FORDHAM University

CLIP Center on Law and Information Policy
AT FORDHAM LAW SCHOOL

March 15, 2018

To: Article 29 Data Protection Working Party

Re: Comments on Article 49 of the GDPR

Via: JUST-ARTICLE29WP-SEC@ec.europa.eu

Thank you for the opportunity to comment on the Article 29 Data Protection Working Party guidelines on Article 49 of the GDPR.[1] These comments focus narrowly on the language in Article 49 that permits derogations for specific situations in the absence of an adequacy decision and, in particular, when a transfer is necessary for important reasons of public interest or when a transfer is necessary in order to protect the vital interests of the data subject or other persons.

The background to these comments is a report that we coauthored (with others) and was published in 2013 by the Center on Law and Information Policy (CLIP) at Fordham Law School in collaboration with the Woodrow Wilson International Center for Scholars. The report is *Privacy and Missing Persons after Natural Disasters*.[2] The report addressed privacy and data protection issues that arise when a natural disaster occurs followed by efforts by government agencies, humanitarian organizations, private companies, volunteers, and others to collect and share information about missing persons.

Our Fordham report offered a roadmap to the legal and policy issues presented by these activities. The report observed that disaster relief involving the collection and dissemination of personal information about missing persons raises unique privacy concerns. Some of the issues identified in the report include:

- Natural disasters create urgent needs to identify and locate missing persons.

---

[1] The guidelines are found in WP262, http://ec.europa.eu/newsroom/article29/document.cfm?doc_id=49846. The request for comments is at http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=614232.

[2] Joel R. Reidenberg, Robert Gellman, Jamela Debelak, Adam Elewa, & Nancy Liu, Privacy and Missing Persons after Natural Disasters (March 6, 2013) (Commons Lab, Woodrow Wilson International Center for Scholars, (Policy series vol. 2) and Center on Law and Information Policy, Fordham Law School), available at SSRN: https://ssrn.com/abstract=2229610 or http://dx.doi.org/10.2139/ssrn.2229610. See also https://www.fordham.edu/info/23830/research/5923/privacy_and_missing_persons_after_natural_disasters.

- Natural disasters arise unpredictably and result in unexpected demands for information sharing to support humanitarian activities that provide information to family and friends of missing persons.
- Because natural disasters can occur anywhere around the world and because family and friends of missing persons who seek information about disaster victims can also be located in any country around the world, data protection and privacy laws of many countries may affect data processing activities.
- Traditional solutions, including data protection impact assessments, notice of collection activities, and consent from data subjects are impractical or impossible in the immediate aftermath following natural disasters.
- All appropriate data sharing activities following natural disasters cannot be predicted in advance because government and other operations may deviate from traditional norms because of emergency circumstances.
- Default data protection rules may create unintended barriers to appropriate data processing activities following natural disasters.
- Personal data processing activities for humanitarian purposes following natural disasters may upset established policies and practices.
- Communication interruptions and other consequences of natural disasters make it difficult or impossible for data processors to engage with multiple data protection authorities with jurisdiction over data flows. Data protection authorities in the region of the natural disaster may be dysfunctional or unreachable.

While recognizing that the law of many jurisdictions may be relevant following natural disasters, our Fordham report analyzes in detail how the law in the United States and the European Union allows or restricts personal data processing activities following natural disasters. In particular, the report identifies some of the uncertainties that arise under the current EU Data Protection Directive with respect to personal data processing activities following natural disasters.

Data protection authorities are well aware of the data protection issues raised by natural disasters. At the November 2011 meeting of the International Conference of Data Protection and Privacy Commissioners in Mexico City, the Commissioners specifically examined how privacy laws can affect the sharing of personal information after a natural disaster, and they adopted a resolution on data protection and major natural disasters.[3] The Privacy Commissioner of New Zealand proposed the resolution with the co-sponsorship of several other privacy commissioners. As highlighted in our Fordham report, New Zealand is a leader in addressing data protection problems arising after natural disasters.

---

[3] International Conference of Data Protection and Privacy Commissioners, Mexico City, Mex., Nov. 2-3, 2011, Resolution on Data Protection and Major Natural Disasters, 2011/GA/RES/004 (Nov. 1, 2011), available at www.privacyconference2011.org/htmls/adoptedResolutions/2011_Mexico/2011_GA_RES_004_Natural_Disasters_ENG.pdf.

150 WEST 62nd STREET * NEW YORK, N.Y. 10023-7485 (USA) * TEL. 212-636-6843 *FAX 212-930-8833
Email: <jreidenberg@law.fordham.edu> Web: <http://faculty.fordham.edu/reidenberg>

These comments do not repeat the detailed analysis of the application of the EU Data Protection Directive to natural disasters included in our Fordham report. However, we repeat here the options and strategies suggested for data protection authorities in the report because they summarize both the issues and the types of responses that would help to solve the problems and because they are equally applicable to the interpretation of Article 49 of the GDPR.

> Action by European data protection authorities might be directly helpful in resolving ambiguities that exist in the EU Data Protection Directive. In some instances, action by European data protection authorities is required to allow some data processing activities. European data protection authorities and missing persons organizations may profitably work together to address these issues.
>
> a) Legitimate Processing
>
> The Directive requires that anyone processing personal data must respect privacy, must process data fairly and lawfully, and must have consent or a lawful reason to process the data. The Directive recognizes several purposes that make data processing legitimate, including when processing is "necessary to protect the vital interests of the data subject, for the performance of a task carried out in the public interest, or for the purposes of the legitimate interests pursued by the controller or by a third party." Action by one or more data protection authorities to clarify that these standards permit the processing needed to allow the work of missing persons organizations would be helpful to establish the legitimacy of that processing.
>
> b) Sensitive Information
>
> The EU Data Protection Directive requires Member States to include additional controls over the processing of sensitive information. Two provisions may be helpful to allow the processing of sensitive information that may be part of missing persons activities. One allows processing when "necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent." A second provision allows Member States for reasons of "substantial public interest" to establish exceptions by law or decision of the supervisory authority. Action by one or more data protection authorities to clarify these standards as transposed into national law could provide clear guidance that would allow information transfers needed to sustain the work of missing persons organizations.

150 WEST 62nd STREET * NEW YORK, N.Y. 10023-7485 (USA) * TEL. 212-636-6843 *FAX 212-930-8833
Email: <jreidenberg@law.fordham.edu> Web: <http://faculty.fordham.edu/reidenberg>

c) Export Controls

> Under the EU Data Protection Directive's data export controls, two provisions that might authorize information transfers use standards that appear to be applicable to missing persons activities. The first allows a transfer "necessary or legally required on important public interest grounds." The second provision allows a transfer "necessary in order to protect the vital interests of the data subject." Action by one or more data protection authorities to clarify these standards as transposed into national laws could provide guidance that would allow transfers needed to sustain the work of missing persons organizations.[4]

The common theme here is the need for a clear interpretation of the language found in the Directive (and now found in the Regulation) that allows transfers *necessary or legally required on important public interest grounds* and transfers *necessary in order to protect the vital interests of the data subject*.

The specific purpose of these comments is to ask the Article 29 Data Protection Working Party to include this language (or similar language) in its guidelines on Article 49 of the GDPR:

> **Natural disasters such as earthquakes and extreme weather events occur, and these disasters create unpredictable and unexpected needs for information sharing that may not have been recognized by the stated purposes for processing. The needs may include domestic and international sharing of personal information with relatives of disaster victims, with persons close to those victims, and with government and emergency workers, all of whom may have an urgent justification to learn the location and status of victims under circumstances in which consent of data subjects is impractical or impossible. The processing of personal data by responsible controllers for a limited time for purposes related to an emergency created by the disaster may be necessary to serve both important grounds of public interest and the vital interest of the data subject.**

A foundation for the proposed language can be found in Recitals 46 and 112 of the GDPR.

> (46) The processing of personal data should also be regarded to be lawful where it is necessary to protect an interest which is essential for the life of the data subject or that of another natural person. Processing of personal data based on the vital interest of another natural person should in principle take place only where the processing cannot be manifestly based on another legal basis. Some types of processing may serve both important grounds of public interest and the vital interests of the data subject as for instance when processing is necessary for

[4] Privacy and Missing Persons after Natural Disasters at 75.

150 WEST 62nd STREET * NEW YORK, N.Y. 10023-7485 (USA) * TEL. 212-636-6843 *FAX 212-930-8833
Email: <jreidenberg@law.fordham.edu> Web: <http://faculty.fordham.edu/reidenberg>

> humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters.
>
> (112) Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport. A transfer of personal data should also be regarded as lawful where it is necessary to protect an interest which is essential for the data subject's or another person's vital interests, including physical integrity or life, if the data subject is incapable of giving consent. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of data to a third country or an international organisation. Member States should notify such provisions to the Commission. Any transfer to an international humanitarian organisation of personal data of a data subject who is physically or legally incapable of giving consent, with a view to accomplishing a task incumbent under the Geneva Conventions or to complying with international humanitarian law applicable in armed conflicts, could be considered to be necessary for an important reason of public interest or because it is in the vital interest of the data subject.

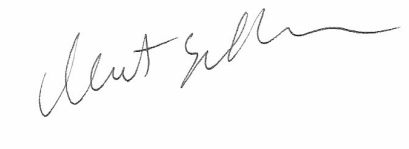
While both Recitals 46 and 112 address some of the issues raised by this comment, the recitals are not specific enough to end all doubt with respect to the sharing of personal information with relatives of disaster victims, persons close to those victims, and government and emergency workers. These activities may not be clearly included in completing tasks under the Geneva Conventions or international humanitarian law. Further, Geneva Conventions and humanitarian law may not cover all organizations that take part in connecting disaster victims with their relatives and other appropriate parties. The Internet provides great capabilities to accomplish this work, and those who participate by processing personal data may not always be permanent organizations with established privacy regimes. Even for permanent organizations, strict compliance with data protection rules under the pressure of a natural disaster may not be possible without some leeway.

The Article 29 Data Protection Working Party should clarify that the public-spirited activities of those who provide information about disaster victims with their families and friends qualifies under the Regulation. As New Zealand Assistant Privacy Commissioner Blair Stewart said in his foreword to our Fordham Report, these activities are “essential in the cause of common humanity.”

150 WEST 62nd STREET * NEW YORK, N.Y. 10023-7485 (USA) * TEL. 212-636-6843 *FAX 212-930-8833
Email: <jreidenberg@law.fordham.edu> Web: <http://faculty.fordham.edu/reidenberg>

Finally, these comments focus exclusively on data processing activities after natural disasters. That was the specific subject of our Fordham report. Other events, including armed conflict and industrial events may give rise to similar concerns. Whether the guidelines on Article 49 should also address these other events is a matter outside the scope of these comments, other than the observation that similar humanitarian interests may arise.

We hereby consent to the publication of personal data contained in this document.



Joel R. Reidenberg
Stanley D. and Nikki Waxberg Chair
Professor of Law
Director, Center on Law and Information Policy

Robert Gellman
Senior Fellow (2012/13)
Center on Law and Information Policy
Privacy and Information Policy Consultant