

## **Standardized 6(1)(f) Balancing Test Framework**

*This framework provides a set of non-binding guidance to assist controllers in performing the 6(1)(f) balancing test. Standardization of the process does not imply or guarantee access to personal data as the controller retains full discretion regarding the process and outcome of the balancing test.*

### **Step 1: Preliminary assessment of the validity of a request for personal data under 6(1)(f)**

The data controller responsible for a disclosure decision should make a threshold determination (without processing the underlying data) about whether the requestor has established an interest in the disclosure of personal data. This determination should consider at least the following elements:

- Is the identity of the requestor clear/verified?
- Has the requestor provided a legitimate interest in processing the data?
  - Interest must be specific, real, and present rather than vague and speculative.
  - An interest is generally legitimate so long as it can be pursued consistent with data protection and other laws.
  - Examples of legitimate interests include: (i) enforcement of legal claims; (ii) prevention of fraud and misuse of services; and (iii) physical, IT, and network security.
- Are the data elements requested necessary to the requestor's stated purpose?
  - Necessary means more than desirable but less than indispensable or absolutely necessary.
  - Consider whether less invasive means would achieve the same goal.
- Are the data elements requested limited and reasonable to achieve the requestor's stated purpose?
  - Each request should be evaluated individually (i.e. each submission should contain a request for data related to a single domain. If a submission relates to multiple domains, each must be evaluated individually.).
  - In addition, each data element in a request should be evaluated individually.

If the answer to any of the above questions is no, the data controller responsible for a disclosure may deny the request, or require further information from the requestor before proceeding to Step 2.

### **Step 2: Assessment of the underlying data requested**

The data controller responsible for a disclosure decision may evaluate the underlying data requested once the validity of the request is determined in Step 1. The purpose of Step 2 is to determine whether the Step 3 balancing test is required. Review of the underlying data should assess at least:

- Does the data requested contain personal data?
  - If no personal data, no further balancing required.

- If the requested data contains personal data, does the data originate in the European Economic Area (EEA)?<sup>12</sup>
  - If non-EEA data, no further balancing required.
- If the requested data contains personal data and originates in the EEA, or the controller does not differentiate based on the geographic location of the data, the controller should proceed to Step 3.

### Step 3: Apply balancing test<sup>3</sup>

The data controller responsible for a disclosure decision should evaluate at least the following factors to determine whether the legitimate interest of the requestor is not outweighed by the interests or fundamental rights and freedoms of the data subject. No single factor is determinative; instead the controller should consider the totality of the circumstances outlined below:

- **Assessment of impact.** Consider the direct impact on data subjects as well as any broader possible consequences of the data processing (e.g., triggering legal proceedings).
- **Nature of the data.** Consider the level of sensitivity of the data as well as whether the data is already publicly available.
- **Status of the data subject.** Consider whether the data subject's status increases their vulnerability (e.g., children, other protected classes)
- **Scope of processing.** Consider whether the data will be closely held (lower risk) versus publicly disclosed, made accessible to a large number of persons, or combined with other data (higher risk).
- **Reasonable expectations of the data subject.** Consider whether the data subject would reasonably expect their data to be processed/disclosed in this manner.
- **Status of the controller and data subject.** Consider negotiating power and any imbalances in authority between the controller and the data subject.

If, based on consideration of the above factors, the controller determines that the requestor's legitimate interest ***is not*** outweighed by the interests or fundamental rights and freedoms of the data subject, the data may be disclosed. The rationale for the approval should be documented.

If, based on consideration of the above factors, the controller determines that the requestor's legitimate interest ***is*** outweighed by the interests or fundamental rights and freedoms of the data subject, the request may be denied. The rationale for the denial should be documented and should be communicated to the requestor, with care taken to ensure that no personal data is revealed to the requestor within this explanation.

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<sup>1</sup> Note that per the Phase 1 EPDP Final Report, Contracted Parties may differentiate between registrants based on geographic location but are not required to do so.

<sup>2</sup> Contracted Parties may also consider whether the requested data originates from any other jurisdiction with applicable privacy laws that might impact disclosure.

<sup>3</sup> This analysis is based on legal advice from Bird & Bird regarding the current state of the law. Controllers will need discretion to adapt their approach to the balancing test in light of revised guidance or new legal requirements.