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

Edward Hayes, Chair, STEP Data Protection Working Group, updated 15 March 2021

The purpose of this memorandum is to summarise STEP’s current understanding of how certain aspects of the UK GDPR should be applied in the context of private, non-charitable, trusts and estates. This is the third edition of this memorandum and reflects STEP’s views as of 15 March 2021.

Whilst the Brexit transition period has now ended, and the GDPR has ceased to have direct effect in the UK, it has to a large extent been incorporated into domestic law by a combination of the European Union (Withdrawal) Act 2018, the Data Protection Act 2018 and supplementary regulations.

In effect, the UK now operates its own version of the GDPR, known as the “UK GDPR”. This memorandum refers to the original EU regulation as the “EU GDPR” for the sake of simplicity. References to articles and recitals are to articles and recitals of the UK GDPR unless stated otherwise.

EU case law which predates the end of the Brexit transition period continues to have precedent status for UK Courts and so past EU decisions in relation to the interpretation of the EU GDPR remain relevant to the interpretation of the UK GDPR. Subsequent EU judgments are not binding on the UK courts but may still be considered when interpreting the UK GDPR.

Whilst there are some differences between the EU GDPR and the UK GDPR, the substance of both data protection regimes remains very similar and the recitals to the EU GDPR have been carried across verbatim. Therefore, whilst this memorandum focuses on the application of the UK GDPR, it may also be of some assistance to practitioners looking to interpret the EU GDPR.

Practitioners should note that both the EU GDPR and the UK GDPR have extra-territorial effect. For example, a UK resident trustee may be subject to the UK GDPR because they are established in the UK, but also to the EU GDPR in relation to the processing of personal data concerning beneficiaries in the EU.

There are currently very few relevant authorities and only limited guidance available concerning the correct application of the UK GDPR in the context of trusts and estates. This memorandum is intended to assist practitioners considering the relevant issues by setting out what may be considered reasonable positions to take in the absence of further clarifications from either the Courts or the Information Commissioner’s Office (the “ICO”).

Please note that this memorandum focuses on the processing of personal data relating to beneficiaries of trusts and estates. 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.

This memorandum is not intended to act as a comprehensive guide covering all aspects of the UK GDPR’s application to trusts and estates. Instead, it aims to provide practical guidance to

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1 S.6 European Union (Withdrawal) Act 2018
2 Article 3
address queries received from members and what STEP’s Data Protection Working Group considers to be some of the key ambiguities in the legislation.

This memorandum 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 4 and 6 (Error! Reference source not found.) 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.

Where possible, STEP’s Data Protection Working Group has discussed the positions set out in this memorandum with the ICO. Whilst the ICO has provided some high level feedback as to its views on some of the matters covered, and this is noted where relevant below, the ICO has not 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 agreement with the positions set out in this document and the guidance provided should not be seen as endorsed by the ICO unless expressly stated otherwise.

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1. SUMMARY OF VIEWS

This memorandum should be read in full but, in summary, practitioners, trustees and personal representatives might consider the following positions when determining their obligations under the UK GDPR:

The scope of the purely personal or household activity exemption (see 2 below):

1.1 A trustee or personal representative is not subject to the UK GDPR (being within the scope of the “purely personal or household activity” exemption) to the extent that 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).

Practical points where the UK GDPR does apply (see section 3 below)

1.2 The UK GDPR could feasibly apply on either:

(a) a trust-by-trust (or estate-by-estate) basis; or

(b) a trustee-by-trustee (or personal representative-by-personal representative) basis.

1.3 Until the correct interpretation is confirmed, members may wish to consider both to determine which is the most appropriate in the circumstances of any particular client. Members should bear in mind that this decision could have wider implications (including
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whether the costs of data compliance should be borne by the relevant trustees/personal representatives or the trust/estate).

1.4 If the trust-by-trust (or estate-by-estate) approach is adopted then:

(a) if there are multiple trustees/personal representatives, they are likely to all, as a collective, be treated as a single data controller (subject to the application of the personal and household activity exemption);

(b) references in the UK GDPR to the “number of staff” that a data controller has could 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;

(c) references to a data controller’s “turnover” could be taken to refer to the relevant trust’s or estate’s gross annual income and proceeds from disposals; and

(d) each trust or estate will need to be considered separately when determining whether there is a requirement to pay the data protection fee.

1.5 If the trustee-by-trustee (or personal representative-by-personal representative) approach is adopted then:

(a) if there are multiple trustees/personal representatives, they are likely to be acting as joint controllers (subject to the application of the personal and household activity exemption);

(b) references in the UK GDPR to the “number of staff” that a data controller has would presumably refer to the number of staff that a corporate trustee or personal representative has;

(c) references to a data controller’s “turnover” would presumably refer to the relevant corporate trustee’s or personal representative’s annual turnover; and

(d) each trustee or personal representative would need to consider their own obligation to pay the data protection fee but should not need to make a separate notification and corresponding payment in respect of each of the trusts and/or estates which they administer individually.

1.6 It appears arguable that trustees and personal representatives who do not have any meaningful discretion in relation to the administration their respective trusts or estates (simple estates and bare trusts being possible examples) may be exempt from paying the data protection fee.

1.7 To the extent that trustees and personal representatives do have discretion as to how their respective trusts or estates are administered, it appears likely that they will be obliged to pay the data protection fee unless they benefit from the “purely personal or household activity exemption” described in section 2.

Data Controllers v Data Processors (see section 4 below):

1.8 Professional service providers will generally be data controllers when acting in the course of their business.
1.9 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 legal basis on which trustees and personal representatives can process special category data (see section 5 below):

1.10 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.

1.11 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 which 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 advisers can process special category data (see section 6 below):

1.12 Advisers 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.

1.13 Advisers 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 UK GDPR (see section 7 below):

1.14 The UK GDPR contains three key disclosure obligations:

(a) Article 13: the obligation to provide a privacy notice 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

1.15 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.

1.16 Arguably, Article 14 privacy notices do not currently 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...
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obligation to send a privacy notice if there are already provisions of UK domestic law governing the obtaining and disclosure of information and which provide appropriate measures to protect the data subject’s legitimate interests. Trust and estates law in England and Wales 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 solely from a source other than the beneficiary.

1.17 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).

1.18 Disclosure obligations are also limited in relation to any information in respect of which a claim of legal professional privilege could be maintained and/or in respect of which a legal adviser owes a duty of confidentiality to their client.

2. THE EXTENT TO WHICH THE UK GDPR APPLIES TO TRUSTEES AND PERSONAL REPRESENTATIVES WHO ARE NOT ACTING IN A PROFESSIONAL CAPACITY

Article 2(2)(a) provides that the UK GDPR does not apply to the processing of personal data by an individual 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 UK GDPR.

Recital 18 clarifies that the UK 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)(a) exemption applies only to “individuals”, there is no possibility of it applying to a trust corporation or other entity which 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”).

However, the position of individual trustees and personal representatives who are acting in a personal rather than professional capacity is ambiguous. The UK 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 UK 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.

Recital 18
such as undermining the effectiveness of the UK’s probate system. These are relevant considerations in light of Recital 4 of the UK 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)(a) 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.

Expenses would not count as “payment” for these purposes and neither would legacies in Wills which 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”5.

The ICO has also offered qualified support to the suggested approach.

During the course of 2019, STEP submitted the following question to the ICO in relation to Article 2(2)(c) of the EU GDPR (which is the equivalent of Article 2(2)(a) in the UK GDPR): “Please confirm that data processing carried on by individuals acting as fiduciaries in a non-professional capacity and without payment should fall within the scope of the personal or household activities exemption in [Article 2(2)(c)].”.

In April 2020, the ICO responded to say: “Based upon the information provided in the examples, it is likely that the individuals would fall within the exemption at [Art 2(2)(c)], however, each situation should be considered in light of the individual circumstances.” The “examples” referred to were of fiduciary arrangements considered during the course of discussions between STEP and the ICO, including:

- individuals jointly owning residential property;
- trustees holding assets in various circumstances, such as for minors under the terms of a will or intestacy, or for disabled beneficiaries;
- personal representatives administering an estate; and
- an individual acting as an attorney for a family member under a lasting power of attorney.

Whilst the ICO’s response does not go into any specifics, it does appear to confirm the principle that an individual acting in a fiduciary capacity can nevertheless fall within the scope of the Article 2(2)(a) exemption provided that they are not acting in a professional capacity and are not paid for their services.

STEP’s position is that this principle might sensibly be applied in practice as follows:

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5 Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and others [2017] (EWCA Civ 121),
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- 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 subject to the UK GDPR but the non-exempt trustees would be. 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 UK GDPR applying to the same person in various different ways depending on the capacity in which they are acting (see section 4 below).

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 UK GDPR.

3. PRACTICAL POINTS IN RELATION TO HOW THE UK GDPR APPLIES TO TRUSTS AND ESTATES GENERALLY

Because the EU GDPR (and, by extension, the UK 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.

**Whether the UK GDPR applies on a trust-by-trust or trustee-by-trustee basis**

One example of this difficulty is the determination of who is a data controller in the context of trusts and estates.

The UK GDPR applies to data controllers when processing personal data. But should a trust corporation which acts as the trustee of multiple trusts count as a single data controller or multiple data controllers (one for each trust)? 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? The same issue arises in relation to estates.

The issue of whether the UK GDPR applies on a trust-by-trust basis is relevant to a number of points, including the circumstances in which trustees and personal representatives must pay the data protection fee.

STEP is aware that members have made calls to the ICO’s helpline on this issue and received differing responses. One caller was informed that a trust corporation which administered a number of different trusts would only be a single data controller and so would only need to pay one data protection fee. Another was told that a trust corporation in the same position would effectively be treated as a separate data controller in relation to each trust, and that the data protection fee would need to be paid in relation to each trust. In the latter case the ICO

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employee noted that this was the approach taken to pension trusts.

Article 4(7), which defines “controller”, refers to natural and legal persons but also to “other bodies” as controllers and so can arguably permit a number of interpretations.

The ICO’s guidance on this point is ambiguous. That guidance provides that “Some organisations don’t have a separate legal personality of their own – for example, unincorporated associations such as sports clubs or voluntary groups. In this case you should review the document which sets up and governs the management of that organisation. This document should set out which individual(s) manage the organisation on behalf of its members and are likely to act as the controller or joint controllers, and how contracts may be entered into on behalf of the organisation. For convenience you may identify the organisation as a whole as the controller (eg you may use the club or group name in your privacy information for individuals). But for legal purposes the controller will actually be the relevant members who make the decisions about the processing by the organisation.”

One could extrapolate from this guidance that, because trusts have no separate legal personality, it will be the individual trustees (whether legal or natural persons) who are the data controllers and that, if more than one, they act as joint controllers in relation to the relevant trust.

However, the same guidance also gives the example of a GP surgery using an automated system in its waiting room to notify patients of when to proceed to the consulting rooms. It says that “The GP surgery will be the controller for the personal data processed in connection with the waiting room notification system because it is determining the purposes and means of the processing”. GP surgeries are often structured as partnerships with no separate legal personality.

Separate guidance specifically dealing with the payment of the data protection fee includes two further examples which could be read as suggesting that the body of trustees should be considered to be a single data controller, as opposed to treating each trustee as a separate data controller:

“Q- I have a limited company with numerous practices – do I need to pay a fee for each location?
A- If all the practices are part of the same legal entity then one fee would cover all of the sites, as long as each practice is not trading as a separate organisation and the limited company determines why and how personal data is used.

Q- My dental practice is a partnership – do all partners have to pay a fee separately?
A- If you’re in a partnership and each partner is responsible for the processing and security of their own patient information, which they would take with them if they left the practice, then each partner would need to pay a separate fee.”

The caveat in the response to the first question suggests that if each practice of the limited company acted as a separate organisation (whether or not legally distinct) it would need to pay a separate data protection fee. This might be considered analogous to multiple trusts administered by the same trustee. The caveat to the response to the second question suggests that if the partnership as a whole had responsibility for processing patient

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information, the partnership would need to pay a data protection fee, rather than the individual partners doing so. This might be considered analogous to the body of trustees paying a data protection fee as opposed to each individual trustee doing so.

Ultimately, the law, and the ICO’s guidance, remains unclear and it is possible to argue for a number of different interpretations in this context. STEP is seeking to clarify the point with the ICO but in the meantime practitioners will need to consider the circumstances relevant to their clients and determine what they consider to be the most appropriate approach. STEP notes the trust-by-trust approach appears to have been taken by the ICO and industry in related areas, such as the treatment of pension schemes and charities which are structured as trusts.

If the trust-by-trust (or estate-by-estate) approach is adopted then STEP’s view on other practical matters is that:

- 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 2 above).
- references to the “number of staff” that a data controller has could 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” could be taken to refer to the relevant trust’s or estate’s gross annual income and proceeds from disposals. An alternative interpretation that has been suggested by STEP members is that “turnover” could be taken to refer to the gross fees received by the trustees or personal representatives.

If the trustee-by-trustee (or personal representative-by-personal representative) approach is adopted then a body of trustees or personal representatives will presumably constitute a body of joint controllers for the purposes of the UK GDPR. The “number of staff” and “turnover” tests are more straightforward to apply in this scenario.

Members should also be aware that the approach taken on this point may have wider implications which go beyond those discussed in this memorandum. For example, it may have an impact on whether or not the costs of data compliance are a legitimate trust/estate expense.

The data protection fee

All data controllers must pay an annual data protection fee to the ICO unless all of the processing they carry out is exempt. Whilst the fee ranges from £40 to £2,900, most data controllers pay £40 or £60 a year.

A number of possible exemptions are set out in the relevant legislation. It appears to be at least arguable that some of these could be relevant to trusts or estates although the specific circumstances of any given trust or estate will need to be considered in detail to determine whether it could fall within them.

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9 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, and STEP is not aware that the approach has changed since the introduction of the Data Protection Act 2018.

10 Regulation 2, Data Protection (Charges and Information) Regulations 2018

11 The Schedule to the Data Protection (Charges and Information) Regulations 2018
Three exemptions of particular interest here are set out in paragraphs 2(b), 2(f) and 2(g) of the schedule to the Data Protection (Charges and Information) Regulations 2018.

Paragraph 2(b) exempts processing undertaken by a data controller for “the purposes of their personal, family or household affairs, including—

(i) the processing of personal data for recreational purposes, and
(ii) the capturing of images, in a public space, containing personal data;”

This may well be relevant to many trustees and personal representatives dealing with family trusts or estates. However, in cases where this exemption could apply, the relevant trustees or personal representatives are unlikely to be considered data controllers in the first place (and so be outside of the scope of the UK GDPR entirely) for the reasons described in section 2 above. In practice, the exemption is unlikely to help individuals acting in a professional capacity or corporate trustees and personal representatives.

Paragraph 2(f) exempts processing which is undertaken for the “purposes of-

(i) keeping accounts, or records of purchases, sales or other transactions,
(ii) deciding whether to accept any person as a customer or supplier, or
(iii) making financial or financial management forecasts,

in relation to any activity carried on by the data controller;”.

One could argue that this would cover the processing carried out by personal representatives in the course of administering an estate which does not create any trusts and in relation to which the personal representatives do not exercise any substantive discretion. Where there is an element of discretion as to how the estate is administered (e.g. where the personal representatives have choices to make concerning the division of particular collections of assets between beneficiaries) it may be more difficult to make the case for this exemption.

Paragraph 2(f) might also be highly relevant to trustees of bare trusts.

When considering the application of this exemption, practitioners should be aware that it cannot apply to the processing of personal data by or obtained from a credit reference agency.

Paragraph 2(g) exempts processing which is “carried out by a body or association which is not established or conducted for profit and which carries out the processing for the purposes of establishing or maintaining membership or support for the body or association, or providing or administering activities for individuals who are either a member of the body or association or who have regular contact with it;”

There may be scope for arguing that a body of trustees or personal representatives is not “established or conducted for profit” and carries on data processing in order to support the relevant trust or estate. However, the references to “maintaining membership or support” in paragraph 2(g) suggest that this exemption was included primarily with organisations such as amateur sports clubs in mind. It is unclear whether it can have a broader application.

STEP’s initial view is that most professional trustees and personal representatives (whether natural persons or corporate entities) will be obliged to pay the data protection fee if they have
any form of substantive discretion in relation to the administration of the relevant trust or estate. Whether this should be done on a trust-by-trust (estate-by-estate), or trustee-by-trustee (personal representative-by-personal representative) basis will depend on the approach taken to that issue, as discussed above.

Other practical issues

Other parts of the UK GDPR which can throw up practical issues for trustees and personal representatives include the provisions concerning data rights. Many of these rights were introduced with the major tech companies in mind and are difficult to apply in the context of trusts and estates.

Trustees and personal representatives should be aware that these rights are generally caveated and that, whilst trustees and personal representatives must ensure compliance with the UK GDPR, sometimes it will be compliant to refuse rather than acquiesce to requests from beneficiaries seeking to exercise their rights. For example, a request from a beneficiary for personal data to be erased (exercising the “right to be forgotten”\(^\text{13}\)) might 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\(^\text{14}\) is a good example of this and is discussed in more detail in section 7 below.

4. 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 UK 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\(^\text{15}\) which 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 advisers 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 above. 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

\(^{13}\) Article 17

\(^{14}\) Article 15

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 UK 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 a different status and obligations under the UK GDPR in relation to each of those roles and must act appropriately in each.

5. THE LEGAL BASIS ON WHICH TRUSTEES AND PERSONAL REPRESENTATIVES CAN PROCESS PERSONAL 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 UK 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

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.¹⁶

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
- 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 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 which 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:

“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

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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 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 (such as in a data protection policy).

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 anticipates that there will be many trusts and estates in relation to which this will not be appropriate. For example, if the beneficiary of a discretionary trust has a serious gambling or substance addiction, that would be highly relevant information when the trustees are 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 many cases it may be possible to rely instead upon 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 and the ICO has confirmed to STEP that “Case law under the 1998 regime may still be relevant under the GDPR”, whilst noting that “the relevance of any case law should be considered on a case by case basis taking into account changes in the legislation”.

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19 Article 9(2)(a)
20 Regina (British Telecommunications plc and another) v Secretary of State for Culture, Olympics, Media and Sport [2012] (Bus LR)
In the context of a trust or estate, the beneficiaries have a legal right to see that 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).

Arguably, 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 UK 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.

Whilst 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 which 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 adviser 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 adviser 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.

It therefore appears reasonable to conclude that any processing of special category data which is necessary for trustees or personal representatives to comply with their fiduciary duties is permitted by Article 9(2)(f).

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 which 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 ADVISERS CAN PROCESS “SPECIAL CATEGORY” DATA

In accordance with their obligations under the UK GDPR more generally, advisers 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 advisers can rely upon to process special category data, STEP anticipates 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, apparently, 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 UK GDPR FOR TRUSTEES AND PERSONAL REPRESENTATIVES

The disclosure obligations

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

- 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 UK or jurisdictions deemed to have equivalent protections for the purposes of the UK 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 which 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 UK;
- 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).

Exemptions from the disclosure obligations generally

It is worth noting that the three primary disclosure obligations are all subject to caveats set out in Part 4 of Schedule 2 to the Data Protection Act 2018.

Two of these in particular are potentially relevant to trustees and personal representatives.

Paragraph 19 of that Part limits the application of Articles 13 to 15 in relation to information in respect of which either:

- “a claim to legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings”; or
- “a duty of confidentiality is owed by a professional legal adviser to a client of the adviser”

Paragraph 19 represents an extension of the equivalent exemption from the Data Protection Act 1998 and it is clear that the addition of the reference to information covered by a duty of confidentiality was intended to broaden the scope of the exemption.

As a result, it may be that the majority of communications between trustees or personal representatives and their legal advisers will be protected from disclosure to third parties under Articles 13, 14 or 15.

Paragraph 23 of Part 4 of Schedule 2 protects “personal data that consists of records of the intentions of the controller in relation to any negotiations with the data subject to the extent that the application of those provisions would be likely to prejudice those negotiations.” It may be possible for trustees or personal representatives to argue that paragraph 23 extends to discussions that they have with beneficiaries about distributions or other matters.

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

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21 The explanatory notes for the DPA 2018 which were issued by the Department for Digital, Culture, Media and Sport state (at 684) that “[Paragraph 19] expands on the exemption in paragraph 10 of Schedule 7 to the 1998 Act” and STEP is aware of a letter written by Margot James MP to Brendan O’Hara MP dated 3 May 2018 which expressly states that “we [the Government] think there is a good argument for broadening two of the exemptions in respect of legal professional privilege in order to capture information which is covered by the wider ethical duty of confidentiality between a legal adviser and their client.”
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 which 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.

A key issue here is how the disclosure obligations in the UK 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 UK 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 (at least to a significant degree). 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.

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 which 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 UK law 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 UK law (Article 14(5)(d)).

Trustees and personal representatives are already subject to domestic laws concerning the disclosure of information to beneficiaries. Arguably, those laws provide appropriate measures to protect beneficiaries’ legitimate interests. As such, in the absence of any authority to the contrary, it might 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 would not mean privacy notices would never need to be sent. They would still be required by Article 13 when data is collected directly from beneficiaries.

If for any reason Article 14(5)(c) is not applicable, consideration should be given to the following:

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

- trustees and personal representatives may 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, in most situations, privacy notices should be issued to beneficiaries.

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.

The ICO has refrained from commenting expressly on any of the analysis set out above. Instead, it has stated to STEP that “The various exemptions in Art 14(5) are available to fiduciaries, just as they are available to other data controllers. However, [sic] must be applied on a case by case basis and must be justifiable. There is no “default position” and each decision should be justified and in line with the accountability principle.”

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) 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. There is no reason to think their approach to the UK GDPR would be any different.

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:

“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.”

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23 Article 14(5)(b)
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.

The ICO has refrained from commenting on STEP’s analysis in this area, other than to stress that each situation will need to be assessed on a case-by-case basis. Specifically, the ICO has said to STEP that “It is for each data controller to consider the individual circumstances around subject access requests and assess whether they are able to justify restricting a data subject’s rights, as per Article 15(4), based upon the unique situation. This will include taking into account all relevant law, including case law.”

Trustees and personal representatives should also consider the points made above under the heading “Exemptions from the disclosure obligations generally” when determining how to respond to subject access requests made under Article 15.

The first version of this guidance was first published on 24 January 2020 and became effective from 29 January 2020. It has been updated twice since.