



# THE OFFICE OF THE DATA PROTECTION COMMISSIONER

## The Data Protection (Bailiwick of Guernsey) Law, 2017 ("the Law")

### Large-Scale Processing

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#### Introduction

A number of questions have been put to the Office of the Data Protection Commissioner (the "ODPC") regarding the definition of "**large-scale processing**".

#### The Relevance of "Large-Scale Processing"

The concept of **large-scale processing** is relevant under the Law in two areas:

- The requirement for the **mandatory appointment of a data protection officer** under Section 47 of the Law (emphasis added):
  47. (1) *This section applies where –*
    - (a) *processing is carried out in the context of a public authority, or*
    - (b) *processing operations are carried out as part of a core activity of a controller or processor and, by virtue of their nature, scope or purpose, those operations require or involve –*
      - (i) **large-scale** and systematic monitoring of data subjects, or
      - (ii) **large-scale** processing of special category data.
  - (2) *Where this section applies, the controller and the processor must jointly designate an individual as a data protection officer in accordance with section 49.*
- Assessing whether processing constitutes a **high risk to the significant interests of data subjects** under Schedule 9, paragraph 6 of the Law (which in turn is relevant to the requirement which arises in certain circumstances under Section 43 of the Law to notify data subjects of a data breach and to the requirements in Sections 45 and 46 of

the Law to undertake Data Protection Impact Assessments and to undertake prior consultation with the ODPC in relation to high risk processing) (emphasis added):

**6. High risk to significant interests of data subjects**

- (1) *Subject to subparagraph (2), whether any processing of personal data is likely to pose a high risk to the significant interests of data subjects must be determined having regard to the nature, scope, context and purpose of the processing, having particular regard to whether a new technology, mechanism or procedure is used to process the personal data.*
- (2) *Processing of personal data is deemed to be likely to pose a high risk to the significant interests of data subjects where it involves –*
  - (a) *a systematic and extensive evaluation of personal aspects relating to data subjects based on automated processing, and decisions are based on the evaluation that affect the significant interests of data subjects,*
  - (b) **large-scale** *processing of special category data,*
  - (c) **large-scale** *and systematic monitoring of a public place, or*
  - (d) *any other prescribed kind or description of processing.*

**What Is Large-Scale processing?**

Neither the Law nor the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the "**GDPR**")) define "large-scale" processing.

Recital 109 of the GDPR provides a limited amount of guidance (in relation to Data Protection Impact Assessments). It states that "*large-scale processing operations which aim to process a considerable amount of personal data at regional, national or supranational level and which could affect a large number of data subjects and which are likely to result in a high risk*" would be included.

However, the recital also states that "*the processing of personal data should not be considered to be on a large-scale if the processing concerns personal data from patients or clients by an individual physician, other health care professional or lawyer*".

The ODPC notes the Guidelines on Data Protection Officers (WP243<sup>1</sup> published by the Article 29 Working Party (the "**DPO Guidelines**") in relation to the requirement to designate a Data Protection Officer under Article 39 of the GDPR, which states that:

*"It is important to consider that while the recital [Recital 109] provides examples at the extremes of the scale (processing by an individual physician versus processing of data of a whole country or across Europe); there is a large grey zone in between these extremes. In addition, it should be borne in mind that this recital refers to data*

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<sup>1</sup> [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=44100](http://ec.europa.eu/newsroom/document.cfm?doc_id=44100)

*protection impact assessments. This implies that some elements might be specific to that context and do not necessarily apply to the designation of DPOs in the exact same way."*

The Annex<sup>2</sup> to the DPO Guidelines state that the following should be taken into account when determining whether the processing is carried out on a large-scale:

- *The number of data subjects concerned - either as a specific number or as a proportion of the relevant population*
- *The volume of data and/or the range of different data items being processed*
- *The duration, or permanence, of the data processing activity*
- *The geographical extent of the processing activity*

*Examples of large-scale processing include:*

- *processing of patient data in the regular course of business by a hospital*
- *processing of travel data of individuals using a city's public transport system (e.g. tracking via travel cards)*
- *processing of real time geo-location data of customers of an international fast food chain for statistical purposes by a processor specialised in these activities*
- *processing of customer data in the regular course of business by an insurance company or a bank*
- *processing of personal data for behavioural advertising by a search engine*
- *processing of data (content, traffic, location) by telephone or internet service providers*

*Examples that do not constitute large-scale processing include:*

- *processing of patient data by an individual physician*
- *processing of personal data relating to criminal convictions and offences by an individual lawyer*

## **The View of the ODPC**

As noted above, neither the Law nor the GDPR define "large-scale processing". Accordingly, the ODPC takes that view that:

- it is for controllers and processors to assess the nature and scale of their processing and to **document** their conclusions accordingly
- Controllers and processors subject to the Law should take account of the terms of the GDPR and the DPO Guidelines (together with the Annex) in making their assessment

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<sup>2</sup>

[http://ec.europa.eu/information\\_society/newsroom/image/document/2016-51/wp243\\_annex\\_en\\_40856.pdf](http://ec.europa.eu/information_society/newsroom/image/document/2016-51/wp243_annex_en_40856.pdf)

- Controllers and processors subject to the Law should take the context of their activities into account in assessing whether they are engaging in large-scale processing. For example:
  - holding and processing personal data belonging to EU citizens from a number of EU countries may be less likely to represent large-scale processing taking into account the total number of residents in such countries
  - However, controllers and processors holding and processing the personal data of Guernsey citizens may be regarded as undertaking large-scale processing on the basis that they hold and process data relating to a high percentage of Guernsey citizens. Similar considerations may be even more likely to arise in very small geographical locations such as Sark
- Small businesses in Guernsey are **unlikely** to be typically undertaking large-scale processing **unless** they are working with large databases of customers (or other types of data subjects). For example:
  - a small construction business would not be likely to have such a database whilst even a small marketing companies may engage in large-scale processing, particularly where they hold and process large mailing lists on behalf of clients
  - Whilst a single doctor GP Practice would not be likely to be engaging in large-scale processing, a large multi GP practice may do so (particularly where the patient list of such a practice represents a significant percentage of the total population of Guernsey).
- Practice and guidance in this area is likely to evolve. The amount of personal data held and processed by a controller or processor may also change over time. The ODPC accordingly expects controllers and processors to ensure that they:
  - **periodically review** the scope and nature of their processing together with any updated guidance which may be published
  - **document** the outcome of such reviews.