

Mr James Dornan  
Convener  
Education & Skills Committee  
The Scottish Parliament  
EH99 1SP

17 October 2017

**BY E-MAIL**

Dear Mr Dornan

**The Children & Young Persons (Information Sharing) (Scotland) Bill – (CYPISB)**

Many thanks for your letter following the evidence session on the above Bill which Maureen Falconer and I attended. We recognised that some Members may have found aspects of the data protection regime confusing, particularly during this period of legislative change, and are pleased to offer some clarification to you.

As we explained at Committee, the General Data Protection Regulation (GDPR) takes full effect from 25 May 2018. As a Regulation, the GDPR aims to have a broadly consistent data protection regime throughout all Member States, albeit with a number of derogations given to the Member States. The UK Government's preferred approach to these derogations can be seen within the associated provisions of the Data Protection Bill 2017 (DPB) which was introduced through the House of Lords on September 14<sup>th</sup>. (The DPB also includes matters outwith the scope of GDPR, in particular, processing personal data for the purposes of law enforcement and national security as well as the powers of the Information Commissioner; however, these matters are not of direct relevance to the subject matter of the CYPISB.)

In broad terms, the CYPISB aims to address the concerns of the Supreme Court by requiring practitioners to consider whether information should be shared if, in their opinion, it could promote, support or safeguard the wellbeing of the child or young person; where it is determined that sharing is to be carried out, practitioners are required to do so in a manner consistent with the associated Code of Practice. In order for the sharing to comply with data protection requirements, the rationale for sharing must adhere to the specific conditions for processing set out in the legislation. The conditions for processing are set out in

Schedules 2 and 3 of the Data Protection Act 1998, and in Articles 6 and 9 of the GDPR. While the DPB may provide for additional conditions for processing, it cannot remove/dis-apply those established via the GDPR. As such, it is possible for the DPB to introduce new conditions for processing via amendment that may or may not impact on the data sharing provisions of the CYPISB.

It is for data controllers themselves to be satisfied at the point of sharing that appropriate conditions exist; however as such sharing will normally take place using consent or because it is necessary for the delivery of a public task, it is likely that conditions will be met. Taken together, this means that the impact of the new regime upon CYPISB itself is limited to a need to update references to both the GDPR and the new Data Protection Act (if passed by Westminster).

In both our written and oral evidence, our criticism of the Scottish Government's proposals was directed toward the Code of Practice. Whilst we recognise that the version of the Code provided for consideration is illustrative and therefore not the final version, its value would have been enhanced considerably if it had had been written with due regard to the implementation of GDPR and the final version of the Data Protection Bill, rather than being based upon the existing data protection regime. This is of particular importance given the constraints the GDPR puts on the ability of public authorities to rely on consent where there is an imbalance between it and the individuals concerned. As a consequence of this not being addressed and in light of the debate around the issue of consent, the Code of Practice might be construed as misleading, in spite of it being described as 'illustrative'.

Unfortunately, I am unable to advise you upon the timescales relating to the DPB and its associated Regulations other than the Bill's need to be commenced in line with 25 May 2018. You may wish to contact the Department for Digital, Culture, Media and Sport as lead Westminster department on data protection, for a more specific timeframe.

Yours sincerely

**Dr Ken Macdonald**  
**Head of ICO Regions**