition of what is in the "substantial" public interest under the DPA 2018 it is up to controllers to decide what processing activities will fall within this condition. Its natural meaning is "of considerable importance", but it is a subjective test as to whether this applies in a particular case, and what distinguishes between processing in the public interest from the substantial public interest. To avoid ambiguity and to ensure that there is consistency in approach, it would be helpful for there to be a broad definition. Care would however need to be taken to ensure that it is not too restrictive and inadvertently excludes processing that may be in the substantial public interest.

Q4.4.6. To what extent do you agree that it may be helpful to create a definition of the term 'substantial public interest'?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible, including on:

○ ***What the risks and benefits of a definition would be***

○ ***What such a definition might look like***

○ ***What, if any, safeguards may be needed***

3.10 Please see our response to Q 4.4.5.

Q4.4.7. To what extent do you agree that there may be a need to add to, or amend, the list of specific situations in Schedule 1 to the Data Protection Act 2018 that are deemed to always be in the substantial public interest?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible, including on:

○ ***What such situations may be***

3.11 We believe that it would be very helpful for the charity sector if the list of specific situations in Schedule 1 DPA 2018 was amended to include a specific provision for the processing of special category health data in relation to fundraising and the protection of vulnerable individuals. Alternatively, one of the existing provisions (i.e. 16 or 19) could be expanded to explicitly cover these processing activities.

○ ***What the risks and benefits of listing those situations would be***

3.12 The benefits of listing this situation would be that charities could record data about vulnerable individuals to ensure that they are treated fairly and appropriately and are not approached for donations where it would not be appropriate to do so. This would better enable charities to comply with their legal and regulatory obligations in this area and to better protect and safeguard those individuals it interacts with.

○ ***What, if any, safeguards may be needed***

3.13 As above, relevant privacy information must be provided to ensure that the processing is transparent. In addition, charities could be encouraged to only record the minimum information that is required to be able to make decisions about an individual and how they are contacted etc.

4. **Political campaigns (Q2.5.1 – 2.5.3)**

Q2.5.1. To what extent do you think that communications sent for political campaigning purposes by registered parties should be covered by PECR's rules on direct marketing, given the importance of democratic engagement to a healthy democracy?

4.1 We agree with government that it is necessary to strike a balance between the fundamental principle of democratic engagement on the one hand, and an individual's right to privacy on the other. As explained above, consider that the current position – where direct marketing rules are somewhat unnaturally extended to campaigning and fundraising activity – to be inadequate. This is because the rules fail to properly distinguish between:

(a) the pursuit of commercial profit; and

(b) messages with a broader democratic or social purpose and treats these goals as having necessarily equal value.

4.2 The position is exacerbated by the current rule that organisations pursuing the first (profit) motive can benefit from the soft opt-in, but those pursuing the second (socio-political)

motive cannot. Allowing both groups to benefit from the soft opt-in (as endorsed above) would go some way to redress the balance.

4.3 However, we would welcome government going further, and seeking to introduce a more flexible regime which permits messages for democratic engagement and campaigning purposes to be sent without UK GDPR-compliant consent, subject to the following points:

(a) We would suggest that the new, more flexible rule is available to any organisations engaged in the promotion of aims and ideals more broadly, rather than simply to non-party campaigners registered with the Electoral Commission in a regulated period. Adopting the more restrictive approach would create an arbitrary situation, where groups that incur less than the registration threshold (proposed to be £10,000 under the Elections Bill) would be subject to a stricter data privacy regime than groups that do not register. Smaller groups and individuals should be at least as able to benefit from a permissive regime for democratic and social engagement as larger groups/organised political parties, who can spend greater sums on ensuring compliance.

(b) Failing this:

(i) The new, more flexible rule should be open to "lower-tier" non-party campaigners as defined under the Elections Bill; and

(ii) It should also apply to participants in referendums.

(c) A suitable regime – particularly one which lowers the standard of consent required to direct marketing communications, or removes the need for consent – must include a clear and easy to facilitate opt-out mechanism.

Q2.5.2. If you think political campaigning purposes should be covered by direct marketing rules, to what extent do you agree with the proposal to extend the soft opt-in to communications from political parties?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible.

4.4 Please see our comments above. We think that a more flexible regime would be appropriate (but would not just limit this to registered political parties, which we think creates a double standard – and would permit other campaigning and fundraising activity subject to clear safeguards e.g., opt-out rights).

4.5 Insofar as the current regime continues to apply to the promotion of the aims and ideals of organisations including political parties and other campaigning bodies, we strongly agree that the soft opt-in should be extended to these activities as well as the pursuit of profit.

Q2.5.3. To what extent do you agree that the soft opt-in should be extended to other political entities, such as candidates and third-party campaign groups registered with the Electoral Commission? See paragraph 208 for description of the soft opt-in

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible.

4.6 Please see the answer immediately above. We would agree that, insofar as the current regime continues to apply, the soft opt-in should cover marketing for the promotion of aims and ideals (e.g., campaigning and fundraising activity) as well as commercial marketing activity.

5. **Subject access requests (Q2.3.1, 2.3.2, 2.3.4 and 2.3.5)**

5.1 Our Employment Department carried out a short survey of targeted clients/contacts (see Appendix 1) in relation to the questions on subject access requests ('SARs'). Our comments in this section draw on the responses we received to our survey.

Q2.3.1. Please share your views on the extent to which organisations find subject access requests time-consuming or costly to process.

Please provide supporting evidence where possible, including:

○ ***What characteristics of the subject access requests might generate or elevate costs*** ○ ***Whether vexatious subject access requests and/or repeat subject access requests from the same requester play a role*** ○ ***Whether it is clear what kind of information does and does not fall within scope when responding to a subject access request***

5.2 We strongly agree that organisations find SARs time-consuming and/or costly to process, which was the view of the large majority of respondents to our survey. It can be particularly challenging for smaller organisations, with fewer resources to dedicate to processing requests. In our experience, SARs involving complex third-party data issues can be particularly time-consuming and/or costly to process and this is often an area where specialist advice is sought, or those which simply involve a large amount of documentation to process. Our clients often face challenges in understanding what information falls within the scope of a request, often because this is unclear from the request itself. However, engaging with the individuals to clarify the scope of the request is often worthwhile in our experience.

Q2.3.2. To what extent do you agree with the following statement: 'The 'manifestly unfounded' threshold to refuse a subject access request is too high'?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, providing supporting evidence where possible, including on what, if any, measures would make it easier to assess an appropriate threshold.

5.3 We somewhat agree that the 'manifestly unfounded' threshold to refuse a subject access request is too high. The vast majority of respondents to our survey either strongly agreed or somewhat agreed with this statement, with marginally more responding that they 'somewhat agree'. In our experience, it is very rare for clients to refuse a request altogether on this basis, as it is seen as a very high bar. Clients are often concerned that it will be seen as draconian, and not an approach that is likely to find favour with the ICO (even where there may be good arguments that the request is 'manifestly unfounded'). In our view, this threshold could helpfully be lowered, and further guidance could helpfully be provided around the types of requests that are likely to meet the threshold (**with practical**

examples). However, we repeat that it is necessary to strike a balance between the fundamental principle of allowing individuals to exercise their rights on the one hand, and reducing the burden for controllers in responding to them. In this case, any lowering of the threshold would need to be carefully balanced against the need not to limit individual rights excessively.

Q2.3.4. To what extent do you agree with the following statement: 'There is a case for re-introducing a small nominal fee for processing subject access requests (akin to the approach in the Data Protection Act 1998)'?

○ ***Strongly agree*** ○ ***Somewhat agree*** ○ ***Neither agree nor disagree*** ○ ***Somewhat disagree*** ○ ***Strongly disagree***

Please explain your answer, and provide supporting evidence where possible, including what a reasonable level of the fee would be, and which safeguards should apply.

5.4 We somewhat agree that there is a case for re-introducing a small nominal fee for processing SARs. The large majority of respondents to our survey either 'strongly agreed' or 'somewhat agreed' with this statement. Marginally more respondents in fact 'strongly agreed' than 'somewhat agreed' with the statement. However, the point was made that, given that the fee under the Data Protection Act 1998 was so minimal, its effectiveness as a deterrent to vexatious requests was limited. Whilst we believe that a nominal fee may help to avoid *some* vexatious requests, we agree that the fee would need to be considerably higher to be an effective deterrent. Our concern about introducing a much higher fee is that it could act not just as a deterrent to vexatious requests, but excessively limit individuals exercising their rights more generally. In our view, a lowering of the threshold for 'manifestly unfounded' requests is likely to be a more effective means of limiting the burden on organisations (particularly smaller organisations) without unduly impacting on individuals exercising their rights.

Q2.3.5. Are there any alternative options you would consider reducing the costs and time taken to respond to subject access requests?

○ ***Yes*** ○ ***No*** ○ ***Don't know***

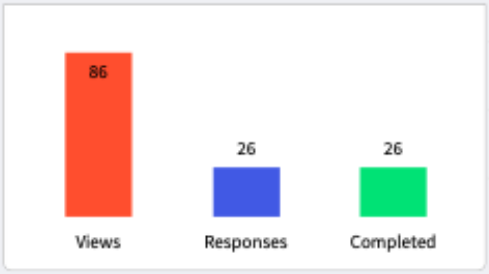
Please explain your answer, and provide supporting evidence where possible.

5.5 In our view, it would be helpful to introduce a new exemption to help organisations not to disclose material which has no apparent relevance to the request. In our experience, organisations are often faced with disclosing emails and other communications that are about the individual (and are in scope of the request) but are not important to the request (e.g., emails or other communications simply mentioning the individual in a work-related capacity). Currently, there is usually no exemption which applies to such content.

5.6 It would also be useful to consider an exemption in cases where there is an overlap between the requestor's personal data and sensitive business information.

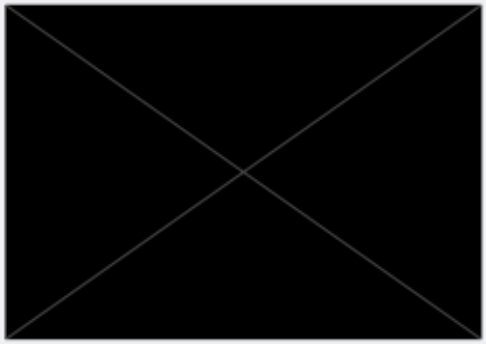
Appendix 1 – Subject Access Requests Survey

Summary



Statistic	Total	Completion Rate
Views	86	30.23%
Responses	26	100%
Completed	26	100%

By Country



Country	Views	Responses	Completed	Completion Rate
[redacted]	5	0	0	0%
	1	0	0	0%
	3	0	0	0%
	1	0	0	0%
	1	0	0	0%
	4	0	0	0%
	1	1	1	100%
	1	0	0	0%
	63	25	25	39.68%
	6	0	0	0%

To what extent do you agree that subject access requests are time-consuming and/or costly to process?

Answer	Responses	% of Answers
Strongly agree	18	72.00%
Somewhat agree	5	20.00%
Neither agree nor disagree	0	0%
Somewhat disagree	0	0%
Strongly disagree	1	4.00%
	25	**100.00%**

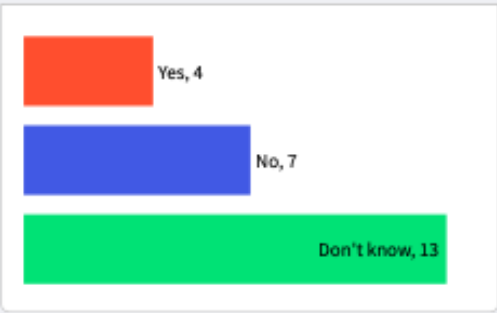
To what extent do you agree with the following statement: 'The 'manifestly unfounded' threshold to refuse a subject access request is too high'?

Answer	Responses	% of Answers
Strongly agree	9	37.50%
Somewhat agree	11	45.83%
Neither agree nor disagree	3	12.50%
Somewhat disagree	0	0%
Strongly disagree	1	4.17%
	24	**100.00%**

To what extent do you agree with the following statement: 'There is a case for re-introducing a small nominal fee for processing subject access requests (akin to the approach in the Data Protection Act 1998)'?

Answer	Responses	% of Answers
Strongly agree	10	41.67%
Somewhat agree	9	37.50%
Neither agree nor disagree	3	12.50%
Somewhat disagree	0	0%
Strongly disagree	2	8.33%
	24	**100.00%**

Are there any alternative options you would consider to reduce the costs and time taken to respond to subject access requests?



Answer	Responses	% of Answers
Yes	4	16.67%
No	7	29.17%
Don't know	13	54.17%
	24	**100.00%**

---------- **END**----------