

GUIDANCE ON MOTIONS

Data Protection

From 25 May 2018, the General Data Protection Regulation (GDPR), together with the Data Protection Act 2018 (the DPA), replaced the Data Protection Act 1998 in regulating the processing of personal data.

Members are data controllers in their own right for the purposes of data protection law, entirely separate to the SPCB. Under GDPR, every data controller must have a legal basis for any processing of personal data. The term 'processing' is wide and includes collecting, storing, using and disclosing personal data.

The Scottish Parliament does not have any general privilege beyond the limited protection which it is given under the Scotland Act 1998 as regards defamation and contempt of court. Whilst the defamation privilege protects Members from the threat of defamation proceedings as regards any statements made in parliamentary proceedings, data protection requirements still apply. As a result, Members must have a legal basis whenever they include personal data in a motion or disclose personal data orally during Parliamentary proceedings. It is not possible to rely on the provisions of the DPA which preserve Parliamentary privilege in this context as these provisions apply only to the House of Commons and the House of Lords.

Data controllers also have a duty to provide certain information to third party individuals (for example constituents) about the ways in which their personal data will be processed, including information about the purpose of the processing, the legal basis relied upon and who the data may be shared with. One way of fulfilling that duty is for data controllers to add a Privacy Notice to their website setting out the required information (data controllers are not expected to get in touch directly with every individual whose personal data may be processed; unless of course the legal basis relied upon is consent).

Parliamentary rules

Under the admissibility rules in Standing Orders, motions must not breach any enactment or rule of law or be contrary to the public interest. In addition, the Guidance on Motions says "the text of motions and amendments should not disclose any information that is protected by an interdict or court order, that is commercially sensitive or confidential or the publication of which may cause personal distress or loss. Particular care should be taken in relation to any motion that names individuals as their identities may need to be protected in their own interests".

As a matter of course, Chamber Desk advises Members to keep personal data to a minimum in motions and questions and this will continue under GDPR.

Submitting motions to the Chamber Desk

In order to process personal data lawfully, all data controllers must identify a valid legal basis for each processing activity they undertake. This means that Members intending to lodge a motion containing information which identifies a living individual (or from which a living individual can be identified) must have a legal basis under data protection law for doing so.

When submitting motions that contain personal data, Members must therefore: (i) be satisfied that, in disclosing this information, they are complying with data protection legislation and (ii) confirm to Chamber Desk in writing which legal basis they are relying on for including such personal data in the motion.

In practice, this means that Members must confirm to the Chamber Desk that either:

- consent has been given by the person named or whose details are included in the motion, or
- the processing is necessary for the performance of a task in the public interest or for the purposes of the legitimate interests pursued by the Member or a third party.

Where special category data is included in a motion (see Annex) explicit consent will be required unless the individual has already manifestly made the information public. Members will be required to confirm to the Chamber Desk which of these legal bases apply where any special category data is included.

The Chamber Desk will not accept motions unless they are accompanied by such confirmation. The reasons for this are to (i) ensure that lodged motions comply with the admissibility criteria set out in Standing Orders, (ii) assist Members in complying with data protection requirements, and (iii) avoid compromising the SPCB's compliance with data protection requirements in processing these motions.

Further information and motion examples are contained in the Annex.

This guidance will be updated on an ongoing basis in light of experience and any future developments.

Chamber Desk
1 June 2018

ANNEX

CATEGORIES OF DATA AND EXAMPLES OF MOTIONS

There are two types of personal data, standard and special category.

Standard personal data

This is any information relating to a living person who is identified or is identifiable from the information used in a motion (with the exception of any special category data – see below). This would include a person's name, age, their contact details, date of birth, phone number, home address and home email.

The legal bases available to data controllers for processing standard personal data are set out in Article 6 of the GDPR and section 8 of the DPA. The legal bases which are most relevant in this context are consent (Article 6(1)(a) GDPR), public interest task (Article 6(1)(e) GDPR and section 8 DPA), and legitimate interests (Article 6(1)(f) GDPR).

When including personal data in a motion, Members must therefore be satisfied that one of the following legal bases applies and decide which is most appropriate in the circumstances:

- consent has been given by the person(s), or
- that the processing is necessary for the performance of a task carried out in the public interest. Where a Member is satisfied that the raising of awareness/encouraging debate on an important issue in a motion is necessary in the public interest (i.e. of general benefit to the public at large), they can rely on this ground for the processing of any standard category data; or
- the processing is necessary for the purposes of the legitimate interests pursued by the Member or a third party. The legitimate interests can be individual interests or broader societal benefits. This may be appropriate, for example, if the Member considers that it is necessary to include personal data in a motion for the legitimate interest of raising awareness about the efforts of a particular constituent who has raised a significant amount of money for charity. However, it is not possible to rely on this legal basis if the rights and freedoms of the data subject outweigh the legitimate interests pursued; a balancing exercise should therefore be carried out and if the impact of processing the data on the individual's privacy is high and/or they would not expect their data to be used in this way then it would not be appropriate to rely on this basis.

MOTION EXAMPLES

Many motions include standard personal data as described above.

Example 1:

That the Parliament congratulates Alison A, Susan B and Tracey C on the work they carry out for the X charity; notes that they raised £5,000 recently following a sponsored walk in aid of the charity, and wishes them every success in the future.

As with all motions that include personal data, the Member must be satisfied that they have a legal basis for doing so under data protection law.

In this example, the Member may consider that the legal basis for including such personal data is legitimate interests – i.e., the legitimate interests of Parliament acknowledging the charitable work of individuals, or indeed the legitimate interests of the third parties (the three named individuals) to receive such acknowledgment. The Member may choose therefore not to seek the consent of the individuals and submit the motion on the basis of one of these other legal bases. If the Member intends to rely on the legitimate interests ground, they will need to consider any potential impact on the privacy rights of the individuals; however, given the nature of the information, any such impact is likely to be low, particularly if the information was made public by the individuals in seeking sponsorship by way of a publicity campaign.

Example 2:

That the Parliament thanks Mary A for the work that she does to help people in her local community in Dunfermline by regularly providing food to the local foodbank, undertaking home visits to older people in the town [etc].

While the Member may consider that the use of this data may pursue the legitimate interest of raising awareness in relation to the work of Mary A, the motion may be highlighting something that has an impact on the individual's privacy and/or where they would not expect their data to be used in this way. As a result, it may not be appropriate to rely on the legitimate interests ground here (unless Mary A has herself publicised the fact that she undertakes these activities). The Member may therefore consider that the legal basis for processing this data is having the consent of the individual named.

Example 3:

That the Parliament congratulates all of the winners at the recent X Awards 2018, which included [list of individual names].

Here, the Member may consider that the legal basis for including such personal data is legitimate interests – i.e., the legitimate interests of Parliament acknowledging the winners of the X Awards, or indeed the legitimate interests of the winners to receive such acknowledgment. In deciding whether including this personal data would have any impact on the privacy of the individuals, the Member could take into account the fact that these awards were promoted and publicised in the media, it is information already in the public domain, and goes no further than naming individuals and the prizes that they won.

In terms of data minimisation, naming 11 members of a football team may not be necessary for the purpose of a motion, where simply congratulating the team on their achievement might suffice.

Example 4:

That the Parliament understands that, after a cost-cutting exercise, the Chief Executive of X has announced that over 100 staff will be made redundant....

In this case, while a name has not been used, the job title makes the person identifiable from the information used. In cases such as this which involve raising awareness/encouraging debate on an important issue of significance to the general public, the member may choose to confirm to the Chamber Desk that the public interest task legal basis applies.

Example 5:

That the Parliament expresses its disapproval of what it considers the abhorrent racist views espoused by Mr John Smith as reported in the media.

In this example, the reference to Mr Smith and his views amounts to personal data. The Member may consider that including this personal data in a motion is necessary for the performance of a task carried out in the public interest (i.e., raising awareness of/encouraging debate on an important issue in the public interest).

As with all motions, the general advice is that Members should consider keeping personal data included to the minimum necessary for its purpose.

It is not necessary for Members to provide the Chamber Desk with any documentation in support of their choice of legal basis for any motions that contain personal data. They should however retain these where consent is obtained in order to provide a record of compliance for their own purposes.

Special category personal data

This includes details of a person's race or ethnic origin, political or religious views, sex life or sexual orientation, trade union membership, physical or mental health, genetic or biometric data. Criminal offence data is not special category data, however it is included in this section as provision in the DPA means that it must be treated in a similar way to special category data.

The GDPR prohibits the processing of special category data unless one of the exemptions set out in Article 9 GDPR applies. When including special category personal data in a motion, Members must be satisfied that one of the exemptions in Article 9 applies and decide which is most appropriate in the circumstances; the exemptions most likely to be appropriate are that:

- explicit consent has been given by the person (whilst there is no definition of explicit consent under GDPR, the requirement for explicit consent can be

satisfied by the person whose details are to be used giving an express written statement (e.g. by email) of their consent to this); or

- the processing relates to personal data that is manifestly made public by the person whose details are being used.

There is no definition of ‘manifestly made public’ under GDPR, however, simply because personal data is in the public domain (for example, in a newspaper article), or has been provided directly to a Member, does not necessarily mean it has been *manifestly made public* by the person. This exemption can only be relied upon in circumstances where it is clear that the data subject has themselves put their personal data into the public domain, for example, on their own social media account or on a charity fundraising page that they have set up themselves).

As for information relating to criminal convictions, these are not classed as special category data and so any processing would have to rely on one of the legal bases in Article 6 GDPR (e.g., public interest or legitimate interests); however, as a result of Article 10 GDPR and section 10(5) of the DPA it is also necessary to comply with a condition in Parts 1, 2 or 3 of Schedule 1 of the DPA. The conditions which are relevant to Members in this context are that:

- consent has been given by the person (this requirement can be satisfied by the person whose details are to be used giving an express written statement (e.g. by email) of their consent to this); or
- the processing relates to personal data that is manifestly made public by the person whose details are being used.

MOTION EXAMPLES

Example 1:

That the Parliament congratulates Joe A on achieving [x]; notes that Joe has a [named medical] condition and that this has reduced his mobility and needs constant care, however this has not prevented him from doing [y]....

In this case, under GDPR, the Member would require to be satisfied that they have received the explicit consent of Joe A (or someone who can lawfully provide consent on his behalf if he does not have capacity to do so) to use information for this purpose that identifies his disability, or that they consider that he has already “manifestly” made this information public on, for example, his social media accounts or another public forum. Where explicit consent is sought, the Member should seek an express written statement from the individual (an e-mail from the individual is acceptable).

Example 2:

That the Parliament notes that Jenny B from Edinburgh has won £1 million after purchasing her first-ever National Lottery ticket; further notes that Jenny, who lives with her partner Susan plans to do [x] with the money.

In this case, the information included may have been gleaned from a newspaper article or TV news story. While this information is in the public domain, it cannot be assumed that all or any of the personal data was provided to the media by the named individuals. The Member might not, therefore, be able to rely on the 'manifestly made public' legal basis and explicit consent would therefore be required.

However, if the information was made available by the individuals, for example on their social media accounts, then the Member may consider that the information has manifestly been made public by them and confirm that this is the legal basis on which the information is being published.

Example 3:

That the Parliament congratulates Rachel A on winning a gold medal at the Paralympic Games; notes that Rachel has [condition] and has been participating in the sport since she was 10....

While this motion mentions a disability, the context is that a medal was won in a competition that was for disabled athletes only. In such circumstances, the Member may choose to process this data relating to the person's name and their disability on the legal basis that the individual has manifestly made the information public through her participation in a public event open only to disabled athletes.

Example 4

That the Parliament is aware that Susan and Derek M, parents of the murdered schoolgirl Amber M, have set up a Memorial Fund in Amber's memory with a view to offering counselling and practical support to families who, like themselves, have suffered severe depression due to the loss of a child; the Parliament commends Susan and Derek's bravery and wishes them well in this venture; and further notes that Amber's killer, Robert F, has now been convicted of murder and sentenced to life imprisonment, with a punishment part of 20 years.

There are a number of issues arising in this example.

First, data protection legislation only relates to living individuals, so it is not necessary to have a lawful basis in order to refer to the deceased victim.

If it is clear (e.g., from broadcast interviews given by the parents or from their own social media accounts) that the parents have themselves made public the fact that they have suffered depression then it would be appropriate to rely on the 'manifestly made public ground' to cover this special category data. Members may choose to rely on legitimate interests to cover the standard data about the parents (ie their name and the fact that they are setting up the Memorial Fund); it would be appropriate to take into account, in the assessment of any privacy impact on the couple, whether they themselves had made the information about the Fund public.

As for the offence related information about the offender (i.e. his name, conviction and sentence), it will be necessary to rely on a legal basis in Article 6 (public interest or legitimate interests would seem to be relevant), but also to satisfy a condition in Parts 1, 2 or 3 of Schedule 1 of the DPA. This makes processing of such information difficult as the only conditions which appear to be relevant to Members in this context are that:

- consent has been given by the offender (this requirement can be satisfied by the person whose details are to be used giving an express written statement (e.g. by email) of their consent to this); or
- the processing relates to personal data that is manifestly made public by the offender.

There is currently no specific guidance from the Information Commissioner on what 'manifestly made public' by the data subject means in the context of criminal offence information (would the test be satisfied, for example, if a named individual has been convicted of an offence, the details of which will have been announced in a public forum?). This guidance will be reviewed in the light of any advice or official guidance from the Information Commissioner, or any case law, relating to this question.

As with all motions, the general advice is that Members should consider keeping personal data included to the minimum necessary for its purpose.

It is not necessary for Members to provide the Chamber Desk with any documentation in support of their choice of legal basis for any motions they submit that contain personal data. They should however retain these where consent is obtained in order to provide a record of compliance for their own purposes.

It is noted that there is a presumption in the DPA that children over 12 (in Scotland) have capacity to provide consent for the processing of personal data relating to them (and for exercising their rights under data protection law). For children under 12, consent can be provided by a parent or guardian.

Further information

Useful guidance on GDPR can also be found on the Information Commissioner's Office [website](#), particularly in relation to:

- the lawful bases for processing normal category personal data;
- special category data;
- consent; and
- providing privacy information to data subjects.

[GDPR FAQs](#)