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To: Secretariat of the WP29
From: Martin Abrams and John Kropf, The Information Accountability Foundation
Subject: Comments on the Article 29 Working Party's Opinion 06/2014
Date: 20 June 2014
Via Email to: JUST-ARTICLE29WP-SEC@ec.europa.eu

Dears Sirs and Madams:

We respectfully submit these comments for your consideration in response to the Article 29 Working Party's request for comments. The request was included in the press release that accompanied the Working Party's Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC.

These comments were written by John Kropf, Senior Scholar, and Martin Abrams, Executive Director and Chief Strategist, of the Information Accountability Foundation (the "Foundation"). They do not necessarily reflect the views of the Foundation contributors or the members of the Foundation's board of trustees.

The Foundation is grateful for the opportunity to present its views. We are a non-profit research and educational organisation founded to integrate accountability and data stewardship as key components of data governance to foster both data protection and information-driven innovation.

The Foundation would like to recognise the significant achievement of the Working Party's Opinion on legitimate interests. We believe the work to be of important value in understanding the history of data protection as a fundamental right that acts as a basis for other fundamental rights and in informing us as to the objectives of the balancing of interests required when legitimate interests form the basis for legitimate processing. The Foundation also acknowledges the Working Group's recognition that all basis for legitimate processing are relevant and that controllers should use the appropriate basis rather than trying to make consent work where it is not appropriate. We commend the Working Party for including these elements in its work plan.

The Foundation conducts significant research in other regions such as Asia, North America and South America. Legitimate interests clearly have a legal basis for processing that accommodates both innovation and abatement of data protection risks. Regions that are without this legal basis are at a competitive disadvantage. The Foundation sees

this endeavour of the Working Party 29 as providing direction to controllers on how to be innovative on and protective of fundamental rights.

Overall, the Foundation supports the Working Party's view that incorporates principles of accountability with a flexible and practical approach to applying the balancing test. The Foundation supports the Working Group's endorsement of accountability as a critical element to the balancing process and would encourage further emphasis of accountability principles.

The central values of accountability have been articulated in five essential elements developed by the Global Accountability Project with the participation of many members of the Working Party 29:

1. Organisation commitment to accountability and adoption of internal policies consistent with external criteria.
2. Mechanisms to put privacy policies into effect, including tools, training and education.
3. Systems for internal ongoing oversight and assurance reviews and external verification.
4. Transparency and mechanisms for individual participation.
5. Means for remediation and external enforcement.

Organisations that build principles of accountability into their data protection programs must link to established criteria (in this case, the national laws that implement the directive) and must conduct an assessment that balances the legitimate interests of the organisation against the fundamental rights, freedoms and interests of individuals affected by the proposed processing.

The adoption of accountability models for data protection and management within organisations requires that organisations wishing to use data in new or innovative ways to assess the risk of such use. It further requires that they are answerable for how that assessment is performed and for the decisions that flow from it. The balancing demanded of the legitimate interest principle is well supported by the accountability mechanisms currently being adopted by data controllers, who are implementing accountability.

We offer our comments in the spirit of assuring this guidance meets its objectives for innovation with effective data protection and are guided by the essential accountability principles. Respectfully, we ask that the Working Party consider the following five general points:

1. Balancing cannot be a fixed formula, and it should be allowed to include different factors depending on the context.

The Foundation supports the Working Party's view that an exhaustive list of legitimate interests is an impractical solution. The fast moving nature of the digital world, the technologies that support it, and the business models that innovate and provide value change quickly and in ways that cannot be fully anticipated. With careful application by organisations and thoughtful oversight by authorities, we believe this may accommodate the full spectrum of current and future circumstances that may involve the most innocuous purpose or the most sensitive personal information. In some cases, innocuous processing will be found inappropriate by the balancing process, because the limited benefits will not justify the limited risk associated with the processing. In other contexts, highly risky processing, with appropriate mitigating safeguards in place, will be fully justified by the societal or organisational lift that would come from the processing. One might find this particularly true in the areas of health, risk prevention and congestion relief as examples.

2. A balancing process that has integrity, not perfection, should be the regulatory goal.

The law requires that all processing of personal information be conducted pursuant to a legitimate legal basis. As processing has become more complex and more central to the creation of economic and social value for individuals, society and organisations, more processing is and will be conducted under the legitimate interest legal basis. This requires organisations, with honesty and skill, to identify all the reasonable, anticipatable interests of individuals whose data is affected by the processing. There will be interests that a thoughtful organisation might not anticipate. There will also be new interests that are only articulated after the balancing process is completed. A responsible organisation should be judged based on the integrity of its process, not on perfection. That means data protection enforcement agencies should have review processes whose methodology is based on assessing reasonableness of the review in light of the facts known at the time, not on perfection. The Spanish data protection law was revised to allow the authority to reduce fines based on the comprehensiveness of an organisation's data protection programme. The Foundation believes the same sort of process should be built into the review of balancing processes when documentation is requested by an agency.

Innovative uses of information will drive economic development. The ability for organisations to establish a legitimate interest as the basis for lawful processing of data is critically important in an information-based economy where data is increasingly collected in ways that do not necessarily directly involve the data

subject. If organisations have a sense that they will be second guessed based on interests that they could not have reasonably anticipated, they will either attempt to force consent as the legal basis for processing, even if not appropriate, or will steer away from value creating processing. The Foundation believes that agencies which review based on reasonably assessing the integrity of organisational processes will preclude these negative outcomes.

3. Analysis needs to be of a “family of processing”, not each processing, and balancing needs to be applied to programmes, not individual processes.

The Foundation recommends that the Working Group adopt the approach that balancing be applied on a project-wide basis or “family of processing” rather than to the individual process. Any data driven project where legitimate interest might be the appropriate legal basis would involve many steps. All the steps must be conducted in a safe, secure and legal fashion. However, conducting a balancing analysis on each step would create extra documentation that would add little value. As a practical matter, it would be overly burdensome to regulators and organisations to conduct a balancing review for an individual process. Instead, organisations should describe a program and project as well as the balancing analysis for the project as a whole. Furthermore, when asked to demonstrate the organisation should be able to describe the rationale for structuring the process as they have done. As an example, if an organisation uses legitimate interests as the legal basis to use data to detect and prevent fraud, the organisation should not have to describe the balancing for each single step. Instead, the organisation should describe the balancing process for the fraud-prevention project—or indeed all fraud-protection measures—as a whole.

4. Transparency needs to be effective and workable – not easy challenges

Increasingly, we see that transparency is a major challenge for effective accountability-based governance and data protection. Who is the audience? What is the purpose for the communication? What are the intended outcomes? Privacy notices are increasingly important where consent is the legal basis to process. The purpose of the notice is to make the consent informed. However, transparency where the legal basis is legitimate interests is much more complex. The Foundation sees two audiences for communication about the balancing of interests process. The first is the information that may be requested by an agency. Accountability requires an organisation to stand ready to demonstrate to a regulator the integrity of its processes. Having documentation that flows from the balancing process for the regulator (as well as the internal parties that oversee processing) is a useful endeavour.

The second audience is the community of individuals whose data is affected. From the Foundation’s perspective, there are two purposes for this communication. The

first is that individuals may object if they believe the balancing truly does not represent their interests in an appropriate manner. The second is that the community of individuals (the “community”) may object if the community believes the balancing of interests was wrong or the processing is generally out of bounds. The Foundation believes this new communications instrument is different from a purpose specification notice. It must be readable and clearly convey the nature of the processing, the types of data used, and the issues explored as part of the balancing of interests process. The Foundation believes that such communications would not only be responsive to the Directive but also to the essential nature of the fourth accountability element, which addresses individual participation.

5. Advanced analytics are not always profiling

Organisations increasingly use advanced statistical analysis to understand trends. New analytic methodologies make it possible for organisations to understand how data correlates to other data. These trends are helpful in every domain. They may help create profiles of likely future behaviour. Some of that trend analysis may be impactful on targeted individuals, such as in the case of online behaviour marketing. Other trend predictions relate to relieving traffic congestion, improving healthcare, and directing resources to new or improved products and services.

The Foundation believes the Centre for Information Policy Leadership’s 2013 paper on big data (“Big Data and Analytics: Seeking Foundations for Effective Privacy Guidance”)¹, which called for a two-phased approach that separated the research that led to new insights and the application of those insights is the correct approach. We also note that the Working Party 29 issued its own white paper in 2013 that identified research as an always-compatible purpose. According to our understanding of the Working Party’s positions, processing first requires a determination that the data may be used and, second, a determination of a legal basis to process. It may be appropriate for the discovery phase to be conducted under the legitimate interests legal basis, while the application of any results may be subject to a different legal basis.

We note, however, the Working Party Opinion suggests that profiling as a negative activity without allowing it to have the full benefit of the balancing process. References throughout the Opinion (“profiling activity is likely to present a significant intrusion into the privacy of a customer (p. 26); Example 5 of profiling (p. 59). It is unclear to the Foundation whether the discovery phase of big data is not distinguished from the category of profiling. The Foundation clearly believes the

¹ Found at:

http://www.informationpolicycentre.com/files/Uploads/Documents/Centre/Big_Data_and_Analytics_February_2013.pdf

discovery of new insights is not profiling. Discovery by itself should not affect any individual.

The Foundation would urge the Working Party to consider that the potential benefits of discovering new insights by using advanced analytic processes against large data sets be addressed as part of the legitimate interest discussion or perhaps that analytics given more neutral treatment. Protection of a data subjects' rights in big data situations can be maintained using principles of accountability.

Conclusion

The Foundation supports measures to provide greater flexibility, transparency and accountability over the balancing of legitimate interests. We would greatly appreciate it if the Working Party further expanded on this approach by considering our comments here.