Freedom of Expression Turned On Its Head? Academic Social Research and Journalism in the European Privacy Framework

By

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Almost 30 years ago, Philip Strong noted that journalists and academic social researchers are both “professional students of the social world”. In pursuing this activity, each group finds it essential to gather and analyse a wide range of information, much of which relates to identified or identifiable individuals. Despite this shared need, it is often held that laws protecting such personal data both do, and should, regulate these actors in a radically divergent manner. Whilst the EU Data Protection (“DP”) Directive 95/46 requires that Member States grant broad derogations from DP laws for journalism, it includes only much narrower provisions to help shield “research”. This approach is continued in the proposed General Data Protection Regulation put forward by the European Commission in January 2012. Meanwhile, at a regulatory level, in 2003 the European Commission’s RESPECT project drew up DP guidance for social researchers which only made use of these narrow “research” exemptions. Finally, the implementation of such a targeted regime for academic speech has come to constitute a serious problem for social researchers leading amongst other things to restrictions on covert and/or deceptive methodologies, the use of “sensitive” personal data and the non-anonymous reporting of research results.

This article argues that this bifurcated understanding of European DP law’s requirements is both legally and normatively wrong. First, the special derogations within the EU Data Protection regime cover not just cover “journalism” but also “literature” and “art”. There is no reason why the work of academics within


2 Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

3 Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM (2012) 11.

humanities and social studies should not fit within one or other of these categories. Secondly, whilst the stipulation that to gain such protection the processing must be “only” or “solely” for one or other of these purposes is unhelpfully opaque, a purposive reading of this reveals that, at least where no clearly incompatible other purpose is present, this should only impose a relatively unproblematic “entirety” as opposed to a strict “exclusivity” requirement as regards the processing in question. Thirdly and most importantly, the alternative and currently mainstream interpretation of the DP framework is radically inconsistent with freedom of expression protections as set out for example in the European Convention on Human Rights (“ECHR”). Academic and non-academic social investigators are essentially both involved in the common activity of collecting, analysing and disseminating material for the public’s benefit. Moreover, membership of the academic community implies a particular concern for the qualities of “rigour, system, culmination and precision”. As a result, *ceteris paribus*, academically validated output should be considered at least, if not more, socially valuable than its non-academic counterpart. However, DP law as traditionally interpreted imposes unique restrictions on the production of just this type of material. It therefore effectively turns freedom of expression protection “on its head”.

The rest of this article is structured into four sections. The first section outlines the relevant DP provisions and their current application at both the pan-European and UK level. A focus on the UK case is justified on the basis that it is important to examine whether the difficulties with which this article is concerned are apparent even in the “least likely” jurisdictions, namely, those which have explicitly taken a decision to minimise the effect of European DP norms on their laws. The second section examines the correct construction of these provisions from the perspective of statutory language, legislative intent and relevant case law. The third moves this into the more detailed discussion of fundamental human rights as set out in the ECHR. Finally, the fourth section offers some brief conclusions.

**Introduction**

*The EU Data Protection Framework and the UK’s Data Protection Act 1998*

The European Data Protection Directive 95/46 has a “breathtaking” scope. As regards private sector activities, it applies to any “processing” of “personal data” carried out either “wholly or partly by automatic means” or as part of a manual:

“filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question.”

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8 Data Protection Directive 95/46 art.3(1). In other words any such activity carried out on computer or other digital device falls within the scope of this Directive.

9 Data Protection Directive 95/46 Recital 15.
“Personal data” is defined as “any information relating to an identified or identifiable natural person”. Thus, it has been suggested that even innocuous material in the public domain which conveys information about an individual (e.g. the title of an author’s book) is “personal”. Meanwhile, “processing” encompasses “any operation or set of operations which is performed upon personal data”. Generally speaking, all such data processing must comply with both the various rules and principles which the Directive lays down. Those controlling such activities (“data controllers”) are also subject to regulation by a national data protection authority, as well as to various forms of private legal action. However, these default requirements are qualified by the presence of a number of derogating provisions which are generally purpose specific. One of the most far-reaching concerns processing “solely for journalistic purposes or for the purposes of artistic or literary expression”. According to art.9 of the Directive, which is placed in a specific section for “special” categories of processing, Member States are required to provide exemptions from the Directive as regards such activities if they are “necessary to reconcile the right to privacy with the rules governing freedom of expression.” In contrast, only limited derogations are set out in favour of “research”. These limit restrictions on the reprocessing of data collected for other purposes and, subject to clear safeguards, empower Member States to provide further limitations on the right of subject access and the ban on processing “sensitive” personal data. Although some of the details differ, the draft General Data Protection Regulation proposed by the European Commission in January, 2012 as a replacement the current Directive continues with this seemingly “bifurcated” approach. In sum, the overall thrust of both the Directive and the proposed Regulation appears to be that “research” processing should be subject to most of default rules and principles for data processing which it sets out. Notwithstanding the traditional British reputation for laxity as regards compliance with the rigours of European data protection, the provisions of the Data Protection Act 1998 (“DPA”) mirror that of the Directive 95/46 quite closely as regards this basic structural distinction. Thus, according to s.32 of that Act processing for the

[11] During the drafting of the Directive, the UK Minister of State for Home Affairs Angela Rumbold MP confirmed that this definition applied even to authors and titles of books as compiled by the book industry. See Bookseller, “Amendments Likely on Data Protection” (July 5, 1991). The applicability of the Directive to public domain data was confirmed by the European Court of Justice (“ECJ”) in Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy (C-73/07) [2010] All E.R. (EC) 213.
[17] Data Protection Directive 95/46 art.6(1)(b). According to recital 29 such safeguards “must in particular rule out the use of the data in support of measures or decisions regarding any particular individual”. Article 6(1)(e) further provides that in relation to personal data further processed and “stored for longer periods for historical, statistical or scientific use”, Member States should also lay down “appropriate safeguards”.
[19] Such derogations for reasons of important or “substantial public interest” are generally allowed for under art.8(4) of the Directive. Article 32(3) of the Directive additionally provides that, subject to suitable safeguards and a transitional measure only, processing already under way for the sole purpose of historical research need not be brought into conformity with the principles in relating to data quality in art.6, the criteria for making data processing legitimate in article 7 and the restrictions on processing sensitive data in art.8.
“special purposes” of journalism, literature and art is exempted from almost all of the data protection provisions if:

- The processing is only for one or more of the special purposes.
- It is undertaken with a view to the publication by any person of any journalistic, literary, or artistic material.
- The data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
- The data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

Additionally, the Information Commissioner’s Office (“ICO”) is prohibited from engaging in most forms of regulatory enforcement in relation to such processing. Finally, so long as the material in question has not yet been published, the data controller also benefits from a duty on the courts to stay legal proceedings which may otherwise be brought against it under the Act. In contrast to these liberal provisions, the Act provides for far narrower special derogations for “research” (including “statistical or historical” purposes) as these relate to compatible processing under principle two, for time-limited data storage under principle five, from the right of subject access under principle six and from the ban on processing “sensitive” personal data. Importantly, there is no exemption at all from the first DP principle’s requirement to provide information notification to data subjects (and to process data relating to them “fairly and lawfully”) or from the ban on the export of the data outside the European Economic Area (EEA) absent “adequate protection”.

**Standard interpretation and answered questions**

The standard interpretation of the DPA, the Directive and by implication the proposed Regulation has held that investigations which take place within an academic context must comply with the restrictive “research” provisions of these instruments as opposed to the more liberal ones for “journalism, literature and art”. Thus, in 2003 the European Commission’s RESPECT project drew up DP guidelines for socio-economic researchers which only made reference to the former provisions. Similarly, in the United Kingdom, the ICO’s model registration

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21 Officially these provisions expire 24 hours post-publication. See DPA s.32(4)(b).
22 Action taken against processing for the purposes of direct marketing (DPA s.11) is excluded from this.
23 DPA s.33(1).
24 Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417) para.9. In addition, as a transitional measure, processing for the purposes of historical research which was already underway at the time the Act came into effect in March 2000 is indefinitely exempt from the first five data protection principles (though not from some of the associated rules) so long as any processing is in conformity with the non-particularity and non-malfeasance conditions and, as regards automated data, is not “by reference to the data subject” (DPA Sch.9 Pt IV para.17(c)). This provision may provide some protection for keepers of historical archives. However, especially given the breadth of the definition of processing in the Act, its restriction to processing which was already underway prior to 2000 makes it largely irrelevant for academic projects which will necessarily involve some new processing.
25 DPA Sch.1 Pt II; Data Protection Directive 95/46 arts 10–11.
26 DPA Sch.1 para.8; Data Protection Directive 95/46 art.25.
template for universities includes processing for “research” but not journalism, literature and art which it terms “journalism and media.” As a result a system of DP regulation of academic expression separate from that of those of other social actors has grown up notwithstanding the absence of case law in this area or indeed any consideration of the core issues discussed in this article by the courts.

The development of this peculiar system of regulation begs the question as to whether academic social research actually should be regulated differently from other non-academic social investigations. This issue will be considered in the next section from the perspective of legislative history, ordinary statutory construction and judicial consideration of European DP law. Following on from this, section three will provide a detailed exploration of the issue from the perspective of fundamental human rights as instantiated in the ECHR.

**Statutory construction of “special purposes”**

*Statutory construction of journalism, literature and art*

Whether social researchers can benefit from the special freedom of expression protections within European DP primarily turns on the meaning to be ascribed to the purposes of journalism, “literary” expression and “artistic” expression. None of these terms are defined on the face of Directive 95/46 or that of the DPA. It is therefore necessary to analyse this issue from the perspective of ordinary statutory meaning, legislative history and judicial case law.

Turning to the ordinary meaning of these terms, the first thing to note is that all three terms are at least potentially severable and must therefore be considered in turn. “Journalism” is defined in the Oxford English Dictionary (“OED”) as:

“[t]he occupation or profession of a journalist; journalistic writing; the public journals collectively; the keeping of a journal; the practice of journalizing.”

Meanwhile, “journalist” is defined as:

“one who earns his living by editing or writing for a public journal or journals; one who journalizes or keeps a journal.”

Despite the reference to “occupation” and “profession”, DPA s.32 and by implication art.9 of the Directive stress that these purposes can be claimed not just by professional journalists but rather by “any person” who is engaged in journalistic purposes. This suggests that the phrase should at least cover any processing aimed at producing a “public journal” which is further detailed in the OED as:

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28 Registration with the ICO for any non-exempt purpose (which includes both “research” and “journalism, literature and art”) is a legal responsibility under DPA s.17. Under s.21, failure to so register is a criminal offence.

29 Information Commissioner’s Office, “N887—University”. In fact, out of the 158 model notifications on the ICO site, the only one which does make full use of the “journalism and media” purpose is that set out for registration as a journalist. See Information Commissioner’s Office, “N900—Journalist”. Available through [https://www.ico.gov.uk](https://www.ico.gov.uk) [Accessed October 31, 2012].

30 DPA s.31(1)(a).

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“[a] daily newspaper or other publication; hence, by extension, any periodical publication containing news or dealing with matters of current interest in any particular sphere.”

Meanwhile, “literature” is defined as inter alia “[t]he action or process of writing a book or literary work”, “literary ability or output”, “the activity or profession of an author or scholar”, “the realm of letters or books”, “[a] body of) non-fictional books and writings published on a particular subject” and “[p]rinted matter of any kind”. Some of these definitions seem to encompass at least all intelligible writing, a definition which is also reflected in s.3(1) of the UK’s Copyright, Design and Patents Act 1988 which defines a “literary work” as “any work, other than a dramatic or musical work, which is written, spoken or sung”. Others suggest the need for a certain positive quality, a stipulation which is reflected in the “literary” merits public good defence within s.4 of the UK’s Obscene Publications Act 1959. Finally, “artistic” is defined inter alia as “[o]f or relating to art or a work of art”, “[o]f or relating to visual arts such as painting, design, and sculpture, as distinguished from literature music, etc.” and “[d]isplaying the characteristics of art; having aesthetic or creative merit”. Again these definitions variously cover anything visual or limit this according to some positive quality.

Whilst each of these terms are clearly “extremely broad”,31 their ordinary meaning leaves a number of aspects ambiguous. Given this, it is appropriate to have regard to relevant legislative history. When the draft Directive was first published by the European Commission, the protection accorded to the “special purposes” was very narrow covering only the activities of the “press and audiovisual media”.32 This clause encountered criticism from both Member States33 and others34 and in the revised draft of the Directive the provision was rephrased so as to cover processing “solely for journalistic purposes by the press, the audio-visual media and journalists”35. The article also acquired the title “Processing of Personal Data and Freedom of Expression” and the accompanying explanatory memorandum stressed that the term “journalists” was “intended to include photojournalists and writers such as biographers”.36 This revision failed to satisfy the concerns expressed and in October, 1993 the Belgian Presidency suggested adding to the clause the purposes of “creation artistique ou littéraire” whilst also deleting reference to the classes of person who might engage in such activities. This was intended to “mieux préciser les limites des finalités des traitement relatifs à l’exercice de la liberté d’expression pour lesquels des derogations sont nécessaires”.37 Some seven delegations expressed certain reservations about this expansion of the scope of protection with Spain in particular being keen for the Member States to clarify that “databases could not

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be regarded as artistic creation”. The Italian and Spanish delegations particularly feared that this extension could “give rise to abuse”. In the event the Belgian proposal to expand the scope of the “special purposes” provision was accepted. A statement was, however, added in the formal Council minutes noting that “[t]he Council and the Commission consider that … artistic and literary expression is a form of expression, freedom of which is guaranteed by article 10 of the European Convention on Human Rights.”

During the parliamentary debate on the transposition of the Directive within the United Kingdom, most of the debate on freedom of expression focused on the traditional media. Nevertheless, in response to questioning about the scope of the “special purposes” protection, the Minister Jeff Hoon stated “[w]e are dealing with the right of a journalist, artist or writer to write and publish freely”. The Government also stressed the importance of the protection for “historical programmes dealing with analysis of the past. It is not the intention of the Government in implementing the directive that the making of these programmes should be inhibited or prevented by individuals attempting to use its provisions to re-write history or prevent the responsible discussion of historical subjects.”

Turning finally to specific case law, the meanings of “literary” and “artistic” expression have not (to the best of the author’s knowledge) received judicial consideration within a DP context. In contrast the scope of “journalistic purposes” has been analysed by a number of European courts including most importantly the European Court of Justice (“ECJ”). In Tietosuojavaltuutettu Satakunnan Markkinäörssi Oy the ECJ developed a broad, purposive understanding of this phrase holding that, at least when reprocessing data already legitimately in the public domain, it could encompass any activity that has as its object is “the disclosure to the public of information, opinions or ideas”. Recital 121 of the proposed Regulation builds on this not only by stressing that “in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly …” but more specifically that vis-à-vis DP, Member States should classify as journalistic all activities whose object “is the disclosure to the public of information, opinions or ideas”.

38 Council Document 7500/94 (June 9, 1994) (noting reservations on this point of Germany, Spain, France, Greece, Italy, Portugal and to a certain extent Luxembourg).
43 Tietosuojavaltuutettu Satakunnan Markkinäörssi Oy (C-73/07) [2010] All E.R. (EC) 213. The case concerned whether the systematic publishing via a Short Messaging Service (“SMS”) of tax information on some 1.2 million persons should be considered journalistic.
44 Tietosuojavaltuutettu Satakunnan Markkinäörssi Oy (C-73/07) [2010] All E.R. (EC) 213 at [61].

Statutory construction of “research”

Turning briefly to the cognate construction of “research” within the DP scheme, this term is also left undefined within both Directive 95/46 and the DPA. However, s.33(1) of the DPA does state that it includes “statistical or historical purposes”. Meanwhile, the Directive itself introduces a number of important complexities. First, it always qualifies any reference to research with either the words “scientific”,45 “historical”46 or “historical or scientific”.47 Secondly, it sometimes simply refers to “historical, scientific or statistical purposes”48 without any use of the word research. Thirdly, although perhaps not entirely consistent on this point, it seems to treat these three purposes as severable and distinct. Finally, the proposed Regulation generally uses the phrase “historical, statistical or scientific research purposes”49 when dealing with “research”. Recital 126 further states that “scientific research” should include “fundamental research, applied research, and privately funded research”. Turning to a consideration of the ordinary meaning of these terms, the OED defines “research” as inter alia (1) a

“[s]ystematic investigation or inquiry aimed at contributing to knowledge of a theory, topic, etc., by careful consideration, observation, or study of a subject,”

and (2) “[i]nvestigation undertaken in order to obtain material for a book, article, thesis etc.; an instance of this”. Meanwhile, “science” refers inter alia to (1) “[a] particular branch of knowledge or study; a recognized department of learning”, (2) anything “contradistinguished from art” and (3)

“[i]n a more restricted sense: A branch of study which is concerned either with a connected body of demonstrated truths or with observed facts systematically classified and more or less colligated by being brought under general laws, and which includes trustworthy methods for the discovery of new truth within its own domain.”

Aspects of the legislative history of the Directive provide a further elucidation of the context in which these provisions should be interpreted. First, it is apparent that the overwhelming focus of the discussion between Member States concerned the implications of the Directive for biomedical and, most especially, epidemiological research. The travaux preparatoires includes no fewer than five official Member State papers exclusively dedicated to a discussion of the difficulties apparent in this area.50 Secondly, the record also demonstrates an awareness of the problems confronting statistical projects especially as carried out by Government.51

45 As in recital 34 concerning sensitive personal data and art.13(2) concerning derogations from subject access.
46 Mentioned only in art.32(3) which provides a derogation in relation to historical research processing already under way before the Directive came into force. This was specifically added as a result of the Netherlands request for “an exception for historical archives compiled before entry into force of the Directive”. See Council Document 6648/94 (May 1, 1994).
47 As in relation to “disproportionate effort” and “impossibility” in art.11(2).
48 As in relation to further processing and incompatibility in recital 29.
49 See, in particular, art.83.
50 These are Council documents: 6454/93 (May 14, 1993) (Danish Presidency), 574061 (December 6, 1993) (UK), 4859/94 (February 15, 1994) (Spain), 2463/94 (SAN) (Netherlands), 9415/94 (September 21, 1994) (UK).
51 Thus, on the European Advisory Committee on Statistical Information in the Economic and Social Spheres (“CEIES”) submitted official evidence during the legislative proceedings on the various issues involved. See Council Document 571956 (October 6, 1993).
Responding to both concerns, between 1993 and 1994 the appropriateness of an overarching clause protecting the “[p]rocessing of personal data for scientific and statistical purposes” was extensively discussed. Ultimately this was abandoned in favour of the current piecemeal approach. Thirdly, the in any case limited discussion of other aspects of this issue almost exclusively concentrated on providing a framework for retaining material originally collected for another purpose and then securing a form of safeguarded access for this for historical or related social research. In other words, there was almost no discussion here of whether, and if so how, the DP framework might be applied to the use and dissemination of personal data within such projects themselves.

Turning more specifically to the enactment of the DPA, only a short exchange on this aspect took place in the Commons Committee considering the Act between two backbench MPs and the Minister George Howarth. This debate vividly revealed the lack of a tight grasp of the relevant provisions in this area. In sum, John Greenway (MP for Rydale) put down a probing amendment suggesting that there it might be advisable to require that a researcher’s bona fides be approved by the data protection authority prior to making use of the special research provisions in the Act. In turn, purporting to address the “genuine needs of researchers”, Ian Taylor (MP for Esher and Walton) noted the slippery nature of the definitions in the absence of such an accreditation regime:

“Some things masquerade as history but are in fact investigative journalism, and would have been better tackled in our earlier discussion about clause 31. We must distinguish between genuine researchers and those who merely claim to be researchers. I know all the best investigative journalists on the so-called quality newspapers call themselves researchers. I doubt whether they would qualify for grants under the research councils for which I was responsible in the olden days.”

In contrast, rejecting such a suggestion the Minister simply dodged the definitional conundrum:

“As it stands, clause 32 [now s.33] is suitably flexible. The benefits it offers are available subject to a straightforward test—that the processing is being carried out for research purposes. It is best to keep the test simple. It does not matter who is doing the processing.”

52 As originally proposed by Denmark (see Council Document 8217/93 (ANNEX) (July 28, 1993)), this new art.9(a) would in principle have been almost as far reaching as the protection for the Press under art.9. However, its use would have been subject in all cases to “prior notification to the supervisory authority” who in order to obtain “adequate guaranties” would be able to “lay down detailed provisions for the processing in question”. In practice, therefore, a far stricter form of regulation than that regarding the Press was always intended. This stringency undermined the case for such a dedicated comprehensive special regime.

53 The only tangential mention of such work occurs in a paper submitted by Denmark, very late in the proceedings, outlining general concerns with the Directive as regards research. This document (Council document 10934/94 (November 14, 1994)) does state: “Denmark has stressed strongly during the negotiations that the present wording [as regards the purposes of research and statistics] is too restrictive. Basic research today is to a large extent based on the establishing and running of registers (databases), especially within medical research, and the directive as proposed may hinder important sociological, historical and medical research as well as statistical work”.

54 What Mr Taylor most especially does not seem to have appreciated here was either that history was also specifically discussed in relation to what became DPA s.32 or that this section actually established a far more advantageous legal position that the research provisions which became DPA s.33.

Finally, to the best of the author’s knowledge, the meaning of these terms within a DP context has not been usefully discussed by either the ECJ or any other EU Member State court.

**Application to academic social research**

Having outlined the statutory meaning of the core terms within the DP framework it is necessary to consider their specific application within an academic context. The essence of academic investigation (or “research”) into social (including political and historical) affairs is to enhance general understanding of this sphere of life through the “discovery, exchange, interpretation and presentation of information” to the public at large. Thus, the American Historical Association stresses that scholarship

“depends on the open dissemination of historical knowledge via many different channels of communication … The free exchange of information about the past is dear to historians”.  

Meanwhile the UK’s Political Studies Association states more prosaically that its “members have a general duty to promote the growth and spreading of knowledge of the highest academic standards”. Finally, the UK’s Social Research Association states that

“[s]ocial researchers should use the possibilities open to them to extend the scope of social enquiry and communicate their findings, for the benefit of the widest possible community.”

This building up of such common knowledge and understanding appears to be a central part of activities aimed at “the disclosure to the public of information, opinion or ideas” which the ECJ suggested in *Tietosuojavaltuutettu v Markkinapörssi* should be protected as “journalistic” under the Directive and its implementing legislation. Indeed, a number of academic researchers, especially in the humanities, stress their affinity and overlap with journalists traditionally conceived. For example, the esteemed historian Professor Brian Harrison has stated that

“in my view there is no distinction in principle between the journalist and the historian: the historians simply have more time for research and reflection, though some journalists (the late Hugo Young, for example) somehow do a better job on historical topics than do some historians.”

Moreover, even before the scope of the “special purposes” was explicitly expanded, the European Commission had by emphasising that the term was intended to include “writers such as biographers” described in pinpoint detail a

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quintessential output of many contemporary historians. In any case, even if the output of some academic social investigators fall outside the “journalistic”, their books, articles and other written (or spoken) contributions must almost invariably fall within that of “literary expression.” Nor do such outputs constitute the type of “abuse” feared by Spain and Italy during the drafting of the Directive. Instead, as the Council Minutes from 1995 made clear and the next section will further explore, they are a key part of the expression “freedom of which is guaranteed by article 10 of the European Convention on Human Rights”. 63

It is more difficult to determine if academic social investigation would generally fall within definition of “research” as set out in the current DP framework. The Directive’s use of this term in an overarching context is generally confined to that which is “scientific”. Meanwhile, wider references which also encompass “history” are usually concerned only with the further processing of data originally collected for a different purpose and not with processing for the purposes of writing (scholarly or otherwise) which was referenced in the “special purposes” above. “Scientific” would tend to suggest an activity whose essence is generalisability. If so then history, 64 political studies and other scholarly endeavours which are legitimately concerned with disseminating public knowledge about the particular (including identifiable individuals) would seem to fall outside this. 65 On the other hand, the distinction between the “particular” and the “generalizable” are by no means clear cut and, in any case, the Directive is not fully consistent in this regard. 66 Moreover, the use of the term “research” in the UK’s transposition of the Directive is even more opaque. 67 Ultimately, it is probably best to acknowledge that academic social investigation will often come within the “research” definitions in DP law and that there is therefore a significant degree of overlap between this and the “special purposes” definitions. In fact, given that one definition of research is an “investigation undertaken in order to obtain material for a book, article, thesis etc” it seems that even conventional journalists and other non-academic authors might also often be processing for a “research” purpose.


64 It has been held that historical scholarship will usually fall outside a similar regulation within the United States Code of Federal Regulations, which specifically defines research as “systematic investigation…designed to develop or contribute to generalizable knowledge”. Common Rule for the Protection of Human Subjects, 45 C.F.R. pt.45, s.46.102.

65 This would tend to imply that the references in recital 34 of the Directive to the acceptability of a lifting of the ban on the processing of sensitive personal data as regards “scientific research” and also to a limitation on subject access under art.13(3) would not be applicable to such activities.

66 In fact, even pure historical projects will often have a “generalizing” dimension. See P. Burke, History and Social Theory (Cambridge: Polity, 2005).

67 Arguably, in other language versions of the Directive, the cognate of “scientific” is not so tightly drawn as that in English. Thus, in German the term “wissenschaftliche” is used which, as the Oxford German Dictionary notes, can depending on its context refer both to “scholarly” and “scientific” pursuits. Nevertheless, as an examination of the various official Council documents makes clear, the context during the negotiations of the relevant articles was on the properly “scientific” as opposed to simply “scholarly”.

68 In the Government consultation paper on what became the DPA, the Home Office made a careful distinction between the implementation of those parts of the Directive which concerned ‘scientific’, ‘historical’ and ‘statistical’ research respectively. See Home Office, Consultation Paper on the EC Data Protection Directive (95/46) (1996). In some contrast, its only reference to “research” in the White Paper was in relation to the exemption from subject access and referenced the issue back to the previous Data Protection Act 1984 (Home Office, Data Protection the Government’s Proposals (1997), Cm.3725, p.9). Drawing on the analysis of the UK’s Lindop Committee on Data Protection, the Data Protection Act 1984’s understanding of “research” was most probably broader than the “scientific research” referenced in the Directive. See Home Office, Report of the Committee on Data Protection (1978), Cm.7341, pp 233–244. It should be stressed that under the Data Protection Act 1984 there was no specific protection at all for freedom of expression per se (journalistic, academic or otherwise).
A need for exclusivity?

The likelihood that the definitions of “research” and the “special purposes” within the DP framework are not dichotomous raises new difficulties. For processing to benefit from its special provisions art.9 of the Directive (and art.80 of the proposed Regulation) impose the requirement that processing be “solely” for journalistic purposes or for the purposes of literary or artistic expression. Section 32 of the DPA imposes the cognate requirement of “only”. Meanwhile, art.13(2) of the Directive provides an exemption from subject access which is available only in relation to processing “solely for the purposes of scientific research”. Similarly, the exemptions from principles two (compatibility), five (time-limitedness) and seven (subject access) under s.33 of the DPA require that any eligible processing be “only for research purposes”. The proposed Regulation further complicates matters by including in art.83 mandatory restrictions on processing for “historical, statistical or scientific research” which cannot be derogated from under the journalistic, literary or artistic protections of art.80.

Interpreting these requirements strictly would impose an “exclusivity” condition on the use of any of these provisions. This would mean that academic scholarship, even if did satisfy one or more of the “special purposes” definitions, could not benefit from the relevant protections since at one and the same time it would also constitute a “research” activity. Nor is this a problem which only confronts academics. Even journalists may often be processing for more than one data protection purpose. Thus, the UK’s ICO has advised that, at least as regards freelancers, journalists should be registered under the DPA not only for the purposes of “journalism and media” but also for that of “trading and sharing in personal information”.

A final irony of adopting such a restrictive interpretation is that it would mean that academic work which constituted both a “research” and “special purpose” activity would also fail to benefit from most of the special “research” provisions in the DP scheme since these also impose an “only”/“solely” requirement for their use. Therefore, and counter intuitively, they would be treated even less favourably than ordinary “research” activity.

A review of the intent behind the inclusion of these restrictions, however, indicates that they had a much more limited purpose than enforcing a stipulation of “exclusivity”. In sum, the overwhelming concern was to ensure that data controllers engaged in either “research” or in the “special purposes” would not be able to rely on the insulating provisions in relation to processing actually being undertaken for a different and separate purpose. Thus, in a 2001 case which pitted data protection against free speech on the internet, Sweden’s Supreme Court of Justice issued the following ruling on the interpretation of the art.9 of the Directive:

69 The Commissioner did not however suggest that such individuals would thereby lose the protection of s.32 of the DPA. See M. Holderness, “Data Protection Required”, Freelance: Newsletter of the London Freelance Branch, NUJ (September 2008).

70 The primacy of this concern is particularly reflected in a changed wording of the “special purposes” within the various drafts of what became the Data Protection Directive. This shifted from a protection in the first draft (COM (1990) 314 art.19) for the “press” and “audiovisual media” (which could theoretically be stretched to cover, for example, employee or direct marketing processing) to one which explicitly restricted this for “only journalistic purposes” (COM (1992) 422 art.9). The final version of the Directive both expanded these purposes to include “literature” and “art” and removed the restriction on their use only by particular entities such as the Press.

“The restriction to ‘exclusively’ journalistic purposes is intended primarily to clarify that personal data used by the media and journalists other than for editorial purposes falls outside the exemption. For example, mass media’s treatment of personal data for billing, or direct mail survey or reader profiles fall outside the exemption.”

Meanwhile, the OED defines “solely” not just as “only” or “exclusively” but also as “entirely”. Given this, it is appropriate to interpret these various references as imposing only a limited “entirely” requirement at least in circumstances when any other processing purpose isn’t clearly incompatible with the exercise of the specially protected purpose. This interpretation is consistent with an open acknowledgment of the fact that data processing purposes can, and often do, overlap. Thus, in relation to the insulating “research” and “special purposes” provisions of both the Directive and DPA, such an interpretation would require an analysis of whether, notwithstanding any overlap present, all the processing under consideration still fell within the relevant protected purpose. To take the freelancer considered above, it may be that in providing his work to a specific third party for payment he would be “trading and sharing in personal information”. Nevertheless, so long as this trading/sharing was done with a view to the publication of literary, journalistic or artistic material, the entirety of the processing would still be for the special purposes and the relevant exemptions would therefore not be lost. The research/special purposes interface is similarly structured. Therefore, academic investigators processing in order to publish literary, journalistic or artistic material should be able to benefit from both the “special purpose” provisions and the provisions on “research”. Some forms of commercial work may, depending on its particular aims and analysis, also benefit from the data protection “research” provisions. However, in so far as the knowledge generated from such activities would be intended only for the eyes and benefit of a particular firm, the “special purposes” protections could not be claimed. The Venn diagram in Figure 1 below sets on in diagrammatic form the understanding of purpose specification under the data protection framework which has been forwarded here.


72 Market researchers have argued that they should be able to benefit from the “research” protections under data protection law but have made no cognate claim in relation to the “special purposes”. See Market Research Society, “The Data Protection Act 1998 and Market Research: Guidance for MRS Members” (September 2003).
Whilst not included in the figure above due to restrictions on space, other recognised DP purposes such as “information and data bank administration” also clearly overlap with both “research” and “journalism, literature and art”.  

Academic social research, freedom of expression and the ECHR

As the discussion in section two demonstrated, it can be argued on the simple grounds of statutory interpretation that the standard interpretation of DP has been wrong to hold that academic social investigations cannot benefit from the protections for “special purpose” processing set out in the Directive, the proposed Regulation and in UK law but may only benefit from the far more limited “research” provisions. This analysis, however, fails to fully identify the central and deep damage which this current interpretation of the DP framework inflicts on the free flow of information and ideas. This final section, therefore, aims to remedy this defect by explicating the contradictions between the standard DP perspective and the framework of rights protection set out in the ECHR and interpreted by the European Court of Human Rights. This analysis not only increases the moral significance of this argument but for a number of interrelated reasons further bolsters the legal argument. First, a key purpose of the “special purpose” regime

73 In fact it seems highly probable that many journalists and researchers will be processing for the purposes of ‘information and databank administration’. Under the old Data Protection Act 1984 (which contained no “special purposes” provision) numerous mainstream newspapers registered their news activity under the “information and databank administration” purpose. Given that this remains a legitimate purpose under the DPA1998 it is unclear how such processing can have ceased to be encompassed within it simply due to the inclusion another overlapping purpose of ‘journalism, literature and art’.

74 Although this article pays due regard to the jurisprudence of the ECtHR, the focus will be on exploring the broad philosophy of the Convention’s protections. This reflects the fact that not all the case law specifically relates the points at issue and also a conscious desire to avoid an “unthinking legalism” in relation to these matters. See H. Fenwick and G. Phillipson, Media Freedom under the Human Rights Act (Oxford: Oxford University Press, 2006), p.81.
itself was to reconcile data protection with the right to public freedom of expression instantiated in the ECHR. Secondly, all EU member states have ratified the ECHR and, under art.59(2) of the Lisbon Treaty, the EU itself is shortly due to do so. Thirdly, in the UK context, the Human Rights Act 1998 requires that all legislation, including the DPA, must be interpreted “as far as possible” in conformity with the Convention.

**Scope and nature of the ECHR**

Article 10(1) of the ECHR provides that everyone has the right to “receive and impart information and ideas without interference by public authority and regardless of authorities”. Article 10(2), however, qualifies this broad liberty by authorising limitations which are “in the interest” of inter alia “protection of the reputation or rights of others” and “preventing the disclosure of information received in confidence”. Any such limitations, however, must be “necessary in a democratic society”. In certain situations, limitations may be required in order to protect the right to respect for private life guaranteed under art.8(1). However, even when such a tension between arts.8 and 10 is present, what is required is a careful balancing which pays close attention to value of the right in the specific context and which respects the overriding need for a close adherence to the principle of proportionality including vis-à-vis other cognate social activities. Finally it should be noted that, according to art.14, limits on the enjoyment of any ECHR right which apply in a discriminatory fashion are generally banned.

**Social research and the freedom of expression hierarchy**

Over the past 30 years, the European Court of Human Rights has built up “an established body of jurisprudence” on the meaning of freedom of expression as set out in the Convention. It is true that this has been criticised for being “notably under theorized”75 and, given that “almost all free expression jurisprudence is, today, media jurisprudence”,76 narrow in its specific focus. Despite this, one unifying tenet has been that limitations which may genuinely be held “necessary in a democratic society” will vary greatly depending on the type of expression at issue. Moreover, the notion of a democratic society has been interpreted in a substantive liberal fashion so as to encompass both participative procedural processes and values such as “pluralism, tolerance and broadmindedness”.77 At the top of this hierarchy of expression is what has been termed “political speech”78 but might more accurately be defined as that which is correctly considered to be particularly valuable to the public of a democratic society as just defined. This encompasses expression linked to “debate on matters of public interest”,79 which is “part of an open discussion on matters of public concern”80 or which concerns the imparting of “information and ideas of public interest”.81 The Court has

77 *Handyside v United Kingdom* (1977) 241 E.H.R.R. 737 at [49].
79 *Gerger v Turkey* Unreported 1999 (249/91/94) at [48].
81 *Jersild v Denmark* (1994) 19 E.H.R.R. 1 at [31].
consistently held that, as regards such “high value” expression, there is “little scope under art.10(2) for restrictions” on such expressive activities.\(^82\) Thus, in *The Sunday Times v United Kingdom*, the court upheld the right to publish information relating to the deleterious effects of the drug thalidomide against the claim that it could prejudice on-going legal proceedings and, therefore, should constitute a contempt of court.\(^83\) In *Thorgeirson v Iceland*, the court held that the publication of an article detailing allegations of police brutality within the Reykjavik police force could not be prohibited as defamatory even if the accuracy of these allegations could not be verified.\(^84\) Finally, in *Jersild v Denmark*, the court held that, given the importance of free public discussion, a broadcaster could not be criminally prohibited from disseminating the content of interviews with persons making extreme racist statements even if the resulting content:

“did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and the ideas of superiority of one race.”\(^85\)

By contrast, despite the fact that it has been held that any restriction on art.10 rights must be justified by reference to a “pressing social need”\(^86\), it is clear that other types of expression, even if communicated to the public, benefit from a much lower degree protection. One clear example of such “low value” speech are the “infortainment” stories about celebrities’ intimate affairs which often appear in the popular, and perhaps also increasingly the “quality”, press. Thus, in the controversial case of *Von Hanover v Germany*, the court refused to protect the publication of photos and commentary of Princess Caroline of Monaco which had been published in a German newspaper. This was because, in its opinion:

“the sole purpose [of publication] was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life.”\(^87\)

Therefore, and critically, such publication could not “be deemed to contribute to any debate of general interest to society”\(^88\).

There are cogent reasons for believing that academic social investigation can, and generally will, fall into the category of expression defined under the ECHR as serving a “high” public interest. As the professional association statements quoted above have already indicated, academics have the task not of feeding idle curiosity but rather of ensuring “the methodical discovery and the teaching of...”

\(^{82}\) *Gerger v Turkey* Unreported 1999 (249191/94) at [48]. It may be suggested that the court’s jurisprudence actually only recognises that speech of such a nature should be highly protected if it is carried out by the Press. It is true that some of the court’s judgments have noted the particular function of the Press as a “public watchdog” (*The Observer and Guardian v United Kingdom* (1991) 14 E.H.R.R. 153 at [35]). However, this should be read as reflecting the, albeit increasingly less valid, understanding that the Press often is the key purveyor of information of critical public interest. What ultimately matters, however, is the nature of the information. Thus, in *Jersild v Denmark* (1994) 19 E.H.R.R. 1 the court explicitly recognised that the audiovisual media also disseminated such valuable information; it, therefore readily extended its principles of social protection developed initially in a Press context to this situation as well. Similarly, in *Steel v United Kingdom* (2005) 41 E.H.R.R. 403 it granted such protection to a “small and informal campaign group” (London Greenpeace) so long as it was “disseminating information and ideas on matters of general public interest such as health and the environment” (at [89]).


\(^{85}\) *Jersild v Denmark* (1994) 19 E.H.R.R. 1 at [34].

\(^{86}\) *Handyside v United Kingdom* (1976) 1 E. R. R. 47 at [48].

\(^{87}\) *Von Hannover v Germany* (59320/00) [2004] E.M.L.R. 21; (2005) 40 E.H.R.R. 1 at [65].

\(^{88}\) *Von Hannover v Germany* (59320/00) [2004] E.M.L.R. 21; (2005) 40 E.H.R.R. 1 at [65].
truths about serious and important things”.

The internal ethic of academics encourages an output marked by “concern for rigour, system, culmination and precision”;

a reflexive and nonpartisan stance and a “regulative ideal of truth-telling”.

Moreover, at least as regards social investigation, academic output will often speak powerfully and directly to debates on vital matters of public interest. Thus, as regards historical writings, Palmowski and Readman argue that:

“[f]rom scholarly debates about collaboration in Vichy France in the 1970s and the Historikerstreit in the 1980s, to Polish discussions about Jebwabne, the findings of contemporary historians have had huge social and political significance.”

Overall, these authors find that such work helps “speak truth to power”.

Meanwhile, Robert Dingwall finds social science investigations often play a vital role in ensuring the “mutual accountability of citizens” to each other.

Finally, we should also not underestimate the broader role of such academic work in sustaining an “empirical conception of knowledge that disrupts traditional verities and that continues to create the modern self, modern society, and modern politics”.

Assessing the general legitimacy of DP restraints on social research

In considerable tension with the ECtHR’s admonishment that there can be “little scope under art.10(2) for restriction” on “high value” expression, the “research” provisions of the DP framework do subject academic work to very severe limitations.

However, it must be acknowledged that a subset of this research will engage the individual data subject’s right to respect for private life as protected in art.8(1). In these cases, the ECHR requires a careful balancing based on “an intense focus on the comparative importance of the specific rights being claimed in the individual case”.

Given the generally “high value” of social research, however, limitations on such expression could only be justified if strictly necessary to protect a weighty private life interest. In contrast, the “research” provisions of

90 Dingwall, “Confronting the Anti-Democrats” (2006) 1 Medical Sociology Online 51, 54.
91 R. Dingwall, “The Ethical Case Against Ethical Regulation of Humanities and Social Science Research” (2008) 3 Twenty-First Century Society 1, 6.
94 Dingwall, “The Ethical Case Against Ethical Regulation of Humanities and Social Science Research” (2008) 3 Twenty-First Century Society 1, 55.
96 Gerger v Turkey Unreported 1999 (24919/94) at [48].
98 Although the scope art.8(1) remains rather opaque, it appears only to extend to truly “private” information. Thus, Baroness Hale in the UK House of Lords decision Campbell v Mirror Group Newspapers argued that a picture of Naomi Campbell popping “out to the shops for a bottle of milk” or otherwise “going about her business in a public street” would not engage private life protection: [2004] UKHL 22; [2004] 2 A.C. 457 at [154]. Applying a similar logic, it is also at best unclear whether art.8(1) protects information which has been published and widely disseminated. In contrast, “personal information” as set out in art.2(a), Data Protection Directive 95/46/EC is defined broadly as “any information relating to an identified or identifiable natural person”. As noted above, it has even been suggested that this encompasses innocuous information fully in the public domain such as the name of an author and a book title.
the DP framework were not drawn up with awareness that such a high threshold
needed to be met. To the contrary, a “labyrinth” of restrictions apply in all
circumstances, many of which are drafted so as to be peremptory in nature.
Particularly problematic from a freedom of expression point of view are the
provisions requiring that the data subject be notified of processing\(^{100}\) and given a
right to object\(^{101}\) and the ban on the transfer of personal data outside of the EEA
absent “adequate protection.”\(^{102}\) Thus, the data subject notification requirements
in the DPA have led Rosemary Jay, the former Head of Legal at the UK’s Data
Protection Registrar, to argue that covert and/or deceptive research is now “almost
certainly” illegal\(^{103}\) apparently even if the data collected is rendered anonymous
prior to publication. These methodologies have been vital in building up an
understanding of a variety of social phenomena including racial and ethnic
discrimination,\(^{104}\) police malpractice,\(^{105}\) and the activities of far-right political
groupings.\(^{106}\) Meanwhile, at least one leading British university has gone much
further holding that if the research in question is “controversial in any way” then
data subjects might even need to be given a right to object to the processing of
innocuous information already in the public domain.\(^{107}\) Finally, either as a result
of principle eight’s export ban or the DP framework as a whole, a number of
institutions have stipulated that research should not be reported in a personally
identifiable form.\(^{108}\) This would be incompatible with the analysis and reporting
of contemporary historical events which often must involve the identification of
the various participants.

**Proportionality of restrictions vis-à-vis treatment of non-academic
expression**

Even if the DP “research” provisions were a potentially justifiable restriction on
academic social investigation, the ECHR requires that any such limitation be
comparable with the restrictions placed on cognate forms of non-academic speech.
This can be seen as an integral part of the requirement that the State Party prove
that the limitation be genuinely necessary to meeting a “pressing social need”.
Thus, in finding that this threshold had not been met in the ban on political
advertising case *Vgt v Switzerland*, the ECtHR noted that:

> “a prohibition of political advertising which applies only to certain media,
and not to others, does not appear to be of a particularly pressing nature.”\(^{109}\)

\(^{100}\) Data Protection Directive 95/46 arts 10–11; DPA Sch. 1 Pt.II.

\(^{101}\) Data Protection Directive 95/46 art.14; DPA s.10.

\(^{102}\) Data Protection Directive 95/46 art.25; DPA Sch.1 Pt.I para.8.

\(^{103}\) A. Barlow, “New Ethical Challenges for Socio-Legal Researchers: SLSA One-Day Conference” (2004)
Socio-Legal Newsletter no.44.

\(^{104}\) D. Sapatkin, “Was This Ethical? Scientists Dare to Deceive”, *The Philadelphia Inquirer* (May 24, 2010).


\(^{106}\) N. Fielding, “Observational Research on the National Front” in M. Bulmer (ed), *Social Research Ethics: An
Examination of the Merits of Covert Participant Observation* (London: Macmillan, 1982).

\(^{107}\) University of Edinburgh, “Guidance: Research and the Data Protection Act” (April 2008). The example given
is published details of Olympic medal rankings.

\(^{108}\) University of Bath, “Guidelines on Academic Research and the Data Protection Act 1998” (October 2008);
University of Newcastle, “Data Protection Staff Handbook—Eighth—Transfer of Data” (December 2005).

\(^{109}\) *VgT Verein gegen Tierfabriken v Switzerland* (24699/94) (2002) 34 E.H.R.R. 4 at [74].
Additionally, at last where the types of social actor divergently treated by the law are in reality pursuing very similar purposes, the non-discriminatory protections of art.14 may be engaged. So long these purposes fall within the scope of a Convention right, this article affords “protection against different treatment, without an objective and reasonable justification, of persons in similar situations”.

As argued above, both academic and non-academic social investigators (the latter often known in general discourse as “journalists”) are engaged in essentially the “same enterprise” of collecting, analysing and disseminating information to the public. Therefore, as an aspect of considering whether an art.10(2) justification is present and also exploring the potential for an art.14 breach, it is necessary to consider whether there are any objective and reasonable justifications for the much less favourable treatment which the standard interpretation of DP would impose on academics. This raises the difficult and thorny issue of defining the distinction between the academic and non-academic. Two potential distinguishing criteria—the institutional and the substantive—suggest themselves. Institutionally, academic work is generally (though not exclusively) connected to universities, whilst non-academic work usually takes place outside these settings. Substantively, academic standards mandate a particular “concern for rigour, system, culmination and precision” as well as a stringent “regulative ideal of truth-telling”. Production of work in adherence to these standards is a process which often takes months or years as opposed to days or weeks.

Despite these distinctions being potentially possible, neither seem to provide the appropriate justification for the differential treatment under consideration. Singling out the investigative work of all individuals who are members of a particular type of civil society institution for less favourable treatment appears at best arbitrary and at worst an example of invidious class-based legislation which art.14 of the Convention aims to protect against. The situation is even more perverse given not only that the treatment in question burdens knowledge production (and dissemination) but that it targets those who are the institutional custodians of “the pursuit, acquisition, assessment, and transmission of knowledge”. This point segues into consideration of the appropriateness of utilising an explicitly substantive definition of academic versus non-academic activity in this context. It is true that, unlike most academic work, a subset of non-academic writing (news journalism) is orientated to the publication of extremely time critical material. Thus, the ECtHR has argued that news is “a perishable commodity and to delay its publication even for a short period might well deprive it of all its value and interest”. Even if such publication is in the public interest, the sheer speed with which these tasks must sometimes be carried out presents particular problems for compliance with some

110 In the VgT case the court found that, given the objective differences between political and commercial advertising, this article was not engaged. Such a clear demarcation, however, does not seem possible in the case of academic versus non-academic expression. See VgT Verein gegen Tierfabriken v Switzerland (24699/94) (2002) 34 E.H.R.R. 4 at [89].
112 Dingwall, “Confronting the Anti-Democrats” (2006) 1 Medical Sociology Online 51, 54.
113 Dingwall, “Confronting the Anti-Democrats” (2006) 1 Medical Sociology Online 51, 54.
114 Dingwall, “The Ethical Case Against Ethical Regulation of Humanities and Social Science Research” (2008) 3 Twenty-First Century Society 1, 6.
elements of the general DP scheme such as the accuracy principle.\footnote{Data Protection Directive 95/46 art.6(3); DPA Sch.2 para.7. These potential difficulties were noted by Lord Phillips in \textit{Campbell v MGN} [2004] UKHL 22 at [122].} In principle, therefore, it might be justifiable to provide a targeted liberal exemption from these DP norms for precisely this type of activity. However, the special purposes regime was clearly also designed to protect against provisions in the DP framework which can have just a pernicious effect on long term publishing projects. One obvious example is the DPA’s complete ban, absence explicit consent, of publishing certain “sensitive” personal data which would either “support measures or decisions with respect to any particular data subject” or would cause, or be likely to cause, “substantial damage or substantial distress”.\footnote{Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417) para.9.} The factor of time-perishability, therefore, provides no objective and reasonable justification for differential treatment here. In any case, non-academic, as well as academic, writers often engage in long term projects and it is fully accepted that, either due to being instances of “journalism” or “literature”, they may benefit from the special purposes regime. A possible justification for the distinction must therefore be approached anew. The traditional attributes of academic scholarship, including rigour, system, culmination, reflexivity and nonpartisan truth telling, are clearly far from irrelevant in assessing the justifiability under the ECHR of a law which specifically covers such expression. To the contrary, adherence to these virtues provides a near blueprint for ensuring that the output will focus on matters of genuine public importance as opposed to pure public amusement. In conformity to the ECHR speech hierarchy, this distinction could therefore provide a justification for imposing on such studies fewer legal restrictions than on types of inquiries which were not so carefully honed. In stark contrast, however, according to its standard interpretation, the European DP framework does the precise opposite. Academic output is designated “research” and thereby subjected to strict and potentially debilitating restrictions. Meanwhile, even non-academic outputs which provide only low value titillation can benefit from the liberal “special purposes” regime established under the Directive, in UK law and seemingly also under the proposed new Regulation. In sum, therefore, as traditionally interpreted, the European DP regime does nothing less than turn on its head the protection of freedom of expression as developed under the ECHR. This lack of consistency vividly demonstrates the lack of a ‘pressing social need’ for such restrictions as required under art.10(2). It may, in addition, raise a legitimate issue of discrimination under art.14. Either way, the clear divergence between binding ECHR requirements and the current standard interpretation of European DP requirements should be addressed in the proposed new Regulation by unambiguous wording making clear that academic investigation is not to be excluded from the freedom of expression protection under art.10 merely because it may also constitute “research”. Irrespective of this, however, European social researchers and their institutions should challenge the standard interpretation of current DP law by claiming the benefit of the more liberal “journalism, literature and art” protections even, if necessary, in the face of regulatory or other opposition. In the United Kingdom’s case this should involve Universities ensuring that they were registered with the ICO for this purpose as well as the purpose of “research” processing.
Conclusion

This article has argued that standard interpretation of the DP framework has been profoundly mistaken in holding that academic social (including historical and political) investigations must adhere to the restrictive “research” provisions of the pan-EU Directive 95/46, implementing national laws and also the proposed Regulation as opposed to the considerably more liberal regime which applies for the “special purposes” of journalism, literature and art. Drawing on statutory language, legislative intent and relevant case law, such a claim can be rejected on the grounds of proper statutory construction of these laws. First, the “special purposes” regime was deliberately expanded beyond its initial focus on the press and audiovisual media in order to ensure that the publishing by any person of journalistic, literary and artistic material was also not to be unduly inhibited. Academic social investigation is clearly orientated toward the production such of books, articles and other literary products for the public. In fact, secondly, given the focus in the legislative debate on biomedical and statistical research as well as the general reference in the Directive to “scientific research” as opposed to “research” *simpliciter*, it is actually less clear that such social investigations were meant to fit within the definition of “research” as set out within the DP context. In any case, thirdly, the general need in order to benefit from an exemption for processing to be “solely” or “only” for the relevant purpose should not be read as imposing a chimerical stipulation of “exclusivity” such that all of the processing must fall outside any other recognised processing purpose. Rather, at least as long as any other purpose is not obviously incompatible with the specially protected type of processing, these words should be read as entailing only an “entirety” requirement, namely that all the processing should be capable of being conceptualised as falling within the particular exempted purpose. Even more fundamentally, this mainstream interpretation seriously conflicts with the logic of freedom of expression as developed under the ECHR. Academic social investigation not only falls within the broad scope of art.10 protection but, due to its general concern to systematically contribute to improving societal knowledge about serious and important things, is part of that category of “high value” expression which the European Court of Human Rights has said should generally not be subject to legal restriction. Even when art.8(1)’s competing right to private life is also engaged, limitations on such expression are only justifiable if strictly necessary to protect a weighty private life interest. In contrast, the “research” provisions of the European DP scheme subject such expression to a labyrinth of onerous and often peremptory regulations which can include a need to notify data subjects of processing (and give them a right to object) and a ban on exporting personal data outside the EEA absent “adequate protection”. Also problematically, the mainstream understanding of DP as a whole entails such restrictions being imposed in these cases whilst granting low-value “infotainment” expression, which appears in the Press or on the internet, the much broader “special purposes” exemption. This effectively turns the logic of freedom of expression under the ECHR on its head. In explicitly targeting only “academic” speech it not only suggests the absence of a “pressing social need” as required under art.10 but raises the additional possibility of a violation of art.14 which protects against arbitrary discrimination.
The issues presented in this article have broader implications for the future of laws regulating privacy and information flows. First, it demonstrates the need to rethink a largely unreflective but widespread societal assumption that academic investigation should legitimately be subject to more restrictions than cognate forms of expressive activity. This is an issue which confronts regulatory systems which exist even in the absence of comprehensive data protection legislation, including Institutional Review Boards and the Common Rule in the United States and ethical review committees and research governance in an ever wider range of countries.\textsuperscript{119} Secondly, for those countries which adhere to the Data Protection Directive 95/46 or cognate laws, the implications are even broader. The sheer labyrinthine complexity of these laws indicates that their overall nature needs to be seriously reviewed so as to provide a manageable and better targeted framework for the protection of personal information. Even the UK’s former Information Commissioner Richard Thomas had labelled the Directive as “no longer fit for purpose” and “bureaucratic”.\textsuperscript{120} As the European Union begins the process of negotiating a revised DP framework, it is to be hoped that these concerns will be begin to be seriously addressed. In any case, as purveyors of critical forms of knowledge production, researchers and their institutions must robustly claim the benefit of the “special purposes” protection notwithstanding any regulatory or other pressure to the contrary.


\textsuperscript{120} S. George, “Shock As Information Commissioner Deems Data Protection Laws ‘Not Fit For Purpose’”, \textit{Mondaq Business Briefing} (August 15, 2008).