

**EXPLANATORY MEMORANDUM TO**  
**THE DATA PROTECTION ACT 2018 (TRANSITIONAL PROVISION)**  
**REGULATIONS 2023**

**2023 No. 414**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

**2. Purpose of the instrument**

- 2.1 This instrument is made in accordance with the power under Section 213(2) of the Data Protection Act 2018 (DPA). It amends Paragraph 14 of Schedule 20 of the DPA 2018, which provides a transitional exemption for systems set up before 6 May 2016 from complying with requirements in Section 62(1–3), DPA 2018, if doing so would involve disproportionate effort. This expires on 6 May 2023. These regulations will extend the transitional exemption to 6 May 2026.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

**5. European Convention on Human Rights**

- 5.1 The Minister of State for Crime, Policing and Fire has made the following statement regarding Human Rights:

“In our view the provisions of The Data Protection Act 2018 (Transitional Provision) Regulations 2023 are compatible with the Convention rights. The provisions are maintaining the status quo with the current Data Protection Act 2018, which in itself is compatible with the Convention.”

**6. Legislative Context**

- 6.1 Section 62 of the DPA introduced a requirement for law enforcement bodies to keep records (logs) of specified processing activities relating to personal data in automated processing systems. These logging requirements are intended as a tool to help controllers monitor the use of personal data. This requirement was not in the Data Protection Act 1998, as logging is specific to Part 3 of the DPA (law enforcement processing).
- 6.2 Part 3 of the DPA was transposed from the EU Law Enforcement Directive 2016/680 (the ‘LED’) and the overarching approach taken to transposition was to copy out the

LED, avoiding changes where possible. Section 62 faithfully reflects Article 35 of the LED.

- 6.3 Section 62 DPA requires controllers to log the following operations: the collection, alteration, consultation, disclosure (including transfers), combination and erasure of personal data. The legislation places additional requirements on the processing actions for ‘consultation’ (i.e., accessing/viewing data) and ‘disclosure’ (i.e. sharing/transferring data).
- 6.4 For consultation, logs must record a reason or justification for consulting personal data, and the date and time the data was consulted. Where possible, the log must also record the identity of the user who consulted the data.
- 6.5 For disclosure, logs must record a reason or justification for disclosing personal data, and the date and time the data was disclosed. Where possible, the log must also record the identity of the user that disclosed the data, and the identity of the recipients of the data, for example, the name of the organisation.
- 6.6 There is currently a transitional exemption available to controllers, under Paragraph 14 of Schedule 20 DPA, which allows for automated processing systems set up **before** 6 May 2016 to not comply with Section 62(1-3) if and to the extent that compliance would involve disproportionate effort. This ceases to have effect on 6 May 2023. This transitional exemption was transposed from Article 63(2) and (3) of the LED.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The Home Secretary is exercising the power, under section 213(2) of the DPA, to bring in regulations to amend paragraph 14 of Schedule 20. The regulations will extend the deadline to allow Part 3 controllers to not have to comply with Section 62 (1-3) DPA (if doing so would require disproportionate effort) from 6 May 2023 to 6 May 2026.
- 7.2 Whilst many of the core policing systems, set up before 6 May 2016, have been adapted to meet the majority of the logging requirements, more niche local pre-2016 automated processing systems are not technologically equipped to meet the logging capabilities before the current deadline of 6 May 2023 but are likely to be replaced in the next few years. Therefore, updating legacy systems that will shortly be replaced is an unnecessary expense.
- 7.3 A number of pre-2016 automated processing systems used by law enforcement agencies are off-the-shelf rather than bespoke. Some lack the functionality that would allow officers to either record a justification every time personal data is accessed or capture when personal data has been disclosed and, more specifically, to whom information has been shared and why. This shows that designing automated processing systems to capture all of the logging requirements is inherently a costly technical task.
- 7.4 This measure also aligns with the Prime Minister’s priority to reduce the administrative burdens on law enforcement agencies, allowing them to focus on more pressing operational needs. Where systems, set up before 6 May 2016, do not currently meet the requirements of section 62, law enforcement will have to adopt onerous workarounds, such as manually recording the information in paper-based records. Given that officers often need to access large amounts of data quickly, this statutory instrument will facilitate their ability to investigate and prevent crime more swiftly until all their systems set up before 6 May 2016 are in-line with section 62 or have been retired.

- 7.5 Law enforcement agencies, and their suppliers, are proactively taking steps to ensure new systems are being developed to replace those pre-2016 systems still in use with new ones featuring the required logging capabilities over the next few years. Replacing pre-2016 automated processing systems is a transitional process. Suppliers may deploy pilot systems to run alongside legacy systems until they are decommissioned, requiring law enforcement agencies to record the same information to differing systems simultaneously, which is an onerous task. This shows how intricate the process of developing police-centric systems is because suppliers need to ensure they are secure and fit for purpose.
- 7.6 The difficulties implementing the requirements, especially recording justification, have also been identified by Member States of the European Union (EU). The European Commission released a report in July 2022 into the transposition of the Law Enforcement Directive. A total of 12 Member states have decided to postpone aligning their pre-2016 automated processing systems with the EU logging requirements from May 2023 to May 2026. Consequently, our extension is unlikely to pose a risk to the UK's adequacy decision for law enforcement processing.
- 7.7 With the Data Protection and Digital Information Bill soon to be returning to Parliament, the Home Office have had the opportunity to reassess the effectiveness of the DPA. As part of this, we will be seeking to remove the requirement to record a justification for consultation and disclosure (though the other requirements of section 62 will remain and will kick in for pre-2016 systems after 6 May 2026). This is because this specific requirement is notably the most difficult to automate, and in any case, is rarely used as a tool in misconduct investigations.

### ***Explanations***

#### *What did any law do before the changes to be made by this instrument?*

- 7.8 Please refer to section 6.6.

#### *Why is it being changed?*

- 7.9 Please refer to sections 7.1 to 7.6.

#### *What will it now do?*

- 7.10 These regulations will amend Paragraph 14 of Schedule 20 DPA by extending the transitional exemption by three years until 6 May 2026.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 Consolidation does not apply to any aspect of this Statutory Instrument.

## **10. Consultation outcome**

- 10.1 No consultation was required for this statutory instrument.

## **11. Guidance**

- 11.1 No guidance was needed as the instrument imposes no new obligation.

## **12. Impact**

- 12.1 There is no expected impact on business, charities or voluntary bodies.
- 12.2 There is no expected impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because no additional costs or benefits are imposed on businesses or the public sector. An Economic Note has been prepared outlining this in greater detail.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is that it will be monitored over the course of three years by Home Office Data Policy Unit. This will be reviewed annually to ensure the statutory instrument is fit for purpose.
- 14.2 The instrument does not include a statutory review clause.

## **15. Contact**

- 15.1 Anjali Singh at the Home Office, email: Anjali.Singh3@homeoffice.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 Teresa Bastow at the Home Office, email: Teresa.Bastow@homeoffice.gov.uk can be contacted with any queries regarding the instrument.
- 15.3 Krisztina Katona, Deputy Director for Data and Identity Directorate, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.4 Minister of State for Crime, Policing and Fire at the Home Office can confirm that this Explanatory Memorandum meets the required standard.