

BALANCE OF COMPETENCES REVIEW

SCOTTISH GOVERNMENT RESPONSE

INFORMATION RIGHTS

1. The Scottish Government welcomes the opportunity to contribute to this call for evidence. This response sets out the key areas where the Scottish Government wishes to make a contribution to the debate on the balance of competences between the UK and the EU in the area of information rights.

2. Our response covers EU competence in the areas of both data protection and access to official information. It should be noted from the outset that under the current constitutional settlement in the UK, data protection is a reserved matter for which the Scottish Parliament has no legislative competence. Access to official information in Scotland, however, is not subject to a specific reservation and the Scottish Parliament has legislative competence in this area.

Data Protection

EU competence

3. The EU has a wide-ranging competence in respect of data protection. Indeed, Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provides that “*everyone has the right to the protection of personal data concerning them*”. In pursuance of this, Article 16(2) TFEU enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to set out rules relating to the protection of individuals with regard to the processing of personal data by the EU institutions, bodies, offices and agencies as well as the Member States when carrying out activities which fall within the scope of EU Law as well as rules relating to the free movement of such data. Separate provision is made in relation to data protection in the area of the EU’s Common Foreign and Security Policy which is governed by Article 39 of the Treaty on European Union (TEU) and for which the right to set the rules regarding data protection and its movement vest in the Council alone.

4. Clearly then, EU competence to regulate the protection of data goes well beyond the handling of data by the EU institutions and extends to the handling of data in the Member States in areas falling within the scope of EU law.

5. Although EU competence in the field of data protection is wide-ranging, it is not an area which falls within the exclusive competence of the EU as defined in Article 3 TFEU. Data protection, instead, falls within the shared competence between the EU and the Member States set out in Article 4 meaning that it is subject to the principles of subsidiarity and proportionality set out in Article 5 TEU. The EU may exercise its competence, therefore, only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effect of the proposed action, be better achieved at EU level. EU action is only prevented from exceeding what is necessary to achieve the objectives of the EU Treaties.

6. The Scottish Government's [Identity Management and Privacy Principles](#) demonstrate the SG's commitment to protecting citizens' personal data and promote good practice across the Scottish Public Sector.

Exercise of EU competence

7. The primary instrument through which the EU has exercised its competence in the field of data protection is 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 ('the Data Protection Directive') which came into effect in 1995. The Data Protection Directive established a framework on how data can be used throughout the EU and required implementation into the national laws of all Member States. The Directive was implemented in the UK by the Data Protection Act 1998 (DPA) which extends to Scotland.

8. Further exercises of EU competence in the area of data protection have included Regulation (EC) 45/2001 which extended the rules prevailing in the Member States by virtue of the Data Protection Directive to the use of data by the EU institutions themselves; Directives 2002/58/EC and 2009/136 which made specific provision in relation to the processing of data in electronic communications ; and the Council Framework Decision 2008/977/JHA which made provision in for the protection of personal data used in criminal matters for the purposes of cross-border police or judicial cooperation.

Future exercise of EU competence

9. To counter the effect of developments in technology and to ensure that EU citizens retain their right to privacy and the protection of their personal data across the entire EU, the European Commission published proposals for new legislation under Article 16(2) TFEU to update the Data Protection Directive on 25 January 2012. The Commission proposes to replace the Data Protection Directive with a Regulation which is to be augmented by an additional Directive specifically regulating the processing of personal data in police and judicial co-operation cases¹.

10. The proposed new Regulation will expand the definitions of data subject and personal data to broaden the reach of EU law in the field of data protection. The Regulation proposes that personal data will also include online identifiers, locational data and genetic data. The requirements for consent have been restricted, requiring explicit consent for any personal data, whereas currently explicit consent is only required for sensitive personal data. Along with expanding the definition of personal data to include identifiers which have developed due to new technology, the Regulation goes further than the Directive in strengthening individuals' right to be forgotten and to have data erased. These rights will prove difficult to organisations who would be required to delete any references to an individual on their website. This also impacts on search engines, as a recent case in Court of Justice of European Union (CJEU) against [Google](#) demonstrated.

¹ The proposed Directive will apply to police and judicial co-operation cases in wholly internal cases but will not extend to the UK by virtue of Article 6a of Protocol 21 to the EU Treaties.

11. The Regulation puts further obligations on organisations (data controllers). Organisations will be required to carry out data protection impact assessments for all aspects of processing personal data. They will be required to employ a Data Protection Officer (DPO) if the organisation has 250 or more employees or processes 5000 individuals' personal data or regularly monitors individuals (for example tracking individuals' movements via GPS). The DPO role has to be independent and will require a qualified, experienced data protection practitioner. The requirement to register with the regulator, in the UK this is the Information Commissioner's Office (ICO), will be removed but organisations will still be required to hold all of the detail required and more and would be obliged to provide this information to the regulator and others on request. It will also be required to notify all data protection breaches (no matter how serious) to the regulator as soon as possible, preferably within 24 hours. The regulator is also likely to have more powers to fine organisations. This may mean that an organisation could be required to pay a fine of 2% of annual turnover or €1m for a data protection breach. The Regulation proposes to extend the territorial scope of legislation requiring any organisations outside the EU who process EU citizens' personal data will be required to comply with the regulation.

Assessment of EU competence and proposals for reform

12. The Scottish Government considers that it is appropriate for the EU to have a shared competence with the Member States in respect of data protection. The establishment and maintenance of a single market built upon fundamental rights of free movement requires some form of overarching policy on data protection across that market. It is also important that this competence can be exercised quickly and consistently to deal with the continued advances in technology and the growth and evolution of the Digital Single Market. It would not be possible for the single market to function effectively if the rules regarding data protection varied widely across the territory of the EU and there is a requirement to ensure a consistency of regulation regarding data protection with a cross border element. Some form of harmonisation is also necessary so that an enterprise in one Member State which is exporting goods and services to a number of others does not have to comply with a variety of fragmented rules and regulations.

13. The Scottish Government is, therefore supportive of EU competence in the area of data protection so it can ensure consistency of data protection across all EU Member States with the objective of all citizens of the Union having a common degree of protection with regard to their personal data – as is required by the EU Treaties. Nonetheless, we consider that the Commission's latest proposals for a Data Protection Regulation would not be an effective or prudent exercise of that competence.

14. The Commission's proposals to replace the Data Protection Directive with the Data Protection Regulation will eradicate a great deal of flexibility that the Member States have in this area. National and regional rules which have been adopted to implement the Data Protection Directive will be replaced with uniform EU-wide rules. While this does have benefits (enterprises will only have to comply with one set of rules), it completely removes flexibility from the process and will impose rigid data protection rules which have been tailored to suit large enterprises in the large Member States on small enterprises operating in smaller markets. The proposed

Data Protection Regulation is much more prescriptive than the Directive while it strengthens individuals' privacy rights it imposes significant and onerous obligations on organisations which are likely to act as a brake and potentially a barrier to economic growth and innovation.

15. The Scottish Government accepts that the Data Protection Directive requires to be updated to counter the effects of modern technology. We do, however, consider that the proposed new EU Regulation is not an example of better or smarter regulation. While uniformity is necessary in some areas, in the area of data protection where the competence is shared with the Member States, EU measures must respect the principles of subsidiarity and proportionality. EU action should, therefore, focus on setting out the core objectives which it aims to achieve and leave flexibility for the Member States to implement it in the most appropriate fashion so as to account for regional variation. Should any Member State not be taking its obligations seriously in this respect then a number of options are open to the Commission as the guardian of the EU Treaties to ensure that they comply. It should not, however, be the role of the EU to establish uniform or inflexible rules when the same results could be achieved by more tailored measures. This problem is all the more acute in the current financial climate in Scotland where inflexible rules regarding data protection could threaten the prosperity and existence of many Scottish enterprises which already take their obligations in this area very seriously.

Access to information

EU competence

16. The EU's competence in respect of the access to information is not as wide-ranging as that of data protection and is limited to the access of documents of EU's institutions, bodies, offices and agencies (see Article 15(3) TFEU). It does not extend to the access of information held by the authorities of the Member States but it should be noted that separate competence may relate to the access of information in specific policy areas such as that of environmental information for which the EU has exercised competence under what is now Article 192 TFEU to adopt Directive 2003/4/EC on public access to environmental information.

Exercise of EU competence

17. In relation to EU legislation on access to information in Scotland, the main piece of legislation which affects Scottish public bodies and members of the public is Directive [2003/4/EC](#) on public access to environmental information. As a result, the Scottish Government adopted the [Environmental Information \(Scotland\) Regulations 2004](#) (EIRs) which require public bodies in Scotland to comply with the obligations set out in the Directive. The EIRs require public bodies to release any environmental information they hold on request unless certain limited exceptions apply and it is in the public interest to withhold the information. According to data collected by the Scottish Information Commissioner, around 6600 requests for information from Scottish public bodies were recorded as EIR requests during the 2013-14 financial year.

18. There are a number of other pieces of EU legislation on access to information which also apply in Scotland. Firstly, the Reuse of Public Sector Information

Directive provides a right to receive information in a reusable format (such as Excel spreadsheets that can be copied and edited) and to use information held by public bodies for other purposes, such as creating a business opportunity. A revised, strengthened version of that Directive (Directive 2013/37/EU) has been adopted and will be implemented by summer 2015. Secondly, the Directive establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) (Directive 2007/2/EC), implemented in Scotland through the INSPIRE (Scotland) Regulations 2009 creates a right of access to spatial information.

19. While the great majority of information requests are handled under Scottish legislation via the [Freedom of Information \(Scotland\) Act 2002](#) (FOISA), the proportion of requests being handled under the EIRs has increased in recent years (probably largely due to increased awareness of the EIRs among public bodies) and the balance of EU competence in this area has increased somewhat as a result of the INSPIRE Directive and the strengthening of the Reuse of Public Sector Information Directive.

Assessment of EU competence and proposals for reform

Right to access documents of the EU institutions

20. Promoting greater transparency and access to information in relation to all the EU institutions is welcome. Therefore, we support EU competence in this area as well its exercise in the form of the Access to Public Documents Regulation. However, we believe that awareness of this Regulation is fairly low amongst most individuals and businesses in Scotland. The institutions should therefore aim to do more to raise public awareness of people's rights to request information from the institutions.

Right to access documents within the Member States

21. Based on our experience of access to information under the Directive on public access to information, we do not consider that more EU competence or action is necessary in order to enable citizens to access official information within Scotland.

22. While there could be some benefits, particularly for organisations operating across the EU, in having harmonised rules across the EU regarding rights to access environmental information, the EIRs are complex, create confusion among staff in public bodies and members of the public about how they differ from FOISA and do not really add to the information rights people already have under FOISA. FOISA is specifically designed to take account of Scottish circumstances and practices, for example in the exemptions under which it allows public bodies to withhold information. While the EIRs have generally similar provisions – and in some places give public bodies greater flexibility than FOISA, their provisions are not designed with Scottish or wider UK circumstances in mind. There are therefore some provisions or missing provisions which mean the Regulations are either clunky or make it difficult or impossible to withhold information which it is generally acknowledged in Scotland that it would not be appropriate to release. Examples of this include:

- Some exceptions which are difficult to interpret or apply and make it less clear where certain types of information, such as legal advice or commercially sensitive information, can be withheld.
- A lack of any provisions to allow information which is due to be published soon to be withheld. This would require official statistics, which have to be properly checked and released on a set date in accordance with the cycle of publication of these statistics, to be released to a requester in advance of the publication date. This would undermine the impact of the announcement of those statistics.
- A requirement to apply the public interest test to withholding information a public body does not have. This provision does not make sense, requires bodies to provide overly bureaucratic responses and causes confusion and suspicion among requesters. For example, even though a body may say it does not have the information requested, given the body then goes on to considering the public interest in both releasing and not releasing the information, the requester may think they must actually have some information.
- Some ambiguity about some of the EIR provisions stemming from the 2003 Directive, such as what bodies are actually subject to the Regulations under part (d) of the definition of a Scottish public authority, and difficulties in some cases in determining what falls within the definition of 'environmental information', particularly where the information requested is a mixture of environmental and non-environmental.

23. Leaving Scotland and others with freedom of information legislation equivalent to the EIRs to opt out of the EIRs would reduce complexity for requesters and public bodies by allowing all requests to be handled under one regime. While the EIRs can help citizens to access information in some cases, they generally create confusion among the public and add to complexity in relation to information requests. In this particular area, we believe Scottish legislation is more appropriate as Scotland already has very robust freedom of information legislation under the Freedom of Information (Scotland) Act (FOISA) which covers all information, including environmental information, and is designed specifically for Scottish circumstances. It would be exceptionally rare that a requester was able to access information through the EIRs that they would not have been able to access under FOISA.

24. Therefore, we would propose that, while the EIRs are beneficial for those Member States or nations which do not have their own freedom of information legislation, those, such as Scotland or the UK, which do have legislation which provides an equivalent level of access to information to that in the EIRs should be able to opt out of EIR coverage. This would benefit both citizens and public bodies by reducing the level of complexity and confusion in handling information requests as it can often be difficult, firstly, to determine if a request should be handled under the EIRs or FOISA or both, and secondly for people to understand the requirements of the two different regimes.

Future challenges

25. Increasing requirements in terms of protecting the privacy of individuals' data may create increased tensions with freedom of information legislation (including the EIRs) by making public bodies (and other organisations who may need to send them information) extremely risk averse about releasing any personal data at all, even in cases where the type of personal data concerned would normally be released at the moment. This will naturally lead to more appeals to the Scottish Information Commissioner and other European Information Commissioners.

26. The increasing volume of information held by public bodies and the changing way citizens correspond with bodies, such as using a variety of social media, may lead to increased challenges in ensuring any information request under FOISA or the EIRs is quickly identified and actioned. Similarly, the volume of requests for information is increasing – for example the Scottish Government has seen constant increases in the numbers of FOI and EIR requests over the past few years. This is generally positive in terms of showing increased awareness amongst the public about their rights to seek information, although it can create resourcing issues for some public bodies in managing all their requests.