**EXPLANATORY MEMORANDUM TO**

**THE DATA PROTECTION (PROCESSING OF SENSITIVE PERSONAL DATA) ORDER 2012**

**2012 No. [DRAFT]**

**1.** This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

## 2. Purpose of the instrument

2.1 This Order specifies circumstances in which sensitive personal data may be processed in accordance with the Data Protection Act 1998 ("the Act") which relate to arrangements put in place by the Home Secretary for disclosure of information about the Hillsborough disaster of 15th April 1989.

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

## 4. Legislative Context

4.1 Any processing of personal data has to comply with the Data Protection Act 1998 ("the Act") and its eight data protection principles. The first data protection principle requires that processing of personal data be fair and lawful and that at least one condition in Schedule 2 to the Act must be met. In the case of sensitive personal data, at least one condition in Schedule 3 must also be met. Sensitive personal data is defined in section 2 of the Act and includes, amongst other things, personal data which consists of information about the racial or ethnic origin of a data subject, their mental or physical health, whether the data subject has committed or allegedly committed an offence and information about any related proceedings.

4.2 In addition to the conditions dealing with the particular circumstances set out on the face of Schedule 3 of the Act, paragraph 10 of that Schedule provides a condition which is satisfied if sensitive personal data is processed in circumstances specified by the Secretary State by Order. Section 67(4) of the Act provides that such an Order is subject to the affirmative resolution procedure.

4.3 For the purposes of paragraph 10 of Schedule 3 this Order specifies that circumstances for the purposes of that paragraph are where the processing is

disclosure of information relating to the Hillsborough disaster which occurred on 15th April 1989 and that the disclosure is necessary to give effect to the protocol on disclosure of information ("the protocol") described in paragraph 7.1 below. The protocol was published by the Secretary of State for the Home Department for the purposes of the Hillsborough Independent Panel ("the Panel") which was established by that Secretary of State.

## 5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

## 6. European Convention on Human Rights

The Right Honourable Lord McNally has made the following statement regarding Human Rights:

In my view the provisions of the Data Protection (Processing of Sensitive Personal Data) Order 2012 are compatible with the Convention rights.

## 7. Policy background

7.1 The Panel was established by the Secretary of State for the Home Department on 15th December 2009 to oversee the disclosure of papers held by public bodies relating to the Hillsborough disaster. The work of the Panel is governed by the terms of reference and the protocol which were published by the Secretary of State for the Home Department on the same date. The terms of reference and the protocol as they were published on that date are attached as the Annex to this memorandum. It is the purpose of the Panel, in accordance with the terms of reference and the protocol, to oversee the maximum possible disclosure of documents held by public bodies in relation to the disaster, firstly to the families of the victims and then to the wider public. The protocol makes clear (for example, at paragraph 7) that the objective of fullest possible disclosure is subject to relevant legal constraints. For the purposes of its work the Panel has been provided with access to Hillsborough documentation held by Government and local agencies relevant to events surrounding the disaster in advance of the normal 30 year point for public disclosure of records of national interest under the Public Records Act 1958.

7.2 Some of the information held by public bodies within the scope of the Hillsborough disclosure exercise includes sensitive personal data. This Order ensures that there is no room for doubt that it may be possible in an appropriate case for an individual or body to disclose such data under the arrangements put in place by the Home Secretary in a way that complies with the first data protection principle. It does so by, as set out in paragraph 4.3 above, specifying a description of circumstances for the purpose of the condition in paragraph 10 of Schedule 3 that relates specifically to the Hillsborough disclosure process.

7.3 In specifying these circumstances, the Order does not guarantee that disclosure of any sensitive personal data relating to the Hillsborough disaster will automatically meet the condition in paragraph 10 of Schedule 3. An assessment of whether the circumstances described in the Order are present will have to be made by each body or individual for each disclosure that that it wishes to make. Additionally, because the specified circumstances are that disclosure must be "necessary" to give effect to the protocol, the body or individual will have to assess whether disclosure pursues a legitimate aim and is a proportionate means of achieving that aim.

7.4 Where an issue arises regarding the possible disclosure of sensitive personal data relating to an identified individual it is intended that the Order and protocol will work in tandem. Paragraph 9 of the protocol sets out the circumstances in which it is expected that individual identities will be withheld from disclosure. The relevant circumstances for withholding individual identities are listed in sub-paragraphs a) to d). By comparison, the Order sets out the circumstances in which a proposal to disclose sensitive personal data may take place in accordance with the Act.

7.5 Therefore, the protocol and Order are consistent and will, in effect, operate together as a two stage process. First, a body or individual seeking to disclose sensitive personal data relating to an identified individual following discussions with the Panel will look at whether any of the circumstances in paragraph 9(a) to (d) of the protocol are present. If one or more of them are, the protocol suggests that an individual's identity should not be disclosed. However, if those circumstances are not present, then the second stage is in play and a decision will have to be made as to whether the sensitive personal data should in fact be disclosed. That decision will have to take full account of the fact that any disclosure must comply with the Act as it applies to sensitive personal data and so will have to satisfy the necessity test set out in the Order.

## 8. Consultation outcome

8.1 Section 67(3) of the Act requires the Secretary of State to consult the Information Commissioner before making an Order under paragraph 10 of Schedule 3. This consultation was undertaken and the Commissioner has confirmed he is content with the form and substance of the Order. The Secretariat to the Hillsborough Panel was also consulted and it also confirmed that it was similarly content.

## 9. Guidance

9.1 The Panel Secretariat will discuss the implications of the Order with the disclosing organisations and the Hillsborough families.

## 10. Impact

10.1 An Impact Assessment has not been prepared for this instrument as it has a negligible impact on business and public bodies.

## 11. Regulating small business

11.1 The legislation does not apply to small business.

## 12. Monitoring & review

12.1 There is no plan for an ongoing review as this order has a singular purpose.

## 13. Contact

Sean Rigney at the Ministry of Justice Tel: 0203 334 3187 or email: sean.rigney@justice.gsi.gov.uk can answer any queries regarding the instrument.