

Response from The Market Research Society (MRS)

Ministry of Justice's Call for Evidence on the current data protection framework

Preamble

- With members in more than 70 countries, MRS is the world's largest association serving all those with professional equity in provision or use of market, social and opinion research, and in business intelligence, market analysis, customer insight and consultancy.
- MRS has a diverse membership of individuals at all levels of experience and seniority within agencies, consultancies, support services, client-side organisations, the public sector and the academic community.
- It also serves MRS Company Partners – agencies, suppliers of support services, buyers and end-users – of all types and scale who are committed throughout their organisations to supporting the core MRS values of professionalism, research excellence and business effectiveness.
- In consultation with its individual members and Company Partners, MRS supports best practice by setting and enforcing industry standards. The commitment to uphold the MRS *Code of Conduct* is supported by the Codeline service and a wide range of specialist guidelines.
- MRS contributes significantly to the enhancement of skills and knowledge by offering various qualifications and membership grades, as well as training and professional development resources.
- MRS enables its members and Company Partners to be very well-informed through the provision of a wide range of publications, information services and conferences.
- MRS offers many opportunities for meeting, communicating and networking across sectors and disciplines, as well as within specialisms.

- As 'the voice of market research', MRS defends and promotes research in its advocacy and representational efforts.
- Through its media relations and public affairs activities, MRS aims to create the widest possible understanding of the process and value of market, social and opinion research, and to achieve the most favourable climate of opinion and legislative environment for research.

Introduction

MRS welcomes the possibility offered by the Ministry of Justice to respond to its call for evidence on the current data protection framework. We have noted the questions asked and used them to guide the content of this response.

MRS confirms that the contents of this paper can be attributed to MRS.

Response to Call for Evidence

Market, Social and Opinion Research

Research in itself does not seek to change or influence opinions or behaviour. Unlike direct marketing, advertising or other commercial communications, it does not seek to promote the aims or ideals of those who conduct or commission it. While **research** is used by marketers to test their products or messages, it **is not a commercial communication**.

Market, social and opinion research plays a key role in helping businesses and other constituencies better understand consumers, customers and citizens in developing goods and services, and is essential for economic efficiency, innovation and progress. Social and opinion research is widely used by public bodies to understand citizens' preferences, measure key performance indicators and used for improving educational, healthcare and police services via government studies.

The fundamental principles of research, embodied in the MRS Code of Conduct are:

- Research must be conducted with the voluntary participation of respondents, based on the principle of informed consent.
- Respondents must not be harmed or disadvantaged as a result of participating in a research project; and

- Personal data collected for research purposes must not be used for other purposes.

These principles mirror the legislative requirements introduced by the Data Protection Directive.

Regulating the business of research

The latest MRS annual survey ¹ of the UK market research industry showed that total market research industry revenue during the 12 months to December 2009, reaching an estimated total of £2.076bn, during which an estimated 15 million research interviews were undertaken. After the US, the UK is the second largest market research sector in the world².

Research in the UK has been regulated by MRS since 1954, when the first MRS Code of Conduct was published for MRS members. Today the MRS Code, last revised and reissued in April 2010, is binding on over 6,500 individual MRS members and over 400 MRS Company Partners.

The MRS Code of Conduct is supported by disciplinary regulations for MRS members and a complaints procedure for MRS Company Partners. Typically MRS receives between 60 and 100 complaints each year.

Of these, about 15 to 25 complaints require some form of investigation which may result in disciplinary action.

Information on the number of complaints over the last three years is set out in annex 1.

MRS also responds to over 500 queries a year via the MRS Codeline advisory service. Codeline is a free and confidential query service on the MRS *Code of Conduct*, associated guidelines and related legislation. Typically 25% of queries directly relate to the Data Protection Act 1998.

MRS has worked extensively with the Information Commissioner's Office since the introduction of the Data Protection Act 1998, to provide relevant guidance on the implications of the Act on research activities.

All the resulting documents were given a supportive foreword (originally from Elizabeth France and then from Richard Thomas - we have not updated the guidance since Christopher Graham took

¹ The Market Research Society, *Survey of the UK Market Research Industry 2009*

² ESOMAR Global Market Research Report 2010

office). The following links show the breadth of guidance which we have agreed with ICO over the years:

<http://www.mrs.org.uk/standards/downloads/revised/legal/The%20Data%20Protection%20Act%201998%20and%20Market%20Research.pdf>

<http://www.mrs.org.uk/standards/downloads/revised/legal/processes2002.pdf>

http://www.mrs.org.uk/standards/downloads/revised/legal/data_protection_social.pdf

Other MRS data protection guidelines can be found here:

<http://www.mrs.org.uk/standards/dp.htm>

In this context MRS has been able to provide a large degree of legal certainty for the research sector about the application of the Act to their business. Whilst MRS recognises the need for some updating of the Act to reflect modern technology, the certainty of the current framework should not be overlooked.

MRS has made a significant investment in time and resources since the introduction of the Act to ensure an understanding and appreciation by the research sector of the impact of data protection. In addition to providing detailed guidance on the Act, MRS also provides training courses, standards and legal briefings, and members' evenings. This year MRS is conducting a number of regional events on the theme of data protection and data security. The low level of complaints about research in terms of those received by MRS but also those received by the Information Commissioner's Office (which has never had to take action against research) reflects the high level of understanding and adherence to the Act by the research sector.

Having a clear understanding of the data protection act allows businesses to make decisions about data collection and processing with confidence in their legal responsibilities. This decision also may require investing resources in data processing capacity and technology. Significant changes to the Directive, and hence the Act, would inevitably lead to a long period of uncertainty and transition for the research sector and others involved in the marketing communications sector. This could have a negative impact on investment in research technology, which is essential to ensuring that the UK research sector continues to be strong and would be detrimental to the overall knowledge economy which is an essential and growing part of the UK economy in the 21st Century.

Key areas of concern in the present review

Consent

The first principle of the MRS Code of Conduct is:

- Researchers shall ensure that participation in their activities is based on voluntary informed consent.

Therefore researchers rely heavily on consent as the basis for fair and lawful processing. Much of that consent is very clear and unambiguous – where a researcher invites a data subject to participate and they agree to do so or where a direct question is asked and an answer is spontaneously and voluntarily given.

In some cases researchers may rely on the second data principle to process data to invite data subjects to participate in a research project. For example, in the case of customer satisfaction research, an individual whose data has been collected in order to obtain a product or service may be invited to give their views on the quality of service they have received. It has been accepted by the Information Commissioner's office that processing data in this way (i.e. inviting them to participate in research) is not incompatible with the purposes for which the data was collected (provision of a product or service).

A number of major social research projects also rely on the ability to contact individuals whose data may have originally been collected for non-research purposes. Examples of this include:

- Victims of Crime surveys, conducted for the Home Office or for local police forces; and
- The GP-Patient Survey for the Department of Health, which interviews patients who have visited their GP in the preceding six months.

MRS does not agree with suggestions that current requirement in the Directive for "unambiguous consent" of the data subject be changed to always require "explicit consent". Unambiguous consent requires data subjects to clearly understand the data that is being collected about them, who is responsible (i.e. data controller), who will have access to it and what it will be used for. MRS considers this level of consent to be sufficient to ensure that data subjects (respondents in the case of research projects) and their data are adequately protected. In many cases, unambiguous consent is obvious – in research a respondent to a research project provides the answers to the questions

they are asked, in a commercial context a purchaser of a book from an online store for example is asked to give the address where it will be delivered. These two examples do not require the asking of a particular question to obtain permission for the processing of data, but the consent of the data subject is clear nonetheless from the circumstances of the data collection.

Only in cases where data processing is not obvious or where further processing is intended at a later date would additional information need to be provided and consent obtained by the asking of a detailed question.

Insisting on explicit consent for every data collection event will embed an “always click yes” mentality in data subjects. By treating all consent in a formulaic way the value of consent overall is diminished and may in fact mean that data subjects are less protected. Further, requiring explicit consent in all cases would place disproportionate burdens on both the data subject and the data controller. Such a burden is restrictive and not enabling – it impedes the flow of data without a commensurate increase in the protection of the rights of the data subject. For research, requiring explicit consent for every data collection event would reduce response rates, introduce demographic bias (historically some social groups are more likely to ‘opt out’) and thus reduce the robustness and reliability of any resulting research data.

Protection of personal data of Minors

Although neither the Directive nor the Act explicitly contain provisions for the protection of minors, MRS has always recognised that children and young people are vulnerable members of society and the MRS Code of Conduct contains a number of specific rules to offer children additional protection. For example, the consent of a parent or a responsible adult acting in the place of a parent is required before a research interview can be conducted with a person under the age of 16. Separate MRS children’s guidelines also prohibit research with minors on products that are illegal for the age group, and set out additional criteria which should be followed to provide maximum protection for respondents that are under 16.

It should also be noted that there are circumstances where the asking of parental consent may harm or adversely affect children, for example, research with users of helpline services such as Childline. The MRS Code of Conduct makes provisions for this by the waiving of parental consent requirements in limited circumstance subject to ethical review and approval of the MRS Market Research Standards Board.

MRS Guidelines for Research with Children and Young People are available here:

<http://www.mrs.org.uk/standards/children.htm>

The revised draft 2010 version of the guidelines is available here:

<http://www.mrs.org.uk/standards/consultation.htm>

MRS, by having specific rules governing research with children, recognises that children and young people are valuable members of society and have the right to participate in society, including participating research projects relevant to them.

Persons under 18 may leave school, marry, join the Armed Forces or attend university and are autonomous persons. The UN Convention on the Rights of the Child also guarantees right to express views to participate in society:

Article 12: States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 13: The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

If additional measures were to be introduced, the need to address concerns for the protection of children and young people must be balanced with their rights of expression. MRS recommends that if additional restrictions were to be introduced that these mirror the self-regulatory rules already in place in Europe, the majority of which require consent of a parent or responsible adult acting in the place of a parent with under 14s. As explained above the MRS Code of Conduct requires such consent before interviewing persons under the age of 16.

It is the view of MRS that if society is to properly prepare children and young people for the transition from childhood to adulthood that the transition should start at 16 at the latest not 18.

“Profiling”

Article 15 of Directive 95/46/EC provides that *Member States shall grant the right to every person not to be subject to a decision which **produces legal effects concerning him** or **significantly affects him***

and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc. [**emphasis added**] Processing of personal data for research is not designed to produce legal effects concerning, or significant effects on, a data subject.

Profiling is not defined in any current legislation. Some discussions referred to the current very broad definition used by the Council of Europe in its *Draft Recommendation on the Protection of Individuals with Regard to Automatic Processing of Personal Data in the Context of Profiling*, published on 3 June 2010:

“Profiling” means an automatic data processing technique that consists of applying a “profile” to an individual, namely in order to take decisions concerning him or her; or for analysing or predicting personal preferences, behaviours and attitudes.

“Profile” refers to a set of data characterising a category of individuals that is intended to be applied to an individual.

The unintended consequence of the broad definition is that many research activities would be included within the definition of “profiling”. There are many examples of profiling used in research, including some particularly important European research projects. Large public sector social surveys use statistical techniques for stratification to improve the quality of the sample which could be described as “profiling” depending on the definition. If legislators were to decide to adopt the Council of Europe definition and introduce the restrictions being proposed by the Council of Europe this could have a huge and detrimental impact on the quality and representativeness of research results; key characteristics for research to be robust for evidence based policy making, an important facet of European policy development. This could have unforeseen impacts on significant research projects such as Eurobarometer and the Labour Force survey.

The Council of Europe has since indicated that procession of data for statistical purposes would not be caught by this definition as this has covered by a separate 1997 recommendation. However, as only a proportion of research is based in statistics this assurance provides limited exemption to the sector, and fails to address the key issue in that research is not a commercial activity and as such should not be subject to the broader “profiling” restrictions meant for commercial communications.

MRS urges legislators not to restrict profiling for purposes such as market, social and opinion research, which do not produce legal effects concerning data subjects or significantly affect data

subjects. If profiling restrictions were to be introduced, the definition of profiling used should make clear that commercial profiling activities are being restricted, not other legitimate profiling activities such as research. Simply banning a single form of automated decision making such as profiling, without reference to the effects of that technique on data subjects, is not proportionate to the balance of risks and benefits brought by the use of that technique.

Data Controller and Data Processor

MRS supports a clarified definition of data controller which would focus on the decision to process data for specified purposes (as is the case in the UK) as opposed to control of a particular computer or filing system (as in the case in other Member States such as Belgium). This would go some way to addressing the issues connected to new processing arrangements, such as cloud computing, and would restate the responsibility of data controllers to assess the security of such systems before electing to process personal data in them. Clarification of this definition would also serve to increase harmonisation across the Member States.

Clarification of the responsibility of a single data controller would also ensure the application of identical standards of processing and security across multiple systems rather than relying on the co-ordination of standards of processing and security by multiple controllers.

In the research context, data may be processed by a telephone centre, a website and by research analysts as part of the same project. Each section or part may work within separate entities and hold data in separate systems. Research quality and process standards (such as BS ISO 20252:2006³) and ethical standards (codes of conduct and practice) ensure that each aspect is managed consistently and that respondents are protected.

Personal Data

MRS recognises that the interpretation of Personal Data also diverges across Member States. In practice however, this is not usually an issue in research. The MRS Code of Conduct, like other research codes, provides a guarantee of confidentiality and anonymity to respondents, independent of the provisions of the Data Protection Act 1998. Even though direct identifiers (such as name, address or other contact details) are usually separated from responses at an early stage, researchers operate under the assumption that they are processing personal data and are very

³BS ISO 20252:2006 Market, opinion and social research – Vocabulary and service requirements



cautious in their interpretation of what information may lead to the identification of a respondent when reporting research findings to a client or publishing a research report.

For further information please contact Debrah Harding (Debrah.harding@mrs.org.uk) at The Market Research Society (MRS)

The Market Research Society
15 Northburgh Street
London
EC1V 0JR

Tel: + 44 (0) 20 7490 4911
Fax: + 44 (0) 20 7490 0608

For more information on MRS and its activities visit: www.mrs.org.uk

Annex 1: MRS Complaint Statistics

