Controller-Processor Agreement between barristers and chambers

Purpose:	To provide a basic precedent for data processing between Chambers and their members for chambers' management.
Scope of application:	All practising independent barristers and chambers. Addresses the laws as applicable in England and Wales.
Drafted by:	The Information Technology Panel
Last reviewed:	March 2023
Status and Effect:	**Please see the notice at the end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4. and neither the BSB nor bodies regulating information security, nor the Legal Ombudsman is bound by any views or advice expressed in it.**

1.   This is a basic precedent for internal use within chambers/management services company for the processing of personal data between members and their Chambers for compliance with essential requirements under the Data Protection Laws.

2.   For further precedents for processing data between:

(a)   Members of Chambers and their Pupils and Devils, see here.

(b)   Barristers and their Chambers see here.

3.   While this Precedent focuses on the position under UK law, to assist those who may be tasked with drafting arrangements under the EU GDPR it references equivalent

provisions under both regimes and refers to both as 'the GDPR regimes' where appropriate. The Data Protection Act 2018 (DPA 2018), implements a limited number of additional provisions into UK data protection law and regard should be had to the provisions of the DPA 2018 in so far as relevant to the specific arrangements.

4.   In relation to the contract provisions required, there are significant similarities between:

(a) the General Data Protection Regulation, Regulation (EU) 2016/679 (**EU GDPR**) regime (which was applicable under UK law until the end of the Brexit implementation period at 11 pm UK time on 31 December 2020 and remains applicable in EEA states), and

(b) the United Kingdom General Data Protection Regulation, Retained Regulation (EU) 2016/679 (**UK GDPR**) regime (applicable under UK law from the end of the Brexit implementation period on 31 December 2020).

5.   UK data protection law is a complex and principle based regime, the text of which lacks clarity in a number of areas and upon which there is currently limited guidance from regulators. Consequently, relevant regulators and/or courts may ultimately reach different views as to the interpretation of the regime to those set out in this precedent. Specialist advice should be sought when tailoring these provisions for a particular scenario. Guidance has been issued by the UK's Information Commissioner's Office (ICO) as well as by European Data Protection Board (EDPB) under the EU GDPR (which is likely to remain highly influential in the UK under the UK GDPR given its similarities with the EU GDPR).

6.   The precedent presumes both the Data Controllers and Data Processors are situated and/or processing data in the UK. If the parties are not in the UK and/or do international work, consideration will be required to implement additional clauses to comply with transfer of data outside and to the UK, and from other EEA Member States, in compliance with Data Protection Laws in particular Chapter V of the UK GDPR.

7.   Further, Chambers with annexes/branches outside the UK and/or do international work, may need to implement additional clauses to comply with transfer of data outside the UK, and from other EEA Member States, in compliance with Data Protection laws in particular Chapter V of the UK GDPR.

Agreement applying to the processing of personal data made between

(1) [Name of [Head of Chambers/MSC]] as [Head of Chambers ("the Head of Chambers")/Management services company ("MSC")].[1]

(2) Individual barristers, [associate members], door tenants, squatters and pupils[2] of Chambers who severally confirm their agreement to these terms ("the Individuals").

RECITALS

Whereas:

(a) This agreement records the agreement of the Head of Chambers/MSC on the one hand and the Individuals on the other hand that each party shall comply with the requirements of the Data Protection Laws when acting as a processor for the other.

(b) The Individuals are Data Controllers for personal data relating to legal and other services performed by them.

(c) The Individuals use facilities (including practice management, document management, internet and communications facilities) provided by the Head of Chambers/MSC in order to assist them, and in relation to these facilities the Head of Chambers/MSC acts as a Data Processor.

(d) The [Head of Chambers/MSC] is a Data Controller in respect of personal data relating to the management of Chambers' business, such as staff employment, tenancy and pupillage applications, and monitoring for equality and diversity and work allocation [ADD ANY OTHERS].

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[1] There are of course various ways in which Chambers may be set up. This agreement is drafted on the assumption that the Head of Chambers (perhaps by means of staff he or she employs) is formally the provider of services to members, and that members assist in the management of chambers from time to time, for example by participating on committees. Other arrangements (which might include the involvement of a service company) will require this agreement to be appropriately amended.

[2] Second six and later.

(e) Insofar as they assist the Heads of Chambers/MSC with the above matters by participating on Chambers' committees or otherwise, the Individuals act as Data Processors.

TERMS

It is agreed as follows:

1.   In this agreement

(a) Chambers is [fill in]

(b) "Data Protection Law" means:

(i)   the Data Protection Act 2018 (**Data Protection Act**);

(ii)   the **UK GDPR**, a version of the EU's General Data Protection Regulation, Regulation (EU) 2016/679 (the EU GDPR) incorporated into UK law (with various amendments made by Brexit legislation) following the end of the Brexit implementation (or 'transition') period at 11pm on 31 December 2020 (Retained Regulation (EU) 2016/679, the **UK GDPR**);

(iii) the General Data Protection Regulation, Regulation (EU) 2016/679 as it forms part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal) Act 2018 (including as further amended or modified by the laws of the United Kingdom or of a part of the United Kingdom from time to time) (the **EU GDPR**);

(iv)   any laws which implement or supplement any such laws; and

(v)   any laws that replace, extend, re-enact, consolidate or amend any of the foregoing (whether or not before or after the date of this Agreement).

(c) "Personal Data" means personal data within the meaning of Data Protection Laws (in particular Article 4.1. of UK GDPR) which is processed in relation to any of the purposes identified in Recitals (b) and (d) above;

(d) "Data Controller" means any party insofar as they are acting as a controller within the meaning of the Data Protection Laws, in particular UK GDPR Article 4.7;

(e) "Data Processor" means any of the Individuals insofar as they are acting as a processor within the meaning of the Data Protection Laws in particular UK GDPR Article 4.8;

(f) "processing" shall have the meaning set out in the Data Protection Laws in particular UK GDPR Article 4.2.

2.   Each Data Processor will process the personal data only on documented instructions[3] from a Data Controller, including with regard to transfers of personal data to a third country or an international organisation, unless required to do so by UK law to which the Data Processor is subject; in such a case, the Data Processor shall inform the Data Controller of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest.

3.   Each Data Processor will ensure that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality.

4.   Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the Data Controller and Processors shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk.

5.   Each Data Processor may engage other processors to process Personal Data provided that they have informed each relevant Data Controller of any intended changes concerning the addition or replacement of other processors, thereby giving the Data Controller the opportunity to object to such changes. Where a Data Processor engages another processor for carrying out specific processing activities on behalf of the Data Controller, the same data protection obligations as set out in this agreement must be imposed on that other processor by way of a contract.

6.   Taking into account the nature of the processing, each Data Processor will assist the Data Controller by adopting appropriate technical and organisational measures,

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[3] If an instruction is initially given orally, the receipt of the instruction should be subsequently recorded and confirmed by email.

insofar as this is possible, for the fulfilment of the Data Controller's obligation to respond to requests for exercising the data subject's rights laid down in the Data Protection Laws (in particular Chapter III of UK GDPR).

7.   Each Data Processor will assist the Data Controller in ensuring compliance with the obligations pursuant to the Data Protection Laws, in particular UK GDPR Articles 32 to 36 (dealing with Security of processing, Notification of data breaches, and Data Protection impact assessments (if any)), taking into account the nature of processing and the information available to the Data Processor. Without prejudice to the generality of the foregoing the Data Processor will maintain appropriate technical and organisational measures to protect Personal Data against accidental, unauthorised or unlawful destruction, loss, alteration, disclosure or access.

8.   The processing of Personal Data by Chambers on behalf of an Individual and by an Individual on behalf of Chambers will continue for so long as Personal Data is processed in relation to any of the purposes identified in Recitals (b) and (d) above.

9.   At the choice of the Data Controller, each Data Processor will delete or return all the Personal Data to the Data Controller after the end of the provision of services relating to processing, and will delete or return existing copies unless the applicable national laws or professional regulatory codes of conduct requires storage of the Personal Data, save in the circumstances set out in clause 10 below.

10.   If two or more Data Controllers give conflicting instructions to a Data Processor in respect of Personal Data in relation to which they are both Data Controllers, the Data Processor shall proceed as follows:

(a) As regards instructions from a Data Controller to modify, delete or anonymise such Personal Data, the Data Processor will not modify, delete or anonymise such Personal Data until a point in time is reached at which the same instruction has been given by all the Data Controllers who are controllers of that Personal Data. The Data Processor will keep a record of all instructions to modify, delete or anonymise Personal Data which have not been complied with. If the instruction in respect of such Personal Data is to delete or anonymise such Personal Data, the Data Processor will not be a Data Processor in relation to the Data Controller that gave that instruction after the giving of that instruction and the Data Controller will cease to be a Data Controller in respect of such Personal Data. If the instruction is to modify such Personal Data, the Data Processor may create a separate copy of such Personal Data modified as instructed.

[Alternative Clause 10(a):

(a) As regards instructions from a Data Controller to delete or anonymise such Personal Data, the Data Processor will inform any other Data Controllers that they are required to copy such Personal Data to their own separate systems and the Data Processor will carry out the instructions once this copying has taken place.

(b) As regards any other conflicting instructions, the Data Controllers will consult the Head of Chambers, and will thereafter give an instruction to the Data Processor which reflects the recommendation of the Head of Chambers.]

11. Insofar as Individuals are joint data controllers within the meaning of the Data Protection Laws, in particular UK GDPR Article 26(1), unless otherwise agreed between the joint controllers each shall be individually responsible for ensuring that the processing each undertakes is in accordance with Data Protection Law, for ensuring so far as each is able the implementation of appropriate technical and organisational measures in accordance with Data Protection Law, and as regards the exercising of the rights of the data subject.

12. Each Data Processor will make available to each Data Controller all information necessary to demonstrate compliance with the obligations laid down in the Data Protection Laws, in particular UK GDPR Article 28 and allow for and contribute to audits, including inspections, conducted by the Data Controller or another auditor mandated by the Data Controller. The Data Processor shall immediately inform the Data Controller if, in its opinion, an instruction infringes any of the Data Protection Laws.

13. This agreement applies to the Individuals severally (not jointly).

[signatures as appropriate]