STEP Guidance Note: the effect of the GDPR on trusts and estates

Edward Hayes, Chair, STEP Data Protection Working Group, 24 January 2020

The purpose of this memorandum is to summarise STEP’s current understanding of how certain aspects of the General Data Protection Regulation (GDPR) should be applied in the context of private, non-charitable, trusts and estates.

There are currently very few relevant authorities and only limited guidance available concerning the correct approach in this area. This memorandum sets out STEP’s views on what it considers to be reasonable positions for members to take in the absence of further clarifications from either the Courts or the Information Commissioner’s Office (the ICO). This is the first edition of this memorandum and reflects STEP’s views as of 24 January 2020.

Please note that this memorandum focuses on the processing of personal data relating to beneficiaries. Trustees and personal representatives can and do process the personal data of other individuals (such as the settlor, family members of beneficiaries, or third-party service providers) and should consider this separately.

For the avoidance of doubt, this note is not intended to act as a comprehensive guide covering all aspects of the GDPR’s application to trusts and estates. Instead, it addresses what STEP’s Data Protection Working Group considers to be some of the key ambiguities in the legislation and queries received from members, and sets out practical guidance as to how these could be addressed. This note will be most relevant to members who are either trustees or personal representatives themselves, or who provide advice in relation to trusts and estates (whatever their profession). Sections 3 and 6 may also be of interest to members who are not directly involved with trusts and estates but work in other parts of the private client industry.

This memorandum has been prepared by STEP following discussions with the ICO. However, the ICO has not yet expressly confirmed whether it considers STEP’s interpretation of the law to be correct. As such, it should not be assumed that the ICO is in full agreement with all of the points made in this document and none of the guidance provided can be seen as endorsed by the ICO.

The GDPR is a European Regulation and so continues to have effect in the UK after Brexit until the end of the agreed transition period. It is supplemented in UK domestic law by the Data Protection Act 2018 (DPA 2018). Article and recital references in this memorandum are to the GDPR, while section references are to the DPA 2018. It is expected that the UK will continue to operate a data protection law either identical to, or very similar to, the GDPR, even after the end of the transition period.

STEP’s Data Protection Working Group has considered the situation specifically in the context of the law in England and Wales. However, because of the territorial scope of the GDPR, it is possible that this memorandum will also be relevant in other jurisdictions to the extent that trusts and estates are concerned.

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SUMMARY OF VIEWS
This memorandum should be read in full but, in summary, STEP’s view is that it is reasonable for practitioners, trustees and personal representatives to take the following positions:

Practical points (see section 2 below)

1.1 The GDPR applies on a trust-by-trust and estate-by-estate basis.
1.2 If a trust or estate has multiple trustees/personal representatives, they are all, as a collective, treated as a single data controller (subject to the application of the personal and household activity exemption).
1.3 In the context of trusts and estates, references in the GDPR to the ‘number of staff’ that a data controller has should be taken to refer to the number of trustees or personal representatives (as appropriate) and not the number of staff that a corporate trustee or personal representative has.
1.4 References to a data controller’s ‘turnover’ should be taken to refer to the relevant trust’s or estate’s gross annual income and gains.

Data Controllers v Data Processors (see section 3 below):

1.5 Professional service providers will generally be data controllers when acting in the course of their business.
1.6 Trustees and personal representatives will generally be data controllers unless they fall within the scope of the ‘purely personal or household activity’ exemption (see below).

The scope of the purely personal or household activity exemption (see section 4 below):

1.7 A trustee or personal representative is within the scope of the ‘purely personal or household activity’ exemption (and therefore not subject to the GDPR) if they are:
   (a) acting in their personal capacity as opposed to a professional capacity; and
   (b) unpaid (for these purposes, expenses do not qualify as payment).

The legal basis on which trustees and personal representatives can process special category data (see section 5 below):

1.8 Trustees and personal representatives can rely upon Article 9(2)(f) to justify processing special category data to the extent necessary for them to perform their fiduciary duties.
1.9 A trustee or personal representative will not be considered to be processing special category data simply because they hold information that could be used to make inferences about matters that would constitute special category data. For example,
knowing that an individual is married to a person of the opposite sex and has children will not amount to processing data concerning that individual’s sex life.

The legal basis on which advisors can process special category data (see section 6 below):

1.10 Advisors can rely upon Article 9(2)(f) to justify the processing of special category data to the extent that it is necessary in the context of providing legal advice or otherwise establishing, exercising or defending legal rights in any other way. The key point is the advice being provided, not the status of the advisor giving it and so the condition could also be used by non-lawyers who work in appropriate fields. This might include, for example, will-writers.

1.11 Advisors can also rely upon Article 9(2)(f) to justify the processing of special category data in the context of providing tax advice, on the basis that this amounts to advising clients on their legal rights in relation to their tax position.

The disclosure obligations of trustees and personal representatives under the GDPR (see section 7 below):

1.12 The GDPR contains three key disclosure obligations:

(a) Article 13: the obligation to provide a privacy notice¹ to a data subject when that data subject supplies the trustee or personal representative with information about themselves

(b) Article 14: the obligation to provide a privacy notice to a data subject when the trustee or personal representative receives information about that data subject from another source

(c) Article 15: the obligation to respond to a data access request from a data subject

1.13 Article 13 privacy notices should be issued by trustees and personal representatives as a matter of course. This will be necessary, for example, when beneficiaries provide information about themselves.

1.14 Arguably, Article 14 privacy notices do not need to be issued to beneficiaries because trustees and personal representatives benefit from the exemption set out in Article 14(5)(c). The Article 14(5)(c) exemption effectively provides that there is no obligation to send a privacy notice if there are already EU or domestic laws governing the obtaining and disclosure of information and which provide appropriate measures to protect the data subject’s legitimate interests. Trust and estates law already contains detailed rules concerning disclosure to beneficiaries which take due account of beneficiaries’ interests. The effect is that, arguably, a privacy notice does not need to be issued to a beneficiary when information about that beneficiary is received from a source other than the beneficiary.

¹ The term ‘privacy notice’ is not used in the GDPR but is helpful shorthand for the collection of information that data controllers are obliged to provide to data subjects in certain circumstances.
1.15 When responding to a data access request (also referred to as a ‘subject access request’) under Article 15, trustees and personal representatives are not obliged to provide copies of any documents or information that they would be entitled to withhold under established principles of trust or estates law (as appropriate).

2 PRACTICAL POINTS IN RELATION TO HOW THE GDPR APPLIES TO TRUSTS AND ESTATES GENERALLY

Because the GDPR was not drafted with trusts and estates in mind, much of the terminology and many of the concepts used need a certain amount of translation in order to make sense in the trusts and estates context.

For example, the GDPR applies to data controllers when processing personal data. But should a trust corporation that acts as the trustee of multiple trusts count as a single data controller or multiple data controllers (one for each trust) for the purposes of the annual fee payment to the ICO? Similarly, where a trust has multiple trustees, are they jointly treated as a single data controller or are they each data controllers in their own right?

STEP’s view is as follows.

- The GDPR applies on a trust-by-trust and estate-by-estate basis. So if a person acts as the trustee of multiple trusts, they will be a data controller in relation to each one of those trusts and will have separate obligations in relation to each of them.\(^2\)

- Where a trust or estate has multiple trustees and personal representatives, they are all, as a collective, treated as a single data controller (subject to the application of the personal and household activity exemption discussed in section 4 below).

- References to the ‘number of staff’ that a data controller has should be taken to refer to the number of trustees or personal representatives (as appropriate) and not the number of staff that a corporate trustee or personal representative has.

- References to a data controller’s ‘turnover’ should be taken to refer to the relevant trust’s or estate’s gross annual income and gains.

Other parts of the GDPR that can throw up practical issues for trustees and personal representatives include the provisions concerning data rights. Many of these rights were introduced with the big tech companies in mind, and it appears that little to no thought was given as to how they could impact upon trusts and estates. Trustees and personal representatives should be aware that these rights are generally caveated and that, while they must ensure compliance with the GDPR, sometimes that compliance will mean refusing rather

\(^2\) This appears consistent with past practice in related areas, such as the treatment of pension schemes, which are usually trusts. An analogous example can be drawn with partnerships – STEP is aware that some law firms that operate as general partnerships are listed as single data controllers by the ICO, despite the fact that the partnerships in question have no legal personality distinct from their partners.

\(^3\) This was clearly the case under the old Data Protection Act 1998, as shown in guidance such as: [https://ico.org.uk/media/for-organisations/documents/1581/registration-by-pension-scheme-trustees.pdf](https://ico.org.uk/media/for-organisations/documents/1581/registration-by-pension-scheme-trustees.pdf), and STEP is not aware that the approach has changed since the introduction of the Data Protection Act 2018.
than acquiescing to requests from beneficiaries seeking to exercise their rights. For example, STEP’s view is that a request from a beneficiary for personal data to be erased (exercising the ‘right to be forgotten’) should generally be refused if the data is still relevant to the administration of the trust or estate in question. In other cases, trustees and personal representatives should comply with requests, but will need to balance various considerations in doing so. The right of access is a good example of this and is discussed in more detail in section 7 below.

3 THE DISTINCTION BETWEEN DATA PROCESSORS AND DATA CONTROLLERS

STEP is aware that some practitioners have been uncertain whether they, or any trustee or personal representative clients, should be considered data processors or data controllers.

Articles 4(7) and 4(8) of the GDPR set out the relevant definitions.

A practical way of understanding the distinction is to consider whether a particular person is making decisions about either what personal data they process (i.e. what they hold) and/or how they process it (i.e. what they do with it). Any person who is making decisions about these issues is likely to be a data controller.

The ICO has issued guidance that confirms that accountants and other professional service providers acting in accordance with their professional responsibilities in the course of their business will be data controllers.

In practice, STEP expects that solicitors, accountants and other professional advisors will ordinarily be ‘controllers’ because they make decisions as to how data will be processed, including what personal data they require to provide advice and how to use that data during the provision of their advice (such as how to incorporate it into forms and documents).

STEP also expects that trustees and personal representatives will be data controllers unless the ‘purely personal or household activity’ exemption applies, as explained below. This is because they determine what personal data they require in order to administer the relevant trust or estate and then make decisions about how to use that data in the course of administration (such as a trustee taking account of a beneficiary’s employment circumstances when deciding whether to make a distribution to them).

It is important to note that individuals and entities can hold a number of different roles and positions, and that they must consider their status under the GDPR in relation to each one separately. For example, an individual might be a solicitor professionally, a member of various professional bodies, the executor of their uncle’s estate, and a keen sportsperson who helps run a local club at the weekend. They are likely to have different obligations under the GDPR in relation to each of those roles and must act appropriately in each.
4 THE EXTENT TO WHICH THE GDPR APPLIES TO TRUSTEES AND PERSONAL REPRESENTATIVES WHO ARE NOT ACTING IN A PROFESSIONAL CAPACITY

Article 2(2)(c) provides that the GDPR does not apply to the processing of personal data by a natural person in the course of a ‘purely personal or household activity’. To the extent that processing falls within the scope of the exemption, the person doing the processing will not be considered a data controller/processor and will not be regulated by the GDPR.

Recital 18 clarifies that the GDPR applies to ‘controllers or processors which provide the means for processing personal data for such personal or household activities’ (we assume this has in mind controllers and processors such as Microsoft, Apple, Facebook, etc.).

Because the Article 2(2)(c) exemption applies only to ‘natural persons’, there is no possibility of it applying to a trust corporation or other entity that takes on the role of a trustee or personal representative.

It is also clear that the exemption cannot apply to an individual acting in a professional capacity (it can only apply to activities with ‘no connection to a professional or commercial activity’).7

However, the position of individual trustees and personal representatives who are acting in a personal rather than professional capacity is ambiguous. The GDPR seeks to draw a distinction between processing carried on in a commercial context and processing carried on in a private context. Private trusts and estates do not fit neatly into either category. On the one hand, individual trustees and personal representatives act in a fiduciary capacity, which is legally distinct from their personal capacity (they cannot treat trust and estate assets as their own for example). On the other, non-professionals holding these roles will almost always have been appointed because of their close personal ties to the settlor or testator (as appropriate) and will consider what they are doing to be a highly personal activity.

In STEP’s view, the law does not require all trustees and personal representatives to be treated as data controllers simply because they are fiduciaries. Furthermore, STEP is concerned that if the GDPR were to apply to unremunerated lay trustees and personal representatives, the result would be innumerable accidental breaches of data protection laws and a reduction in the willingness of individuals to accept these roles, which could have serious practical implications, such as undermining the effectiveness of the UK’s probate system. These are relevant considerations in light of Recital 4 of the GDPR, which states that the right to the protection of personal data ‘is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality’.

STEP’s view is that the Article 2(2)(c) exemption should be interpreted as applying to an individual acting as either a trustee or a personal representatives provided that they are not either:

- acting in a professional capacity; or
- paid for their role.

7 Recital 18 to the GDPR
Expenses would not count as ‘payment’ for these purposes, and neither would legacies in wills that are conditional on the legatee acting as a personal representative.

STEP notes that this approach would be in line with the view of the Court of Appeal that the courts should ‘be cautious about criminalising what, for many people, are their ordinary activities’.

STEP also believes that this approach is consistent with the reported authorities concerning the scope of the Article 2(2)(c) exemption.

For the avoidance of doubt, STEP’s interpretation means that:

- A non-professional who is paid for their work is unable to benefit from the exemption (because payment makes their activity professional/commercial).
- An individual who has taken on a role in a professional capacity, but is in fact unpaid (such as a solicitor who agrees to waive their fee), is unable to benefit from the exemption (because their activity is inherently professional/commercial).
- Where a trust has a mix of trustees who benefit from the exemption and trustees who do not benefit from the exemption, the exempt trustees are not part of the controller group alongside the non-exempt trustees. Instead, all of the obligations under the GDPR and the DPA 2018 fall on the non-exempt trustees as controllers. The same analysis would apply to an estate with a mix of exempt and non-exempt personal representatives.
- An individual who happens to be a member of a relevant profession, such as an accountant, but is appointed to a role in their personal capacity (e.g. they become a personal representative for a family member) and is not paid for their work, would still benefit from the exemption. This is an example of the GDPR applying to the same person in various different ways depending on the capacity in which they are acting (see section 3 above).

References to trustees and personal representatives in the remainder of this memorandum are to trustees and personal representatives who do not benefit from the exemption and so are data controllers for the purposes of the GDPR.

5 THE LEGAL BASIS ON WHICH TRUSTEES AND PERSONAL REPRESENTATIVES CAN PROCESS ‘SPECIAL CATEGORY’ DATA

In order to process (i.e. do anything with) personal data, data controllers must have a ‘lawful basis’ for the processing. A ‘lawful basis’ can be thought of as a ‘lawful purpose’ and the list of possible purposes in respect of ‘regular’ personal data is set out in Article 6. ‘Regular’ personal data is not a phrase used in the GDPR itself but is a helpful way of referring to any data that is not ‘special category’ personal data (as described below).

The lawful bases on which ‘regular’ personal data can be processed

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8 Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and others [2017] (EWCA Civ 121),
STEP anticipates that, of these lawful bases, most trustees and personal representatives will seek to rely on either:

- Article 6(1)(c) – the processing is necessary for compliance with a legal obligation to which the controller is subject; or
- Article 6(1)(f) – the processing is necessary for the controller’s legitimate interests or the legitimate interests of a third party, unless there is a good reason to protect the individual’s personal data which overrides those legitimate interests.

Article 6(1)(c) could be applicable on the grounds that trustees and personal representatives have fiduciary duties, which amount to legal obligations which are enforceable in the Courts, and that they need to process certain personal data (in particular in relation to beneficiaries) in order to comply with those duties.

Article 6(1)(f) could be applicable on the grounds that trustees and personal representatives have a legitimate interest in the proper administration of the relevant trust or estate. However, relying on Article 6(1)(f) involves the balancing of interests between the controller (the trustee or personal representatives) and the data subjects (the beneficiaries). This can involve more work on the part of the trustees or personal representatives. More guidance can be found on the ICO’s website.

Special category data – what is it?

As well as an Article 6 lawful basis, certain types of personal data, known as ‘special category data’, need an additional justification before they can be lawfully processed. The controller must have a lawful basis under Article 6, but must also satisfy one or more of the ten conditions set out in Article 9(2).

Special category data is personal data that is considered particularly sensitive and so requires extra protection. The definition is set out in Article 9(1) and refers to:

- personal data revealing racial or ethnic origin;
- personal data revealing political opinions;
- personal data revealing religious or philosophical beliefs;
- personal data revealing trade union membership;
- genetic data;
- biometric data (where used for identification purposes);
- data concerning health;
- data concerning a person’s sex life; and

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• data concerning a person’s sexual orientation.

It is theoretically possible that trustees and personal representatives could process personal data falling into any one of the ‘special categories’, but information concerning the beneficiaries’ health might be the type that is most commonly sought and considered.

The wording varies between some of the categories. Contrast, for example, the reference to ‘data concerning a person’s sex life’ with the reference to ‘data revealing racial or ethnic origin’. The ICO’s guidance appears to suggest that both should be read to have the same effect\(^\text{10}\), but it seems possible that the words ‘concerning’ and ‘revealing’ could be found to have different meanings. Unless and until there is further clarification of this point, STEP suggests that trustees and personal representatives proceed on the basis that any data that either concerns or reveals one of the special categories should be considered special category data.

As such, data can become special category data indirectly. The ICO’s guidance on the subject of special category data states that\(^\text{11}\):

‘Special category data includes personal data revealing or concerning the above types of data. Therefore, if you have inferred or guessed details about someone which fall into one of the above categories, this data may count as special category data. It depends on how certain that inference is, and whether you are deliberately drawing that inference.’

Trustees and personal representatives will frequently hold information that might allow them to make inferences of this nature. For example, they will often know about a beneficiary’s marital status or family arrangements, which might allow them to deduce information about that beneficiary’s sex life or sexual orientation.

However, STEP understands from its discussions with the ICO that simply knowing about a person’s domestic arrangements should not be seen as equivalent to processing data concerning that person’s sex life or sexual orientation. It is therefore likely that trustees or personal representatives would need to be more specifically recording or considering data concerning a beneficiary’s sex life or sexual orientation before they would be deemed to be processing such information. Similar logic should presumably apply in relation to other special categories of data as well.

For example, the mere fact that a trustee knows a beneficiary is in a long-term same-sex relationship should not constitute the processing of special category data about that beneficiary’s sexual orientation by the trustee. This would be the case even if the fact that the beneficiary was in a long-term relationship was relevant to the trustee’s decision making (e.g. if the trustee was considering making a distribution to help the beneficiary purchase a property with their partner). However, if the trustee ever considered the same-sex nature of the relationship to be relevant to a decision, that would of course constitute processing special category data.


Special category data – which processing conditions could be relevant for trustees and personal representatives?

The next question is which, if any, of the ten conditions set out in Article 9(2) can be used to justify the processing of special category data by trustees and personal representatives?

It is worth noting that a data controller must determine the condition they are relying on to process special category data before they begin this processing. The reliance on the condition must also be documented in some way.

One of the possible conditions is express consent, but the threshold for a valid consent in this context is very high and such consent can be withdrawn at any time. In practice, STEP does not expect this to be appropriate in relation to many trusts or estates. For example, if the beneficiary of a discretionary trust had a serious gambling or substance addiction, that would be highly relevant information when the trustees were considering whether, and if so how, to make a distribution to the beneficiary. But it would be all too easy for the beneficiary simply to refuse to give their consent to that information being processed.

In STEP’s view, the more appropriate condition is Article 9(2)(f). This permits the processing of special category data to the extent it is ‘necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity’.

There is pre-GDPR case law (decided in relation to the DPA 1998) which held that a more ‘natural’ way of expressing legal claims was to express it in terms of ‘processing that is necessary for the purposes of establishing, exercising or defending “legal rights”’ [author’s emphasis]. In STEP’s view, this continues to be a relevant authority.

In the context of trusts and estates, the beneficiaries of a trust or estate have a legal right to see a trust or estate properly administered and may gain further legal claims or rights during the course of its administration (such as becoming absolutely entitled to assets from the trust or estate).

STEP’s view is that, in order for the legal claims/rights of beneficiaries to be established, exercised and defended, trustees and personal representatives must be permitted to process special category data to the extent necessary to comply with their fiduciary duties.

STEP also considers this approach to be in line with Recital 4 of the GDPR (which, as mentioned above, states that the right to data protection ‘must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality’). In this case, the right to the protection of personal data must be balanced against the right to have trusts and estates properly administered and must also be considered in the context of the considerable protections that are in any case afforded to beneficiaries’ personal data by the trustees’/personal representatives’ fiduciary duties.

While, as with the other positions set out in this note, the ICO has not expressly confirmed its agreement with STEP’s view, guidance published after STEP’s discussions with the ICO
appears to offer it considerable support. Specifically, the revision to the ICO’s guidance on special category data that was issued on 14 November 2019 includes the following example:

‘A professional trust and estate practitioner advises a client on setting up a trust to provide for a disabled family member. The advisor processes health data of the beneficiary for this purpose. Although there is no active legal claim before the courts, this is still for the purpose of establishing the legal claims of the trust beneficiary for the purposes of this condition.’

Although this refers to an advisor establishing a trust rather than a trustee or personal representative administering a trust or estate, the analysis would appear to be equally applicable to both scenarios.

Alternatively, it may be possible for trustees and personal representatives to rely upon the ‘substantial public interest’ condition set out in Article 9(2)(g). This permits (inter alia) processing that is necessary for one of the conditions set out in Part 2 of Schedule 1 to the DPA 2018. Paragraph 6 of Part 2 is the ‘statutory, etc and government purposes’ condition, which provides that:

‘6 (1) This condition is met if the processing:

(a) is necessary for a purpose listed in sub-paragraph (2), and

(b) is necessary for reasons of substantial public interest.

(2) Those purposes are:

(a) the exercise of a function conferred on a person by an enactment or rule of law;

(b) the exercise of a function of the Crown, a Minister of the Crown or a government department.’

The analysis here would be that:

- 6(1)(a) is satisfied because the office of trustee or personal representative is conferred in part by rules of law (thereby falling within the scope of 6(2)(a)); and
- 6(1)(b) is satisfied because the proper administration of trusts and estates is a matter of substantial public interest.

However, in light of the ICO’s guidance, STEP suggests that reliance on the Article 9(2)(f) condition will be preferable in most cases.

6 THE LEGAL BASIS ON WHICH ADVISORS CAN PROCESS ‘SPECIAL CATEGORY’ DATA

In accordance with their obligations under the GDPR more generally, advisors must be careful only to process personal data that is relevant to their work and for which there is a lawful basis under Article 6. It is important to remember that for these purposes ‘processing’ includes simply recording that data on the file.
For example, if an accountant meets with a longstanding client to discuss their tax return, the client may also mention various details about their family or acquaintances. The accountant should think carefully as to whether this information contains personal data in relation to family members or other third parties and, if so, whether it is relevant to their advice. If not, they should not record it in their file note.

This is a particularly important when dealing with special category data (as defined in section 5 above) because of the stricter limits on how and when special category data can be processed.

In terms of which Article 9(2) conditions advisors can rely upon to process special category data, we expect that many working in the trusts and estates field might be able to make use of Article 9(2)(f). As explained above, this permits the processing of special category data to the extent ‘necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity’. The ICO’s guidance of 14 November 2019 states that to fulfil this condition:

‘You must show that the purpose of the processing is to establish, exercise or defend legal claims. ‘Legal claims’ in this context is not limited to current legal proceedings. It includes processing necessary for:

• actual or prospective court proceedings;
• obtaining legal advice; or
• establishing, exercising or defending legal rights in any other way.’

It is clear that lawyers can rely upon this condition when providing legal advice.

However, it is notable that one of the two examples which follows this extract (set out in full in section 5 above), refers to a ‘trusts and estates practitioner’ providing advice rather than specifically a solicitor (in contrast with the other example in that part of the guidance). This supports the view that there is no need for the data controller to be a lawyer in order to fulfil the condition. The key point is not who the data controller is, but what they are doing, with the implication that non-lawyers could fulfil the condition when advising on matters such as trusts and wills.

If that is correct, then it would also seem reasonable for non-lawyers who advise on tax to rely upon Article 9(2)(f) on the basis that they are advising clients on their legal rights and legal claims in the context of their tax liabilities.

7 THE IMPLICATIONS OF DISCLOSURE OBLIGATIONS UNDER THE GDPR FOR TRUSTEES AND PERSONAL REPRESENTATIVES

The disclosure obligations

The GDPR contains three primary disclosure obligations, two of which are proactive and one of which is reactive:
Professional standards guidance

- Article 13: Contains a proactive obligation to provide certain information to a data subject when data is collected from that particular data subject (e.g. when a trustee receives information about a beneficiary from the beneficiary himself or herself). This information must be provided at the time the personal data is collected.

- Article 14: Contains a proactive obligation to provide certain information to a data subject when data is collected from someone else (e.g. when a trustee receives information about a beneficiary from the settlor). Generally, this information must be provided at the latest within one month of the personal data being received.

- Article 15: Contains a reactive obligation to provide certain information in response to a data access request, also known as a 'subject access request' (e.g. when a beneficiary submits a subject access request to a trustee). Generally, this information must be provided within one month of receiving the subject access request.

In relation to Articles 13 and 14, the information to be provided includes:

- details for the main data protection contact for the data controller;
- a summary of how the personal data will be used and the lawful bases for its use, including information on how long it will be stored for;
- a summary of third parties with whom the personal data might be shared and an explanation, if relevant, of the basis on which it might be shared with persons outside of the EEA or jurisdictions deemed to have equivalent protections for the purposes of the GDPR;
- the existence of the data subject’s data rights; and
- in the case of Article 14 only (i.e. where the data has been received from someone other than the data subject), a summary of the categories of personal data that have been received.

The information referred to above is often provided by way of a ‘privacy notice’ (i.e. a document, such as a letter or email, setting out all of the required information), although that is not a term used in the legislation itself.

In relation to Article 15, the information to be provided includes:

- confirmation that the beneficiary’s personal data is being processed (assuming that it is);
- the categories of personal data being processed and how it will be used, including information on how long it will be stored for;
- a summary of third parties with whom the personal data has been or will be shared and whether any are outside of the EEA or jurisdictions deemed to have equivalent protections for the purposes of the GDPR;
- where the personal data was collected from; and
• a copy of all of the personal data being processed (i.e. all of the personal data that the trustees or personal representatives hold about the beneficiary).

The application of the GDPR disclosure obligations in the context of trusts and estates

Compliance with Article 13 should be relatively uncontroversial because, if the beneficiary provided the data themselves, then they must already be in contact with the trustee or personal representative and so are likely to be aware of their status in relation to the trust or estate. This is fortunate because there do not appear to be any exemptions from Article 13 that are likely to be relevant to trustees or personal representatives.

However, there is potential for the obligations set out in Article 15, and to a lesser extent Article 14, to cause concern for trustees and personal representatives, particularly where the relevant beneficiary is not otherwise aware of the trust or estate (for example, if they are a minor or only a default beneficiary who is never expected to benefit).

Article 15 (subject access requests) has caused particular concern because of the requirement to provide beneficiaries with copies of their personal data, which in practice will often mean copies of documents containing that personal data.

The key issue here is how the disclosure obligations in the GDPR interact with existing laws of disclosure in the trusts and estates context.

It is an established principle of trust law that trustees are entitled to refuse disclosure of certain trust information or documents to beneficiaries under certain circumstances. In particular, beneficiaries have no automatic right to receive records of discussions relating to a trustee’s exercise of discretionary powers, although they have a reasonable expectation to receive other documents – for example, trust accounts. Similarly, beneficiaries of estates do not have an automatic right to receive copies of all documents and information to which personal representatives are privy (although statute provides that they are entitled to certain information, including accounts).

There have been concerns in the industry that the GDPR obligations simply cut across the existing laws in this area and so have the potential to seriously undermine them.

This is not STEP’s interpretation.

Importantly, the disclosure obligations in Articles 14 and 15 are not absolute. STEP’s position is that the caveats to these obligations allow existing disclosure laws to be given effect. This is explained below in relation to each article in turn.

Article 14

For ease of reference this section uses the term ‘privacy notice’ as shorthand to refer to the information that must be provided to a data subject under the terms of Article 14.

\[\text{[1964] 3 All ER 855}\]
There are numerous situations in which issuing a privacy notice to a beneficiary might not be in the interests of the beneficiaries of a trust or estate as a whole and might undermine the effective administration of the trust or estate.

For example:

- A will that establishes a discretionary will trust might be accompanied by a letter of wishes, which lists as default beneficiaries a number of the testator’s more remote relatives. The letter might ask the trustees of that will trust to add these individuals as beneficiaries of the will trust and distribute the estate to them in the event that none of the testator’s immediate family survives him or her. To facilitate this, the letter is likely to include the names and addresses of those more remote relatives, which could be personal data in relation to them. However, if at the time of the testator’s death he or she has living descendants, the default beneficiaries will effectively be irrelevant to the administration of the estate. Sending privacy notices will at best take time and cost and at worst cause confusion (raising false hopes as to an entitlement from the estate) and/or lead to familial disputes that could otherwise be avoided (such as if some family members take offence at not being included when others were).

- A trust is established for the settlors’ children including a minor child. The minor child is not aware of the trust because the settlors (the beneficiary’s parents) do not want to disincentivise the child from pursuing their studies or a career. If the trustees have to send the minor child a privacy notice, the existence of the trust will be revealed, which could lead to further questions and ultimately have the disincentivising effect that was feared by the parents.

Fortunately, Article 14 offers some flexibility here. Article 14(5) provides that it is not necessary to issue a privacy notice to a data subject to the extent that:

- the data subject already has the information that would be contained within it (Article 14(5)(a));
- notifying the data subject is impossible (Article 14(5)(b));
- notifying the data subject involves disproportionate effort (Article 14(5)(b));
- notifying the data subject is likely to render impossible or seriously impair the achievement of the objectives behind the processing (Article 14(5)(b));
- obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject’s legitimate interests (Article 14(5)(c));
- the personal data must remain confidential subject to an obligation of professional secrecy under either UK or EU law (Article 14(5)(d)).

STEP’s view is that trustees and personal representatives are already subject to domestic laws concerning the disclosure of information to beneficiaries and that those laws provide appropriate measures to protect beneficiaries’ legitimate interests. As such, in the absence of any authority to the contrary, it would be reasonable for trustees and personal representatives to take the position that Article 14(5)(c) applies to them and there is no need
to issue privacy notices to beneficiaries when information is received from third parties. Note that this does not mean privacy notices will never need to be sent. They will still be required by Article 13 when data is collected directly from beneficiaries.

If, for any reason, Article 14(5)(c) is not applicable, STEP’s view is that:

- issuing privacy notices to beneficiaries who are unlikely to ever benefit from the trust or estate would involve disproportionate effort and so should not be required (relying on Article 14(5)(b));

- trustees and personal representatives should not be obliged to send privacy notices to the extent that doing so would be likely to seriously frustrate or undermine the purpose of the processing (i.e. the proper administration of the trust or estate). This is also reliant upon the Article 14(5)(b) exemption; and

- otherwise, privacy notices should generally be issued to beneficiaries by default.

It is important to note that if Article 14(5)(b) is relied upon, the controller must instead ‘take appropriate measures to protect the data subject’s rights and freedoms and legitimate interests, including making the information publicly available’. What amounts to appropriate measures will depend on the circumstances.

**Article 15**

There have been concerns, particularly following the Dawson-Damer decisions, that data subject access requests could be used to open a backdoor into trusts and allow beneficiaries to obtain copies of documents and information that they would not otherwise be entitled to under trust law. The same fear could be raised in relation to estates.

However, Article 15(4) of the GDPR provides that the right of a data subject to obtain a copy of their personal data under a subject access request shall not adversely affect ‘the rights and freedoms of others’. If one looks at the progress of the Data Protection Bill through Parliament in 2017, it is clear that the government took the view this was sufficient to prevent the GDPR from cutting across existing trust law rules concerning disclosure.

In particular, Lord Ashton of Hyde, for the government, stated:

‘Article 15(4) of the GDPR directly protects against disclosure where it would adversely affect the rights and freedoms of others, including any rights or freedoms of trustees. The court also has power to withhold disclosure of information where there is an overriding need to do so, for instance where subject access is being used for an improper purpose. We believe that any gap between what can be withheld under trust law and data protection law is narrow, and no more than is appropriate to protect the rights that the beneficiaries of a trust have in their data.’

Subsequently, Lord Keen of Elie went further on behalf of the government, confirming that:

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15 Article 14(5)(b)
‘where disclosure under data protection law would reveal information about a trustee’s deliberations or reasons for their decisions that would otherwise be protected from disclosure under the trust law, the Government’s view is that disclosure would adversely affect the rights and freedoms of trustees and beneficiaries in the trustees’ ability to make independent decisions in the best interest of the trust without fear of disagreement with beneficiaries’\(^{17}\).

STEP’s view is that, in practice, the exemption under Article 15(4) operates so as to allow trustees to withhold copies of documents to the extent that they would otherwise be entitled to refuse disclosure of such documents under established trust-law principles. The same logic would apply in relation to personal representatives.

However, trustees and personal representatives must bear in mind that Article 15(4) is only an exemption from the obligation to provide copies of personal data in response to a subject access request. It does not operate to exempt the controller (in this case the relevant trustees or personal representatives) from the obligation to respond with the other information set out in Article 15 – or limit the obligation to provide redacted copies of documents if those redactions can be used to avoid any adverse impact on others.

This guidance is effective from 29 January 2020

\(^{17}\) Hansard, December 13, 2017, vol.787, col.1598