

GDPR Considerations during Covid-19 FAQ

Issued: 24 March 2020

Context

The FAQ have been compiled from queries coming into the Knowledge Centre in the week preceding 24/3/20.

1. What legal basis can employers rely on when processing personal data in the context of preventing and containing the spread of Covid19?

The appropriate legal basis will depend on the type of information being processed.

Processing of personal data other than health data may be justified on the basis of one or more of the following legal bases:

- a. processing is necessary for compliance with a legal obligation to which the controller is subject (e.g. obligation to protect health and safety of employees under the Safety, Health and Welfare at Work Act 2005)
- b. processing is necessary to protect the vital interests of the data subject or another person
- c. processing is necessary for the purposes of the legitimate interests of the employer where such interests are not overridden by the interests or fundamental rights and freedoms of the data subject.

Health data is a 'special category of personal data' under the legislation. The processing of health data may be justified on the basis of one or more of the following legal bases:

- a. processing is necessary for the purposes of carrying out obligations in the field of employment law (e.g. obligation to protect health and safety of employees under Safety, Health and Welfare at Work Act 2005)
- b. processing is necessary for the purposes of public interest in the area of public health, such as protecting against cross-border threats to health.

Employers must implement appropriate safeguards to protect health data which is being processed in line with one of the above legal bases. Such safeguards might include:

- Limitations on access in order to prevent unauthorised consultation, alteration, disclosure or erasure of personal data

- Strict time limits for erasure of personal data and mechanisms to ensure such limits are observed
- Specific targeted training for those involved in processing operations
- Logging mechanisms to permit verification of whether and by whom personal data has been consulted, altered, disclosed or erased
- Encryption

In all instances, the processing of personal data and special category personal data must only be carried out where necessary and processing must be proportionate to the purpose served.

2. While undergoing the contact tracing process, do employers need employee consent?

Employee consent should not be required to undergo the contact tracing process.

The contact tracing process is carried out at the direction of the HSE. It is, therefore, likely that processing health data and personal data as part of the contact tracing process will be permitted on the grounds of public health, in particular protecting against serious cross-border threats to health.

Employers may also rely on their legal obligation to protect the health and safety of employees under the Safety, Health and Welfare at Work Act 2005 (as amended) to process health data as part of contact tracing processes, where it is necessary and proportionate to do so.

Notwithstanding the legal bases set out above, employers must ensure that adequate safeguards such as those set out above are implemented. They must also, in the interests of transparency and good employee relations, be clear with employees as regards what information will be shared with colleagues and third parties and the purposes for doing so.

3. What data protection considerations should employers be mindful of when processing personal data related to Covid-19?

Employers should be mindful of the principles of data protection when processing data in relation to Covid-19. Please refer to existing guidance on the Ibec member only website for further information (<https://www.ibec.ie/employer-hub/data-protection/ibec-implementing-gdpr>)

In particular, employers should consider the following:

- a. Measures taken in response to Covid-19 involving the use of personal data, including health data, should be necessary and proportionate. Decisions should be informed by the guidance and/or directions of public health authorities, or other relevant authorities.
- b. Employers must be transparent about the measures they implement in this context, including the purpose of collecting the personal data and how long it will be retained for.
- c. Employers must protect the security and confidentiality of the personal data processed in this context.
- d. Employers may only process the minimum amount of data necessary to achieve the purpose of implementing measures to prevent or contain the spread of COVID-19.
- e. Employers should document any decision-making process regarding measures implemented to manage COVID-19, which involve the processing of personal data.

4. Can employers identify employees who are suspected or known to have contracted Covid-19 in their communications with staff and third parties?

Employers may inform staff that there has been a case, or suspected case of Covid-19 in the organisation. However, the Data Protection Commission has advised that identifying suspect or positive cases should be avoided. Such communications should, therefore, not name the affected individual.

There may be some instances where disclosure of this information may be justified, for example, where such disclosure is required by public health authorities in order to carry out their functions. However, in general employers should protect the privacy of those employees who may be suspected of having Covid19, awaiting a test or have contracted Covid-19.

Any organisation considering identifying affected individuals to colleagues or third parties are advised to contact their Ibec executive.

5. How long can employers store information collected in this context?

Employers will unlikely be in a position to identify exact retention periods for the information processed in line with Covid-19 requirements.

In these circumstances, it may be sufficient for employers to identify the criteria that will be used to determine that period, e.g. for as long as is required to protect against threats to public health and/or to comply with legal obligations and/or to defend any legal claims.

It will be important for employers to be transparent with employees as regards the retention of this information. In particular, they must inform them when an exact retention period(s) can and have been identified.

6. Can an employer request information from staff on their recent travel history and medical information such as symptoms of fever, high temperature etc?

The Data Protection Commission has advised that in the current circumstances, employers would be justified in asking employees and visitors to inform them if they have visited an affected area and/or are experiencing symptoms of Covid-19.

The DPC has, however, stated that implementation of more stringent requirements, such as a questionnaire, would have to have a strong justification based on necessity and proportionality and on an assessment of risk. This should take into consideration specific organisational factors such as the travel activities of staff attached to their duties, the presence of vulnerable persons in the workplace, and any directions or guidance of the public health authorities.

There are, of course, no data protection implications in bringing the HSE recommendations to the attention of staff and visitors, if they have recently travelled to an affected area and/or are experiencing symptoms and requesting that they take any appropriate actions.

7. Can an employer request more specific details of their employee's illness on medical certificates in light of the situation in relation to Covid-19?

The Data Protection Commission has advised that employers would be justified in requiring employees to inform them if they have a medical diagnosis of Covid-19 in order to allow necessary steps to be taken.

However, the DPC has stated that employers must ensure that the recording of any health information is justified, factual and limited to what is necessary in order to allow an employer to implement health and safety measures.

Employers and employees should follow the advice and directions of the public health authorities at all times.

8. Do the timelines for responding to GDPR data subject requests still apply where an organisation is temporarily closed or capacity to handle requests is curtailed because of Covid-19?

The Data Protection Commission has, helpfully, acknowledged the significant impact the Covid-19 health crisis may have on organisations' ability to action GDPR requests from individuals, such as access requests. While the timelines for responding to requests from individuals are set down in law in the GDPR and cannot be changed, the DPC has recognised that unavoidable delays may arise as a direct result of Covid-19.

In this regard, it has recognised the need for a proportionate regulatory approach to the current extraordinary circumstances facing organisations. While it has stated that the statutory obligations cannot be waived, it has said that should a complaint be made to the DPC, the facts of each case including any organisation specific extenuating circumstances will be fully taken into account.

The DPC has, in particular, identified that frontline and critical services organisations such as healthcare may need to divert resources to priority work areas with consequential impacts on other areas such as the handling of access requests.

Any organisation experiencing difficulties in responding to requests should communicate with the individuals concerned about the handling of their request, including any extension to the period for responding and the reasons for the delay in responding. The GDPR provides for an extension of two months to respond to a request where necessary taking into account the complexity and number of requests.

The DPC has also suggested that organisations experiencing difficulties in actioning requests should also consider whether it is possible to respond to requests in stages. For example, an organisation whose staff are working remotely may have difficulties in accessing hard copy records. In this case it may be possible to provide the requester with electronic records, with hard copies provided at a later stage. Again, organisations should communicate clearly with the individuals concerned.

Where an organisation, due to the impact of Covid-19, cannot respond to a request in full or in part within the statutory timelines, they remain under an obligation to do so and should ensure that the request is actioned as soon as possible. For accountability and transparency purposes, the reasons for not complying with the timelines should be documented by the organisation and clearly communicated to the affected individuals.

9. Where can employers find further information?

The Data Protection Commission has issued welcome and useful guidance on data protection considerations relevant to the Covid-19 pandemic which is available below:

<https://dataprotection.ie/en/news-media/blogs/data-protection-and-covid-19>

10. Can an employer require all staff and visitors to the building to fill out a questionnaire requesting information on their recent travel history concerning countries affected by the virus, and medical info such as; symptoms of fever, high temperature, etc?

As noted above, employers have a legal obligation to protect the health of their employees and maintain a safe place of work. In this regard, and in the current circumstances, employers would be justified in asking employees and visitors to inform them if they have visited an affected area and/or are experiencing symptoms.

Implementation of more stringent requirements, such as a questionnaire, would have to have a strong justification based on necessity and proportionality and on an assessment of risk. This should take into consideration specific organisational factors such as the travel activities of staff attached to their duties, the presence of vulnerable persons in the workplace, and any directions or guidance of the public health authorities.

There would be no data protection implications in bringing the HSE recommendations to the attention of staff and visitors, if they have recently travelled to an affected area and/or are experiencing symptoms and requesting that they take any appropriate actions.

Any questions about the appropriate measures that should be implemented to protect against COVID-19 should be addressed to the public health authorities.

Finally, while it was not a question- it is useful to review the principles of data protection under GDPR:

The principles of data protection require that personal data should be:

- Processed fairly, lawfully and transparently
- Used only in ways, which are compatible for the purpose for which it is given
- Accurate and up to date
- Adequate, relevant and limited to what is necessary for the purpose for which it is given
- Only kept for specified, explicit and legitimate purpose(s)
- Retained for no longer than necessary
- Kept safely and securely

Additional Resources

Remote Working:

<https://dataprotection.ie/en/protecting-personal-data-when-working-remotely-0>

Ibec Guidance on GDPR is available in the HRM Guide and Ibec member only website

Disclaimer: Ibec has endeavoured to find a reasonable balance between the legislative requirements and the current public health situation. This document will be reviewed on a regular basis as the need arises. In the meantime, it is intended as a practical guide and is not a substitute for specific professional (including legal and medical) advice on individual circumstances.