



## The “right to be forgotten”

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In May 2014 the European Court of Justice ruled that a user had the right to have links to web pages about him removed from Google’s search results because the passage of time had made them “irrelevant”. A Spanish citizen had complained that Google’s links to an auction notice of his repossessed home infringed his privacy. The takedown demand only applied to search results and not the web page containing the notice itself. However, the Court added that others had a similar right to have search results deleted “unless there are particular reasons, such as the role played by the data subject in public life” that would justify keeping the links online. The Court noted that if search engines refused to comply, it would be up to local regulatory authorities – such as the Information Commissioner’s Office in the UK – to force their hand.

As a result of the ruling, Google’s European sites must process thousands of data removal requests that the company has received since its web form went live on 30 May.

The judgment has been criticised by campaigners for freedom of expression, as well as by the House of Lords EU Sub-Committee on Home Affairs, Health and Education.

The Court ruling is based on the 1995 Data Protection Directive. Meanwhile, protracted negotiations are continuing to replace this legislation with a new Regulation, which (in draft) also incorporates a “right to be forgotten”. The UK Government opposes this proposal. (See: Library Note SN6669, [The Draft EU Data Protection Framework](#).)

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## 1 The judgment

The European Court of Justice (ECJ) set a legal precedent on 13 May 2014 when it ruled that a user had the right to have links to web pages about him removed from Google's search results because the passage of time had made them "irrelevant".<sup>1</sup> A Spanish citizen had complained that Google's links to an auction notice of his repossessed home infringed his privacy. The takedown demand only applied to search results and not the web page containing the notice itself. However, the Court added that others had a similar right to have search results deleted "unless there are particular reasons, such as the role played by the data subject in public life" that would justify keeping the links online. The Court noted that if search engines refused to comply, it would be up to local regulatory authorities – such as the Information Commissioner's Office (ICO) in the UK – to force their hand.<sup>2</sup>

The judgment in [Case C-131/12](#) followed a request for a preliminary ruling concerning the interpretation of certain Articles of [Directive 95/46/EC](#) "on the protection of individuals with regard to the processing of personal data and on the free movement of such data" and Article 8 of the [EU Charter of Fundamental Rights](#). The 1995 Directive was given effect in the UK by the [Data Protection Act 1998](#). The Court determined that data subjects had a right to have data erased where its publication in a list of search results breached the requirement of Article 6(1)(c) for data to be "adequate, relevant and not excessive".

EU Commissioner Viviane Reding described the ECJ decision as "a clear victory for the protection of personal data of Europeans".<sup>3</sup>

## 2 Google's response

Google's initial response was to say that the ruling was "disappointing" and that it needed time to "analyse the implications".<sup>4</sup> It has since set up an [online form](#) for complainants wishing to have links removed.<sup>5</sup> The company explains:

... we will assess each individual request and attempt to balance the privacy rights of the individual with the public's right to know and distribute information. When evaluating your request, we will look at whether the results include outdated

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<sup>1</sup> [Case C-131/12](#), *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*.

<sup>2</sup> A useful summary of the judgment is available in an [ECJ press release 70/14](#) (13 May 2014).

<sup>3</sup> "Politician and paedophile ask Google to 'be forgotten'", *BBC News*, 15 May 2014

<sup>4</sup> "UK reacts to Google 'right to be forgotten' ruling", *BBC News*, 21 May 2014

<sup>5</sup> [https://support.google.com/legal/contact/lr\\_eudpa?product=websearch](https://support.google.com/legal/contact/lr_eudpa?product=websearch)

information about you, as well as whether there's a public interest in the information – for example, information about financial scams, professional malpractice, criminal convictions or public conduct of government officials.

Those wishing to have data removed from Google's index must:

- provide weblinks to the relevant material
- name their home country
- explain why the links should be removed
- supply photo ID to help Google guard against fraudulent applications.

Google said that decisions about data removal would be made by people rather than the algorithms that govern the workings of almost every other part of Google's search system. Disagreements about whether information should be removed or not will be overseen by national data protection agencies. Information will only disappear from searches made in Europe; queries piped through its sites outside the region will still show the contested data.<sup>6</sup>

According to an *Independent* article on 3 July, Google had reported receiving more than 41,000 takedown requests in the four days following the ECJ ruling.<sup>7</sup> By mid-July the figure had risen to 90,000.<sup>8</sup> One of the first articles affected by the ruling was a blog post by Robert Peston, the BBC's economics editor, on the departure of Stan O'Neal from Merrill Lynch in October 2007. Other takedown requests have reportedly come from the singer Kelly Osborne, a football referee who lied about a controversial penalty, and a "foul-mouthed" former president of the Law Society.<sup>9</sup>

The volume of requests presents a sizeable challenge to Google, but one which a global corporation may be able to absorb. Smaller search engines, to whom the judgment applies by analogy, are not so well placed. Commentators have suggested that they might respond by automatically withdrawing links to any material objected to because they would not have the resources to examine requests on a case-by-case basis. This would effectively allow any individual an uncontested right of censorship.<sup>10</sup>

### 3 ICO response

In Britain, the Information Commissioner's Office (the data protection regulator) responded to the ECJ judgment first in a blog on its website,<sup>11</sup> then with a brief overview of what it sees as the main points of the judgment:

In operating their search service, Google is processing personal data and is acting as a data controller under the terms of the European Data Protection Directive.

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<sup>6</sup> "Google sets up 'right to be forgotten' form after EU ruling", *BBC News*, 30 May 2014

<sup>7</sup> "Critics outraged as Google removes search results about top UK lawyer and US banker", *Independent*, 3 July 2014

<sup>8</sup> "Google plans debates on 'right to be forgotten'", *BBC News*, 8 September 2014

<sup>9</sup> "Right to be forgotten: Google accused of deliberately misinterpreting court decision to stoke public anger", *Independent*, 3 July 2014

<sup>10</sup> European Committee [HL], *EU data protection law: a 'right to be forgotten'?*, 30 July 2014, HL 40 2014-15, para 35

<sup>11</sup> David Smith, "Four things we've learned from the EU Google judgment", ICO blog, 20 May 2014

Google is established in Spain in terms of its search engine service under the terms of the Directive. Spanish data protection law therefore applies to Google.

Search providers can be required to remove links to web pages that contain personal information published by third parties, from the list of results displayed, following a search on the person's name, where the processing of the personal data does not comply with the relevant provisions of the Directive.

A search provider can be required to consider removal regardless of the legal status of the personal information in the third party web pages.

The Court highlights the significance of interference to personal data rights that can be caused by the availability of the links associated with a name.

The Court observed that the data subject's rights also override, as a general rule, the legitimate interest of internet users to access information.

A balance will have to be struck between these interests. It will depend, in specific cases, on the nature of the information in question and its sensitivity for the individual's private life. It will also depend on the interest in communicating the information to the public, an interest which may vary, according to the role played by the data subject in public life.

The Court observed that lawful processing of personal data may, in the course of time, become incompatible with the directive.

Requests to remove links should be directed to the search provider as data controller. Where the controller does not grant the request, the data subject may bring the matter before the data protection supervisory authority or the courts.<sup>12</sup>

By the end of June 2014 more than 12% of the requests received by Google originated in the UK. If Google decided to refuse the takedown on the grounds that the data were not, in their view, "inadequate, irrelevant or excessive" or fell within the Court's exception for "particular reasons", then an appeal might be made to the ICO. Steve Wood, Head of Policy Delivery at the ICO, has commented that this could represent a serious addition to the regulator's workload.<sup>13</sup>

## 4 Issues arising

A number of other issues are raised by the ECJ judgment. Some of these are covered in a "Q&A" feature on the *Guardian* website.<sup>14</sup> Several points are worth highlighting – first, that the judgment applies to a search engine, not to the original press story that is being indexed:

**Q: Why is it Google is being hit by this and not the newspaper?**

**A:** Because the newspaper gets the protection of being "media" under European data protection law (which offers various protections and exemptions for journalistic work). Google has explicitly opted out of being described as a "media" company.

But the judges decided that because Google collects lots of data and then processes it, and that that data includes information about people, it is a "data controller" under the

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<sup>12</sup> Information Commissioner's Office, *ICO overview of key points of the Court of Justice of European Union judgment regarding Google and the removal of search results*, 20 May 2014

<sup>13</sup> European Committee [HL], *EU data protection law: a 'right to be forgotten'?*, 30 July 2014, HL 40 2014-15, para 38

<sup>14</sup> "Explaining the 'right to be forgotten' – the newest cultural shibboleth", *Guardian*, 14 May 2014

meaning of the EU data protection directive. "Data controllers" have special obligations in the EU - including the responsibility to remove data that is "inadequate, irrelevant or no longer relevant".

Secondly, there is no obligation on the search engine to act proactively in removing data, only to respond to reasonable requests:

**Q: This means that Google's index is going to be emptied out of anything about people, doesn't it?**

**A:** No. The ruling is carefully phrased: someone who wants information about them taken out of the index will have to apply to Google, which will then have to weigh up whether it is in the public interest for that information to remain.

Thirdly, the judgment has application across the EU, even though Google is based in the US:

**Q: But Google says it doesn't process the data in Europe. So why does the court think it's a "data controller" in Europe? Don't the judges understand the internet?**

**A:** The judges' ruling suggests that they understand the non-location of the internet and data, and the operation of search engines, very well. Their concern is whether a company that provides a service available in Europe is covered by European law even if its headquarters are in California (as is the case with Google). They note that the location of Google's servers is secret, for commercial reasons, but that it has a subsidiary in Spain which sells advertising there. By that criterion, they say, Google's operation - including its service - falls under the European data protection directive.

## 5 Criticism of the judgment

Much of the criticism of the ECJ judgment has concerned its possible impact on freedom of speech. Writing in the *Guardian* shortly after the judgment, Mark Stephens warned:

Privacy is a universal right that must be protected, but this overreaching judgment is far more likely to aid the powerful in attempts to rewrite history, than afford individuals more influence over their online identities.<sup>15</sup>

Index on Censorship said that the ruling "should send chills down the spine of everyone in the European Union who believes in the crucial importance of free expression and freedom of information".<sup>16</sup> A number of articles on the [Index website](#) discuss the ECJ ruling in more detail.<sup>17</sup> Jimmy Wales, the founder of Wikipedia, has also spoken out against the ruling.<sup>18</sup>

The House of Lords EU Sub-Committee on Home Affairs, Health and Education took oral evidence on the ECJ judgment before publishing a final report on 30 July 2014.<sup>19</sup> On 9 July, Simon Hughes, the Minister for Justice and Civil Liberties, appeared before the Committee. He said:

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<sup>15</sup> Mark Stephens, "[Only the powerful will benefit from the 'right to be forgotten'](#)", *Guardian*, 18 May 2014

<sup>16</sup> Quoted in "[Politician and paedophile ask Google to 'be forgotten'](#)", *BBC News*, 15 May 2014

<sup>17</sup> See, for example: Melody Patry, "[Are search engines the ultimate arbiters of information?](#)", 14 May 2014. For a contrary view see: Rik Ferguson, "[Right to be forgotten' is the step in the right direction](#)", 21 May 2014.

<sup>18</sup> "[Wikipedia swears to fight 'censorship' of 'right to be forgotten' ruling](#)", *Guardian*, 6 August 2014

<sup>19</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f/inquiries/parliament-2010/right-to-be-forgotten/>

I do not think, both as an individual and a Minister, we want the law to develop in the way that is implied by this judgment, which is that you close down access to information in the EU that is open in the rest of the world.<sup>20</sup>

The EU's data protection framework is currently undergoing revision and includes proposals for a "right to be forgotten" to be enshrined in a Regulation.<sup>21</sup> (For more information on this see our Library Note, [The Draft EU Data Protection Framework](#).) Having heard evidence from data protection experts, the ICO, the Minister and Google itself, the Committee recommended that the UK Government continue to fight to ensure that the updated Regulation no longer includes any provision on the lines of the Commission's "right to be forgotten" or the European Parliament's "right to erasure" which they declared to be "misguided in principle and unworkable in practice".<sup>22</sup>

On publication of the Lords report, the Chairman of the Sub-Committee, Baroness Prashar, said:

The expression, 'right to be forgotten' is misleading. Information can be made more difficult to access, but it does not just disappear. Anyone anywhere in the world now has information at the touch of a button, and that includes detailed personal information about people in all countries of the globe. Neither the 1995 Directive, nor the [ECJ]'s interpretation of it, reflects the incredible advance in technology that we see today.

We believe that the judgment of the Court is unworkable. It does not take into account the effect the ruling will have on smaller search engines which, unlike Google, are unlikely to have the resources to process the thousands of removal requests they are likely to receive.

It is also wrong in principle to leave search engines themselves the task of deciding whether to delete information or not, based on vague, ambiguous and unhelpful criteria. We heard from witnesses how uncomfortable they are with the idea of a commercial company sitting in judgment on issues like that.

There are compelling arguments that, in the new Regulation, search engines should not be classed as data controllers. We do not believe that individuals should be able to have links to accurate and lawfully available information about them removed, simply because they do not like what is said.

It is incredibly difficult for legislation to keep up or 'future proof' the unforeseen leaps that technology is bound to make. We do, however, need to ensure that the next Regulation does not attempt to give individuals rights which are unenforceable.<sup>23</sup>

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<sup>20</sup> <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/righttobeforgotten/right-to-be-forgotten-evidence.pdf>

<sup>21</sup> "EU makes limited progress with draft Data Protection Regulation", *Privacy Laws & Business International Report*, June 2014, p8

<sup>22</sup> European Committee [HL], [EU data protection law: a 'right to be forgotten'?](#), 30 July 2014, HL 40 2014-15, para 62. For a summary of the latest in the protracted negotiations on the data protection package, see paras 57 to 59.

<sup>23</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f/news/right-to-be-forgotten-report/>