

## Annex A – Legislative History of Paragraph 7, Schedule 2, Part 2, DPA 2018

1. The Explanatory Notes to the DPA 2018 provide limited guidance on the intended scope of paragraph 7 of Schedule 2. In respect of that paragraph specifically, the guidance explains that:

671 Paragraph 7 restricts the application of the listed GDPR provisions to personal data processed for the purposes of discharging the functions concerned with the protection of members of the public, charities and fair competition in business, as set out in the table.<sup>1</sup>

2. Paragraph 676 then explains that:

676 The restrictions in paragraphs 7, 8, 9, 10 and 11 apply to the extent that the processing would be likely to prejudice the proper discharge of those functions. They replace provision under section 31 of the 1998 Act.

3. Similar guidance was provided in the Explanatory Notes to the original Bill placed before Parliament.<sup>2</sup> That Bill was introduced in the Lords on 13 September 2017. The original version of column 1, paragraph 7 of Schedule 2 to the Draft Bill read as follows:

*Functions designed to protect the public etc.*

...

1. The function is designed to protect members of the public against—

(a) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate,

(b) financial loss due to the conduct of discharged or undischarged bankrupts, or

(c) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity.<sup>3</sup>

4. The rest of the Table mirrors the provisions ultimately included in the DPA 2018. Paragraphs 8 to 9 addressed “*Regulatory functions relating to legal services, the health service and children’s services*” and “*Functions of certain other regulatory bodies*”.

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<sup>1</sup> [http://www.legislation.gov.uk/ukpga/2018/12/pdfs/ukpgaen\\_20180012\\_en.pdf](http://www.legislation.gov.uk/ukpga/2018/12/pdfs/ukpgaen_20180012_en.pdf)

<sup>2</sup> §590, <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/18066en.pdf>. See also §30.

<sup>3</sup> Underlined emphasis added; italicised emphasis in the original:

<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/18066.pdf>

5. The original guidance to the Bill explained that:

The restrictions in paragraphs 7, 8 and 9 apply to the extent that the processing would be likely to prejudice the proper discharge of those functions. They are based on the exemptions provided for under section 31 of the 1998 Act.<sup>4</sup>

6. During the Bill's Second Reading in the House of Lords, Lord Ashton of Hyde and Baroness Williams of Trafford (Ministers for DCMS and the Home Office, the sponsoring departments), wrote to Peers responding to important points that were raised in the debate, but in which there had been insufficient time to cover (see letter dated 19 October 2017<sup>5</sup>). This letter noted that, prior to the debate, a number of Peers had suggested that, in scrutinising the Bill, it might be helpful to be able to cross-refer to the exemptions provided for under DPA 1998. Responding to that suggestion, the Ministers provided an Annex to the letter in order to assist Peers. That Table contained a comparison of the new provisions in Schedules 1-3 of the DPA 2018 with the provisions of the 1998 Act.<sup>6</sup> The first column is entitled, "*Bill provision*". The second column is headed:

Equivalent under Data Protection Act 1998 ("the 1998 Act") or comment (if Bill provision is new)<sup>7</sup>

7. Thus, where, for example, a provision of Schedules 1-3 was wholly new, this was made clear in the second column (see, by way of example, the entry for the new immigration exemption in paragraph 4 of Schedule 2). If, however, the provision was partly new and partly based on a previous DPA 1998 exemption, this was also made clear (see, by way of example, the entry for paragraph 1 of Schedule 1).
8. The entry for paragraphs 7 to 9 of Schedule 2 are described in Column 1 as: "*Exemptions from data rights for functions designed to protect the public as well as to enable regulatory functions.*" The second column states only: "*Section 31 of the 1998 Act*".
9. The clear implication is that the provisions in paragraph 7 were not intended to be different from those already enshrined in section 31 DPA 1998. It appears, in particular, that the new heading for paragraph 7 was a product of a decision to break down into separate paragraphs the various regulatory exemptions that had been added to s. 31(1) DPA 1998 over time.

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<sup>4</sup> Emphasis added.

<sup>5</sup> [http://data.parliament.uk/DepositedPapers/Files/DEP2017-0603/Letter\\_on\\_Data\\_Protection\\_Bill\\_from\\_Lord\\_Ashton\\_and\\_Baroness\\_Williams.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2017-0603/Letter_on_Data_Protection_Bill_from_Lord_Ashton_and_Baroness_Williams.pdf)

<sup>6</sup> [http://data.parliament.uk/DepositedPapers/Files/DEP2017-0603/Annex\\_to\\_Library\\_deposit\\_on\\_Data\\_Protection\\_Bill.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2017-0603/Annex_to_Library_deposit_on_Data_Protection_Bill.pdf)

<sup>7</sup> Emphasis added.

10. It is understood that the initial ‘technical amendments’ which were made to paragraph 7 during the Parliamentary process were intended to make it clear that dishonesty, malpractice or other seriously improper conduct does not have to relate to financial services to engage the restrictions, by splitting the original row 1 into two.<sup>8</sup> These ‘technical amendments’ were reflected in the version of the Bill transferred to the House of Commons in January 2018. By that stage, the second row of the Table under paragraph 7 read:

*Description of function design*

2. The function is designed to protect members of the public against—

(a) dishonesty, malpractice or other seriously improper conduct by persons who carry on any activity that brings them into contact with members of the public, or

(b) the unfitness or incompetence of persons who carry on any activity that brings them into contact with members of the public.

*Condition*

The function is of a public nature, or is exercised in the public interest.<sup>9</sup>

11. The ‘technical amendments’ introduced a requirement that the persons subject to the regulatory action or function should be carrying on activities that bring them into contact with members of the public. It would appear this was done to make clear that the conduct in issue did not need to be limited to that relating to financial services. The NPNSCPs have been unable to identify any public discussion of why this language was adopted, as opposed to the original language of “*persons authorised to carry on any profession or other activity*”. Similarly, while the conditions for using the exemption were narrowed as part of the technical amendments, there was no public explanation of why this was done and, in any event, it was reversed subsequently (see §§13-15 below).
12. In March 2018, the paragraphs covering regulatory exemptions were expanded in response to submissions from other regulators. In particular, two new paragraphs were added to the group of regulatory exemptions to cover organisations the Bank of England and specific bodies with Audit

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<sup>8</sup> See, p.2, Amendments Sch2-127-33 Sch2-127-38 20 October 2017, <http://data.parliament.uk/DepositedPapers/Files/DEP2017-0615/Data Protection summary amendments to be tabled.pdf> Data Protection Bill: Summary of government amendments for Lords Committee tabled on 20 October 2017. See also the covering letter at: [http://data.parliament.uk/DepositedPapers/Files/DEP2017-0615/eCase\\_06141\\_-\\_Peers\\_DPB\\_.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2017-0615/eCase_06141_-_Peers_DPB_.pdf); and the amendments paper at [https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/18066\(d\).pdf](https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/18066(d).pdf).

<sup>9</sup> <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/18153.pdf> Bill version of 18 January 2018, as brought from the Lords.

functions (Amendment 98<sup>10</sup>). It appears, therefore, that where further regulators were identified that were not deemed to be covered by the existing exemptions, read across from s. 31, this was dealt with by adding specific new provisions for those bodies, if new protections were considered necessary.

13. During this same period, March 2018, row 2 of paragraph 7 was the subject of the Government's proposed Amendment 96. The proposed exemption, and the explanation given for it by the Government, were as follows:

Schedule 2, page 139, leave out lines 17 to 27 and insert—

[Description of function design]

“2. The function is designed to protect members of the public against—

- (a) dishonesty, malpractice or other seriously improper conduct, or
- (b) unfitness or incompetence.

The function is—

- (a) conferred on a person by an enactment,
- (b) a function of the Crown, a Minister of the Crown or a government department, or
- (c) of a public nature, and is exercised in the public interest.”

*This amendment extends the exemption provided for in paragraph 7 of Schedule 2. It amends the second entry in the table (functions designed to protect members of the public against dishonesty etc) by removing the requirement that the function relates to people who carry on activities which bring them into contact with members of the public. It also*

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<sup>10</sup> See page 7 of [http://data.parliament.uk/DepositedPapers/files/DEP2018-0237/Data\\_Protection\\_Bill\\_amendments.pdf](http://data.parliament.uk/DepositedPapers/files/DEP2018-0237/Data_Protection_Bill_amendments.pdf) the Government Amendments Overview provided to the Data Protection Bill Public Bill Committee on 8 March 2018; and p.14 of the related amendments paper, [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/amend/data\\_rm\\_pbc\\_0308.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/amend/data_rm_pbc_0308.pdf) [https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153\\_Combined\\_1-2\\_13\\_03\\_2018.pdf](https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153_Combined_1-2_13_03_2018.pdf). The agreement to this amendment is recorded at page 12 of the Proceedings Report: [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/amend/data\\_pro\\_pbc\\_0313.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/amend/data_pro_pbc_0313.pdf)

We have also had representations from several regulators on the need to make additional provisions to protect the integrity of their activities. Amendment 97 provides the UK's Comptroller and Auditor General, and their counterpart in each of the devolved Administrations, with an exemption from certain GDPR provisions where these are likely to prejudice their statutory functions. That will prevent certain individuals who suspect they may be under scrutiny from trying to use their rights under the GDPR, such as article 15 (confirmation of processing) as a way of confirming that their data is being processed, or from using article 17 (right to erasure) and article 18 (restriction of processing) to undermine the effectiveness of an audit.

Likewise, amendment 98 provides an exemption for the Bank of England from the list of GDPR provisions, where these may inhibit its ability to exercise its functions. This amendment ensures the Bank of England can continue its work as a monetary authority without undue restriction from the GDPR..”

*amends column 2 of the table to bring the second entry into line with the first and third entries.*<sup>11</sup>

14. Hansard records the following explanation for the amendments made at this stage:

[Column 58-59<sup>12</sup>] On the more general question of who can make use of the exemptions in schedule 2 and when, amendment 96 broadens the exemption in paragraph 7 of the schedule, which relates to the protection of members of the public. As drafted, the exemption applies to personal data processed for the purposes of discharging a function that is designed to protect members of the public against dishonesty, malpractice or incompetence by persons who carry out activities that bring them into contact with members of the public. We have identified an issue with that wording: a number of public office holders, including police staff, do not carry out activities that necessarily bring them into contact with members of the public. Amendment 96 broadens the scope of the exemption to include processing in relation to individuals who work for those organisations in a behind-the-scenes capacity...<sup>13</sup>

15. The removal of the ‘technical amendments’ made in October 2017 to row 2 appears to have been driven by a concern that they narrowed the scope of the exemption. The restriction of the exemption to activities that bring the controller into contact with the public was not contained in s. 31 DPA 1998 and narrowed the scope of regulatory work that could benefit from the exemption. However, the subsequent removal of that language was not intended to extend the scope of the exemption beyond that granted by s. 31 previously: where that was the intention, Parliament was informed about the incorporation of new or more expansive exemptions.
16. At the very least, what the legislative history of row 2, paragraph 7, shows is that there was no expressed intention to extend the general scope of that exemption beyond the regulatory sphere covered by s. 31 DPA 1998.
17. Finally, it is noted that Article 23(1) GDPR specifies the potential grounds for strictly necessary exemptions. They include “(h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);”. Parliament did not specify a basis for paragraph 7, but it seems likely that it was that

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<sup>11</sup> Emphasis in the original, Column.75.

[https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153\\_Combiened\\_1-2\\_13\\_03\\_2018.pdf](https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153_Combiened_1-2_13_03_2018.pdf)

<sup>12</sup> [https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153\\_Combiened\\_1-2\\_13\\_03\\_2018.pdf](https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153_Combiened_1-2_13_03_2018.pdf). The agreement to this amendment is recorded at page 12 of the Proceedings Report: [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/amend/data\\_pro\\_pbc\\_0313.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/amend/data_pro_pbc_0313.pdf)

<sup>13</sup>All of the amendments to the regulatory activities exemptions were added to draft Bill as amended in the Public Bill Committee of 23 March 2018. <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0190/18190.pdf>

provision of Article 23(1) (and its equivalent in the Data Protection Directive was the likely basis of s. 31).