

EXPLANATORY MEMORANDUM TO
THE DATA PROTECTION (CHARGES AND INFORMATION) (AMENDMENT)
REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport (DCMS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Data Protection (Charges and Information) Regulations 2018 (“the Funding Regulations”) set out a requirement for data controllers (individuals and organisations that handle people’s personal data) to provide information, and pay a charge, to the Information Commissioner’s Office (ICO). This instrument amends the Funding Regulations by introducing a new exemption for the processing of personal data by: (i) members of the House of Lords; (ii) elected representatives, as defined in paragraph 23(3) of Schedule 1 to the Data Protection Act 2018 (“the DPA 2018”) in connection with the discharge of their respective functions; and (iii) relevant processing undertaken by candidates (prospective and validly nominated) seeking to become elected representatives.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The powers under which this instrument is made cover the entire United Kingdom (see section 137 of the DPA 2018) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Minister for Digital and the Creative Industries has made the following statement regarding Human Rights:

“In my view the provisions of the Data Protection (Charges and Information) (Amendment) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Currently all controllers for the purposes of the DPA 2018 are required to provide certain information to the ICO and pay a charge, unless a relevant exemption applies. The charge regime was implemented on 25 May 2018, via the Funding Regulations. There are three levels of charge for data controllers, payable annually: micro organisations (including individuals), charities and small occupational pension schemes, who pay £40, small and medium organisations, who pay £60 and large organisations, who pay £2,900. A £5 discount applies for payment by direct debit.
- 6.2 The Schedule to the Funding Regulations sets out a number of exemptions from paying the charges for certain types of data controller and processing. The exemptions are intended to form part of a fair and flexible framework of paying charges to the ICO, and provide for scenarios where payment of a charge would not be appropriate, for example because payment of the charge would give rise to significant negative impact on individuals or businesses. Currently, data controllers do not have to pay the annual data protection charge if they process personal data without an automated system such as a computer or if they only process personal data for one (or more) of the following purposes: staff administration; advertising, marketing and public relations; accounts and records; not-for-profit purposes; personal, family or household affairs; maintaining a public register; and judicial functions. Charities and small occupational pension schemes are also automatically subject to the lowest tier of charge.
- 6.3 The Funding Regulations were subject to the affirmative resolution procedure. In March 2018, during the Lords and Commons parliamentary debates on the Funding Regulations, the Government committed to conducting a consultation on the exemptions (see Hansard: HL 20 March 2018, vol 790 col 45GC, and HC, Second Delegated Legislation Committee, 26 March 2018, col 5). The Government also made it clear that it was minded to consider an exemption for all elected representatives and members of the House of Lords. The commitment to publish a consultation was also set out in the Explanatory Memorandum to the Funding Regulations.
- 6.4 The Data Protection (Charges and Information) (Amendment) Regulations 2019 will extend the exemptions in paragraph 2(2) of the Schedule to the processing of personal data relating to the discharge of the responsibilities of elected representatives, as defined in paragraph 23(3) of Schedule 1 to the DPA 2018 - this definition includes members of the House of Commons, members of the National Assembly for Wales, members of the Scottish Parliament, members of the Northern Ireland Assembly, UK wide local authority councillors and police and crime commissioners. The Regulations will also extend the exemptions at paragraph 2(2) of the Schedule to relevant processing undertaken by candidates (prospective and validly nominated) standing for these offices and by members of the House of Lords.
- 6.5 Although the Funding Regulations were originally made under sections 108(1) and (5) and 110(6) of the Digital Economy Act 2017 (c. 30), those sections were subsequently repealed by paragraph 224 of Schedule 19 to the DPA 2018. By virtue of paragraph 26 of Schedule 20 to the DPA 2018, the Funding Regulations have effect as if they were made under section 137 of that Act. Those Regulations are being amended now by relying on the powers at section 137 of the DPA 2018.

7. Policy background

What is being done and why?

- 7.1 Article 4 of the General Data Protection Regulation (‘the GDPR’) defines a controller as a “natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data ...”. In accordance with this definition, elected representatives, candidates (prospective or nominated) and members of the House of Lords are classed as data controllers where they are responsible for personal data of their constituents and members of the public. For instance, a Member of Parliament (MP) or local councillor will always be the data controller for their office as they correspond with their constituents and make decisions as to how constituents’ cases are dealt with and therefore how their personal data is processed. Employees of the elected representative can process personal data on the data controller’s behalf and are expected to comply with the DPA 2018, but will be acting on the elected representative’s instructions, and therefore the overall responsibility for the processing remains with that individual.
- 7.2 Elected representatives currently incur the £40 charge (£35 if paying by direct debit). There is no current exemption in the Funding Regulations that specifically covers elected representatives, candidates (prospective or nominated) or members of the House of Lords, although they would be able to claim exemption under paragraph 2(2)(a) of Schedule 1 to the Funding Regulations if all processing they undertake is by non-automated means. In addition, parish and town councillors are not normally required to pay a charge. This is because any processing of personal data they undertake is generally done on behalf of the town or parish council (they are not themselves acting as data controllers) and therefore covered by the annual charge paid by the town or parish council.
- 7.3 A public consultation, ‘Review of exemptions from paying charges to the Information Commissioner’s Office’ was published on 20 June 2018 and closed on 1 August 2018. The consultation included a question on whether a new exemption should be introduced for elected representatives, as defined in paragraph 23(3) of Schedule 1 to the DPA 2018, as well as candidates (including prospective candidates) for election and members of the House of Lords. The consultation set out the Government’s views that activity deriving from elected representatives’ public office and public function should not be liable to a charge, and that charges of this nature potentially represented a perceived or actual barrier to democratic engagement. Detail on the outcome of the consultation is included below.
- 7.4 This instrument inserts into the Schedule to the Funding Regulations a new exemption for the processing of personal data by members of the House of Lords (and those acting with their authority) and for the processing of personal data by elected representatives (and those acting with their authority) where the processing is used solely for the purposes of standing for or fulfilling the office of elected representatives (as defined in paragraph 23(3) of Schedule 1 to the DPA 2018. The exemption will extend to personal data processed by validly nominated candidates and by prospective candidates prior to their nomination (and those acting with the authority of those persons), where that processing relates solely to these individuals standing for the elected offices defined in paragraph 23(3) of Schedule 1 to the DPA 2018. The new exemption will take effect from 1 April 2019 and will cover the requirement to

provide information to the Information Commissioner, as well as the requirement to pay a charge.

- 7.5 The exemption extends to individuals who have been validly nominated as candidates, and those who have been selected by their party but not yet formally nominated as candidates, or have commenced activity as an independent candidate. This is to address the risk that prospective candidates who have not yet gone through the process to become validly nominated might be liable to a charge when their incumbent opponents are not, thereby creating an additional barrier to democratic engagement. In order to ensure that the exemption can be applied in practice, it is the type of activity in connection with which personal data is processed by candidates that is the determining factor in whether processing is exempt. The activity must be reasonably regarded as intended to promote or procure the election or re-election of the person in order to qualify for the exemption.
- 7.6 Elected representatives often process very sensitive personal data when handling case work, and the Government understands the need to ensure that elected representatives handle that data appropriately and in accordance with the expectations of those who they serve. As with other existing exemptions, the new exemption does not absolve those eligible for the exemption of their data protection responsibilities. Those who are data controllers for their constituents' casework, will remain controllers, and will continue to receive tailored support and guidance from the ICO. They will also be subject to the same penalties and enforcement powers of the ICO as other controllers in the event of a breach of the legislation.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 The Government received 430 substantive or partial responses to the consultation. Overall, and for a variety of reasons, there was broad support for the current exemptions to remain as is. The most prominent reason for retaining current exemptions was the potential impact upon micro organisations; small and medium sized enterprises and small, informal, voluntary groups should the exemptions be removed. The consultation did not highlight any significant public concern or drive to make a change, and therefore we have decided to retain the current exemptions as is at this point in time.
- 10.2 Of the total responses to the consultation, 29% supported a new exemption for elected representatives, candidates (including prospective candidates) for election and members of the House of Lords, while 15% of respondents did not agree with the proposed exemption; 24% responded they did not know and 32 % did not answer the question.
- 10.3 Of those who responded in favour of a new exemption for elected representatives, nearly 50% added comments. Many of those commenting indicated they agreed with

the rationale for the exemption set out in the consultation; that is, that the charges constituted a ‘barrier to democracy’ and that activity deriving from public office should not be liable to a charge. Some respondents commented that the charges were bureaucratic and put additional administrative and financial burdens on the taxpayer, given that many elected representatives could claim back the charges as an expense. Some respondents thought the exemption should only extend to local authority elected representatives, and not MPs.

- 10.4 There were a number of reasons why respondents did not favour a new exemption for elected representatives. Some considered that the requirement to register (which arose under the Data Protection Act 1998 but is no longer in place) was important for transparency and it reminded elected representatives about their data protection related obligations and responsibilities, especially given their processing of sometimes highly sensitive personal data and previous breaches of the legislation by some MPs. Others felt that MPs should not be given ‘special treatment’ over other data controllers who were required to pay the charge, especially as they receive remuneration and it was considered that the charge was relatively low compared to the level of remuneration received.
- 10.5 The consultation responses did not make a compelling case against this exemption being implemented, or for it to only extend to certain categories of elected representatives. The Government believes that any exemption for elected representatives should recognise that all levels of elected representative fulfill the same, important role in representing the public. As such, Government has decided to proceed with implementing the new exemption, noting the support from respondents for those who take up public office roles, some of which do not receive substantive remuneration, which is in line with its intention to remove perceived or actual barriers to those roles where appropriate. A full Government response to the consultation is available at <https://www.gov.uk/government/consultations/review-of-exemptions-from-paying-charges-to-the-ico>.
- 10.6 Separate to this consultation, Government also worked with the Cabinet Office (who have responsibility for electoral reform policy), the Ministry of Housing, Communities and Local Government (to assess impact upon locally elected representatives) and the ICO to assess the impacts of this new exemption.
- 10.7 Each of the devolved administrations were also consulted separate to the public consultation process. They were content with our policy proposals.

11. Guidance

- 11.1 The ICO will provide guidance on the new exemption on its website and in its e-newsletter. Elected representatives and members of the House of Lords also receive guidance on their general data protection responsibilities through their organisations and representative bodies; for example, through the House of Commons Information Rights and Information Security Service (IRIS) in the case of MPs and the Information Compliance Team for members of the House of Lords, and through the Local Government Association (LGA) in the case of local authority councillors.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

- 12.2 The impact on the public sector is only in relation to those who are elected representatives or those seeking to become an elected representative (as defined in paragraph 23(3) of Schedule 1 to the DPA 2018), and members of the House of Lords in that they will no longer be required to pay the ICO's annual data protection charge.
- 12.3 The new exemption means a loss to the ICO's funding, estimated at £720,000 per year from 2019/20 based on an approximate figure of 18,000 elected representatives, candidates (prospective and nominated) and members of the House of Lords currently paying the charges, who no longer have to pay. Given that some elected representatives currently claim the cost of the charge as an expense, this also represents a potential saving to the public purse.
- 12.4 DCMS will work with the ICO to manage the impact on their income, and ensure that there is not a detrimental effect on services provided to data controllers (including business and civil society).
- 12.5 A full Impact Assessment has not been prepared for this instrument because this policy does not give rise to a financial impact on businesses.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is set out in the DPA 2018.
- 14.2 The regulation itself does not include a statutory review clause. However, section 138(2) of the DPA 2018 requires the Information Commissioner to keep under review the working of the Funding Regulations. The Information Commissioner may from time to time submit proposals to the Secretary of State for amendments to be made to them. Further, the Secretary of State is required by section 138(3) of the DPA 2018 to review the Funding Regulations within 5 years of them being made. It is anticipated that a review will be undertaken at the end of the current Spending Review, in 2021.

15. Contact

- 15.1 Maggie McDonald at DCMS, telephone 020 7211 6564, email: maggie.mcdonald@culture.gov.uk or Kavita Perry at DCMS, telephone 020 7211 6048, email kavita.perry@culture.gov.uk can be contacted with any queries regarding this instrument.
- 15.2 Kevin Adams, Deputy Director for Domestic Data Protection Team at DCMS can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister for Digital and the Creative Industries at the DCMS can confirm that this Explanatory Memorandum meets the required standard.