PUMP COURT
CHAMBERS

General Data Protection Regulation

Introduction

1. GDPR introduced an EU data protection regime in the UK. The UK Data Protection Act 2018 (DPA 2018) repealed the Data Protection Act 1998 with effect from 25.5.2018. While trustees have previously been subject to data protection their duties are now tightened up and some obligations have been extended to agents i.e. solicitors and other professionals working for trustees.

2. GDPR tries to ensure that personal data is processed so that individuals (data subjects) are protected. In the context of private client work this means that trustees and their advisors owe duties to beneficiaries of trusts, settlements and estates as data subjects.

3. Solicitors acting for trustees (which includes executors, administrators and PRs) will either be (i) data processors (broadly any entity or individual that processes personal data (any information relating to an identified or identifiable natural person (the data subject) on a data controller's behalf) or (ii) joint data controllers (the person who, alone or jointly with others, determines the purposes and means of the processing of personal data [Article 47 GDPR]) with the trustees. New obligations are imposed for both.

Brexit

4. DPA 2018 applies to both cross board and domestic processing of data. On Brexit, although the GDPR will no longer have direct legal effect in the UK, DPA 2018 will mean UK law is aligned to EU data protection law. However, GDPR compliance is expected to be mandatory following Brexit so that trustees and solicitors must take account of it [Article 45 GDPR].

Trustees and solicitors as data controllers or processors

5. Basically, if solicitors or trustees are carrying out any processing, including collecting, recording, organising, storing, retrieving, consulting, using, erasing or destroying of the personal data [Article 4(2), GDPR] then they are data controllers or processors and at first blush must send out privacy Notices . GDPR applies in relation to the information they gather, store and use about trustees (if they are their agent) and trust beneficiaries who are natural persons (e.g. not charities or other organisations). PRs and trustees will collect and store the personal data of beneficiaries supplied at least initially by the deceased or settlor and so will be data controllers. They will owe duties to beneficiaries as data subjects.

6. While obviously you will treat trustees, executors, administrators and PRs for whom you act in the same way as other clients it is important to remember that they themselves will be "processing" personal data of beneficiaries and so will be data controllers too. They will need advice and guidance.

7. GDPR doesn't apply to the personal data of deceased persons [recital 27 GDPR] however the information held will still be subject to the common law duty of confidentiality owed to a settlor or testator post death.

8. Same rules apply even if you are acting pro-bono or voluntarily as trustee, agent or advisor as lack of remuneration does provide an exception in the private client world because acting as trustees or PRs are not regarded as purely personal activities [Article 2(2)(c), recital 18, GDPR].

Statutory duties

9. Article 5, GDPR sets out several principles that data controllers and processors must comply with when processing personal data. These are the core obligations and will form the basis of any claim for breach of statutory duties. These you know and are, thankfully, self-explanatory:

   9.1. Data minimisation to what is necessary in relation to the purposes for which it is processed. And personal data must not be kept in a form which permits identification of data subjects for longer than is necessary for the purposes for which the data is processed.

   9.2. Accuracy. Personal data must be accurate and, where necessary, kept up to date. Every reasonable step must be taken to ensure that data which is inaccurate, having regard to the purposes for which it is processed, is erased or rectified without delay.

   9.3. Integrity and confidentiality. Personal data must be processed in a manner that ensures its subject to technical and/or organisational security measures to protect against unauthorised or unlawful processing and against accidental loss, destruction or damage.

   9.4. Accountability. The data controller is responsible for, and must be able to demonstrate, compliance with the other data protection principles. Record-keeping is likely to be key.

10. These next two duties present problems for trustees and solicitors because the personal data they control and the purpose behind the processing will often be dictated by a third party; the settlor. Beneficiaries may be unaware that their personal data is being controlled by the trustee or solicitor and they may not fully understand the purpose behind the processing, or the third party may not wish the data subject to know. As yet, no precedents exist:

   10.1. Personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. This is because data subjects have a right to receive information about the identity of the data controller and the nature of the processing, whether or not their personal data is being processed and, if so, the nature of and purpose behind processing,

and any personal data breach when that breach is likely to result in a high risk to their rights and freedoms.

10.2. Process limitation. Personal data must be collected only for specified, explicit and legitimate purposes. It must not be further processed in any manner incompatible with those purposes. Further processing of the data beyond that which was originally anticipated is only permitted as long as the new processing activity is not incompatible with that original purpose. Further processing of personal data for a purpose that is incompatible with the original purpose is only permitted if the data subject consents to this new processing activity.

Compliance

11. The processing of personal data by PRs and trustees can only be lawfully carried out if [Article 6, GDPR]:

11.1. The data subject has given their consent to the processing of their data for one or more specific purposes. In most cases, personal data about beneficiaries will be supplied by the settlor or testator or gathered without beneficiary consent. Consent is therefore unlikely to be a ground that could be used by trustees and it adds additional obligations on the data controller and gives the data subject more rights.

11.2. Legal or contractual obligations have arisen; it is necessary for compliance with a legal obligation to which the data controller is subject. This is most relevant legal ground for processing personal data is likely to be that trustees are legally obliged to hold information about the beneficiaries (and, conceivably, other family members or individuals who had a relationship with the settlor) as part of their duties in drafting or administering the will, settlement or trust.

12. Processing data about a beneficiary's race, ethnic origin, politics, religion, trade union membership, genetic and biometric data, health, sex life or sexual orientation is special category data in GDPR [Article 9, GDPR]. Trustees and PRs may hold such information e.g. reference to addictive traits of the settlors children may be written in a letter of wishes asking that no funds out of a discretionary trust are made while these problems persist.

13. In the private client world one of these conditions must apply before you process this data:

    13.1. Beneficiary consent. Sometimes applicable.

    13.2. The processing is necessary to protect the vital interests of the beneficiary or of another person where the beneficiary is physically or legally incapable of giving consent.

    13.3. The processing is necessary for the establishment, exercise or defence of legal claims. Often the reason information of this nature is given is to assist in the event that a will is challenged.

    13.4. The processing is necessary for reasons of substantial public interest, so long as this is proportionate to the aim pursued, respects the essence of the right to data protection and there are safeguards in place to protect the beneficiary's rights and interests. Arguably there is a substantial public interest in ensuring the proper administration of trusts and estates.

14. Trustees may have access to this type of sensitive data about beneficiaries, other family members and individuals with whom the settlor had a relationship from letters of wishes and trust documents. This information is often essential, and it is arguable that it is in the public interest to see that the wishes of a settlor are followed as closely as possible, or that the processing is necessary to establish beneficiary rights, or it is necessary to support trustees' decision-making.

15. A further issue is that trustees or PRs may not even know that they hold the special category data until the letter of wishes is opened. This raises a question of what they should do in response to a data breach or subject access request before they have seen the letter of wishes. The ICO may produce guidance on this and other unexplored issues in the future especially as it is an area that pension trustees have to grapple with, not just trustees of private trusts.

Trust law and the Londonderry principle, legal professional privilege, subject access requests,

16. Pursuant to trust law beneficiaries have a right to information about a trust that currently benefits, or is in the future likely to benefit, them. Adult beneficiaries with an interest in possession under a trust, e.g. a life interest, are entitled to know of the existence of the trust, and of the nature of his interest under it [***Brittlebank v Goodwin*** (1868) LR 5 Eq 545]. This right is limited to the right to due administration of the trust if it is discretionary. The extent of disclosure and the exercise of this discretion by trustees and their solicitors is a litigious area. These rights, and the precedents on trust law, do not sit comfortably next to the GDPR requirements of providing beneficiaries with information.

17. In ***Dawson-Damer v Taylor Wessing LLP*** [2017] EWCA Civ 74 the court allowed the trust beneficiaries' subject access request. Beneficiaries were disgruntled when they had been excluded from a class of discretionary beneficiaries (unfortunately that is not uncommon!). The solicitors argued that they should not have to comply with the request because (i) the request was made a for a collateral purpose – hostile litigation in Bahamas (ii) the exception for legal professional privilege would be Bahamian legal professional privilege since the trustees were Bahamian and it would be disproportionate to expect English solicitors to get to grips with the niceties of the Bahamian system (iii) legal professional privilege is extended in relation to trusts by the ***Londonderry*** principle which states that trustees do not have to disclose information if it would reveal the reasons for the exercise of their discretions.

18. In rejecting all of these arguments the Court of Appeal held (i) the DPA 1998 (pre-DPA 2018) does not contain an exception for documents not disclosable to a beneficiary of a trust under trust law principles (ii) that the DPA 1998 does not limit the purpose for which a data subject may request their data; thus the reason behind the request for access is irrelevant. This means that trustees cannot refuse to supply beneficiaries with details of the personal information they hold about them simply because they believe that the beneficiary has a collateral purpose such as mounting hostile litigation (iii) It is UK legal professional privilege not Bahamian (iv) Legal professional privilege is not extended by the ***Londonderry*** principle.

19. Unfortunately, the same principles are likely to apply under the GDPR. Having said that the ***Londonderry*** principle was addressed when the GDPR was going through Parliament and the government's position was that Article 15(4) of GDPR already prevented disclosure of material that would inform the beneficiaries of the reasons for the exercise of trustee discretion. This was because the government considered that the rights and freedoms of others referred to in Article 15(4) includes the rights of both trustees and beneficiaries.

20. Overall this is a troubling binding judgment and with the internet, publicity over GDPR raising awareness, much more is information is in the public domain than many solicitors, trustees and PRs would like.

21. However, GDPR makes a distinction between data provided by the data subject and data provided by the settlor or third party. Where data has been provided by someone other than the beneficiary, trustees and solicitors may be able to rely on confidentiality obligations owed to the settlor or other beneficiaries to limit what they disclose [Article 14(5)(b) and (d), GDPR].

However, the court's approach to this limitation under the GDPR is uncertain [see ***Lewis v Tamplin*** [2018] EWHC 777 (Ch)] as GDPA 2018 [paragraph 17, schedule 2] includes an exemption from the GDPR obligation to provide data subjects with information about personal data that is processed where a claim for legal professional privilege could be maintained in legal proceedings.

22. Trustees and PRs could possibly argue in some cases (although not all) that the provision of information to all beneficiaries would be disproportionate. There is still no guidance from the ICO on the extent when Privacy Notices do not have to be supplied to beneficiaries, so it is prudent to provide the Privacy Notice and the information required unless there are clear grounds not to.

Privacy Notices

23. GDPR requires data controllers to give information to data subjects ("Privacy Notices"). This must include contact details of the data controller, the purposes for which the data will be processed, the ground on which data is held, the source of the data where it is acquired from a third party, the period for which the data will be held, the right to complain to the ICO and the rights of the data subject to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject and to object to processing as well as the right to data portability.

24. It is difficult to see that PRs will have any excuse for not providing the Privacy Notice to beneficiaries. Article 14(3) requires information to be provided within a reasonable period after obtaining the personal data but at the latest within one month. Where the data obtained is used to communicate with the data subject at the latest this should be provided as at the time of the first communication to that data subject. Put simply when trustees, PRs and their solicitors first contact a beneficiary they must provide a fully complaint Privacy Notice.

25. Some good news is that if the testator is alive then there is no obligation to provide the Privacy Notice (or comply with the GDPR in respect of named beneficiaries in a will) on the basis that it would be a breach of the duty of client confidentiality [Article 14(5) GDPR] until the testator dies and the will becomes a public document. Until then the trustees, executors, administrators, PRs, and beneficiaries are nothing but names on an ambulatory document; as it is always revocable and of no legal effect until death.

Top tips for Privacy Notices for trustees & PRs

26. Rather than identify all PRs and/or trustees, give the contact details of just one representative PR or trustee.

27. The source of the personal data usually comes from the settlor or testator (i.e. a third party). The Privacy Notice should explain that the personal data set out in the relevant trust, will, letter of wishes (etc) or that this information was gathered from the attendance notes made or questionnaires completed when the settlor or testator gave instructions for the trust/will to be drafted.

28. The purpose behind the processing only needs to go into detail if it is not the purpose for which the personal data was obtained. Usually personal data is obtained in the private client context to:

    28.1. Verify beneficiaries' identities

    28.2. Correspond with the beneficiary about distributions and trust or estate accounts

    28.3. Assessing financial or physical needs of the beneficiary when deciding whether funds should be distributed to them

    28.4. Seeking consents to an appropriation

    28.5. Completing tax eturns and certificates of tax deducted

28.6. Meeting regulatory requirements required by the trust registration scheme, CRS or FATCA

28.7. Checking compliance wih undertakings in relation to IHT conditional exemption

28.8. Bankruptcy searches

28.9. Enquiries about missing beneficiaries, PRs, creditors or even the Deceased, including the use of search agents

28.10. Monitoring beneficiaries in relation to occupation rights

28.11. Assessing life expectancy of life interest beneficiaries for actuarial or tax indemnity purposes.

29. Usually it is sufficient to state that the data will be used to communicate with data subjects, establish entitlement and comply with legal and regulatory requirements in the due administration of the trust or estate. Only if the information is to be used for another purpose is it necessary to inform the beneficiaries of the detail.

30. Third party sharing of information can again be broadly stated as "sharing with those providing professional services to the estate or trust, HMRC and regulatory bodies".

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Worked scenarios

(i) Assessing what personal data is held and when to limit it.

31. Henry and Isobel are trustees of the Jeffries Family Discretionary Trust. The settlor is Kenneth Jeffries who defined the discretionary class as the lineal descendants of his father and mother and their spouses. Kenneth has written a letter of wishes indicating that he would like his four children and their children to be the principal beneficiaries and that the other members of the discretionary class should only benefit if his children and grandchildren have all died. He does not envisage that any other beneficiaries will ever benefit. Rather than employing a genealogical researcher to track down all Kenneth's second cousins (who he believes are settled in Queensland, Australia), the trustees decide to limit their record keeping to Kenneth's immediate family. This complies with the purpose limitation and data minimisation principles of the GDPR. The trustees ask Kenneth to keep them informed if any of his children or grandchildren move house or get married. After Kenneth dies, they contact all Kenneth's children and grandchildren (using a privacy notice) and ask them to let them know if any of their personal details change. They have to gather this personal information to comply with their obligations to register the trust with HMRC's Trust Registration Service in any case. If all Kenneth's children and grandchildren were to die, the trustees would have to reconsider their policy about what data they process.

(ii) Processing special category data

32. In his will Leonard gave his second wife, Mandy, a right to occupy his home for life. The will states that the right to occupy will terminate if Mandy remarries or cohabits. On termination of the right to occupy, the property passes to Leonard's three children from his first marriage. Leonard's PRs suspect that Mandy is cohabiting with her friend Norman. They employ a private detective to

investigate Mandy's activities. Leonard's daughter has already passed on evidence that Norman is living with Mandy at the house. The PRs decide that processing the information about Mandy's sex life, although it is special category data, is justified to protect the rights of Leonard's children. However, it could be argued that hiring a detective to gather the information is not proportionate and wrongfully intrudes on Mandy's rights and freedoms.

33. Oscar established a life interest trust for his wife. On her death the trust assets are to be distributed to his grandchildren (excluding stepchildren and illegitimate children). Oscar has obtained information from his daughter-in-law that indicates that one of his grandchildren is not genetically linked to him. The trustees distribute the trust fund but exclude the grandchild from benefit. The grandchild challenges the trustees' decision and requests that they disclose what data they hold about him. The trustees argue that they were holding the genetic data to enable them to distribute the trust fund according to the terms of the trust deed. The grandchild lodges a complaint with the ICO. To be consistent with the accountability principle, the trustees will want to make sure that they have a robust explanation for their actions and appropriate records, including their reasoning, as to the lawful basis for processing.

(iii) Data subject access requests

34. Quentin and Roger are trustees of the Taylor Family Discretionary Trust. One of the reasons for establishing the trust was that the settlor feared that his son, Unwin, might gamble away his inheritance. The settlor wrote a letter of wishes giving details of Unwin's activities and patterns of behaviour (including details of previous criminal convictions for possession of drugs). The letter asks Quentin and Roger to treat Unwin's sister, Xan, and her children, as the primary beneficiaries and that Unwin should only benefit if there is evidence that he has mended his ways. Unwin sends Quentin and Roger a data access request which they refuse claiming they suspect Unwin will make

a breach of trust claim against them. They are adamant that Unwin will not receive anything from the trust fund as he shows no signs of changing his lifestyle. Quentin and Roger argue that, if they provide full details to Unwin (including their deliberations about his lifestyle), this is likely to render impossible or seriously impair the achievement of the objectives of the data processing (that is, making trustee decisions) (Article 14(5)(b), GDPR). The court subsequently needs to consider whether to order Quentin and Roger to give Unwin details of the information they hold about him. This will include consideration of whether details of their deliberations at trustee meetings should be disclosed. These deliberations, since they contain statements of opinion, are also personal data. The court would have to balance Unwin's right to the underlying information against the effective making of trustee decisions (where, arguably, free and candid discussion might be compromised if there were a risk of disclosure).