

GUIDANCE ON QUESTIONS

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 question 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, questions must not breach any enactment or rule of law or be contrary to the public interest. In addition, the Guidance on Questions says “the wording of a question 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 regarding questions that name individuals, since they may be people whose identity needs to be protected”.

The Guidance on Questions also states that “questions should be no longer than is necessary to elicit the information sought. In editing, the clerks will consider whether questions contain any material that is not strictly necessary”. As a matter of course therefore, Chamber Desk clerks advise Members to keep personal data to a minimum in questions and this practice will continue under GDPR.

While it is acknowledged that personal data is rarely used in questions, this guidance sets out the position under GDPR should a Member consider doing so.

Submitting parliamentary questions 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 question 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 questions 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 question.

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 question, 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 question (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 questions unless they are accompanied by such confirmation. The reasons for this are (i) to ensure that lodged questions comply with the admissibility criteria set out in Standing Orders, (ii) to assist Members in complying with data protection requirements, and (iii) to avoid compromising the SPCB's compliance with data protection requirements in processing these questions.

While this guidance relates to written and oral parliamentary questions, GDPR applies also to proceedings in the Chamber. If a Member chose to raise an issue in proceedings that included personal or special category data, as a data controller in their own right, they must satisfy themselves that they have a legal basis for doing so.

Further information and question 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 QUESTIONS

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 question, 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 asking a question 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. 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.

QUESTIONS EXAMPLE

Parliamentary questions are a means by which Members can obtain factual and statistical information from the Scottish Government or the Scottish Parliamentary Corporate Body (SPCB). It is accordingly rare for individuals to be named in parliamentary questions. The expectation would be that an issue relating to a specific individual is more appropriately raised during proceedings.

Example:

To ask the Scottish Government for what reason it has not yet compensated Joe B, whose property was compulsorily purchased as part of the construction of the new section of the M77 motorway.

While the Member may consider that the use of this data may pursue the legitimate interest of raising awareness in relation to the plight of Joe B, the question may be highlighting something that has an impact on Joe B's privacy and/or where he would not expect his data to be used in this way. As a result, it may not be appropriate to rely on the legitimate interests ground here unless, in this case, the Member is satisfied that Joe B has himself publicised the fact that he has still not been compensated. The Member may therefore consider that the legal basis for processing this data is having the consent of the individual named.

While the question as it stands may meet the admissibility criteria, the Chamber Desk clerks may suggest a more general question, without the need to refer to personal data. There may also be sub judice issues to consider if there are ongoing legal proceedings in relation to a particular case, which would result in the question being inadmissible (Rule 7.5.1)

An alternative might be along the lines of:

To ask the Scottish Government how many people's property were compulsorily purchased as part of the construction of the new section of the M77; of these, how many have not yet received compensation from x, and for what reason compensation remains unpaid in each case.

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 question, 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.

QUESTION EXAMPLE

Example :

To ask the Scottish Government for what reason Mary B of 12 Main Street, Newtown has had to wait x weeks for an operation to do y, and what action it will take to ensure z.

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

This type of question is more likely to be asked in the Chamber as an oral supplementary to a published oral question rather than in a written question, but in asking it during proceedings, the Member still requires to be satisfied that he or she has a legal basis for doing so.

If this example was submitted as a written question, the Member may decide to process this data on the grounds of having the explicit consent of Mary B to use such

details (bearing in mind that the information about Mary B's health amounts to special category data). This means that the Member must have an express written statement to the effect that consent has been given.

Alternatively, if the information was made available by Mary B, for example on her social media account, then the Member may consider that the information has manifestly been made public by them and should confirm that this is the legal basis on which the information is being published.

If the personal data had 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 Mary B. The Member might not, therefore, be able to rely on the 'manifestly made public' legal basis and explicit consent would therefore be required.

However, in the absence of consent in this case, the Chamber Desk *may* consider that the question breaches the admissibility rule in Standing Orders that:

"the wording of a question should not disclose any information...the publication of which may cause personal distress or loss". In such circumstances, the following may be suggested as an alternative:

To ask the Scottish Government what its response is to concerns that waiting times for operations to do x in Newtown are not being met and what action it is taking to address this.

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](#)