



GIBRALTAR REGULATORY
AUTHORITY

(20) COVID-19: Temperature checks

Guidance on the EU General Data
Protection Regulation 2016/679 &
Data Protection Act 2004

14th May 2020

Guidance Note IR02/20

FOREWORD

The EU General Data Protection Regulation 2016/679 (the "GDPR") came into force on 25th May 2018, replacing the existing data protection framework under the EU Data Protection Directive 95/46/EC.

Her Majesty's Government of Gibraltar amended the Data Protection Act 2004 (the "DPA") on 25th May 2018, in accordance with the introduction of the GDPR. The DPA complements the GDPR and also implements the Law Enforcement Directive 2016/680. Therefore, the DPA and the GDPR must be read side by side.

It is important to note that the GDPR does not generally require transposition (EU regulations have 'direct effect') and automatically became law in Gibraltar. Therefore, organisations involved in the processing of personal data need to be aware of the obligations that the GDPR and/or the DPA will impose on them. The GDPR emphasises transparency, security and accountability by data controllers, while at the same time standardising and strengthening the right of European citizens to data privacy.

The Gibraltar Regulatory Authority, as the Information Commissioner, is aware of the increased obligations that the GDPR and DPA place on organisations. The Information Commissioner's aim is to alleviate some of the concerns for businesses, public-sector and third-sector organisations and assist them ensure data protection compliance.

SUMMARY

- The Gibraltar Regulatory Authority, as the Information Commissioner (the “Commissioner”), notes rapid developments in the use of technology to support the fight against COVID-19. Amongst these developments is the use of thermal imaging cameras to check the body temperature of individuals (note this guidance applies to temperature checks generally and not only to the use of thermal imaging cameras).
- Carrying out temperature checks is a privacy intrusion, which can only be justified in very limited circumstances. It is important to note that in the case of the COVID-19 pandemic temperature checks could significantly impact the freedom of individuals, which are already limited due to government restrictions, and that temperature checks may not necessarily be reliable as there are a variety of reasons that may cause fever; further, COVID-19 infected individuals do not always have fever. The necessity of temperature checks and the proportionality of their intrusion should therefore be very carefully considered as there may be less intrusive and more appropriate alternatives.
- Body temperature is a special category of personal data. Therefore, a lawful basis must be identified in Articles 6 and 9 of the GDPR.

Consideration is given to the following three scenarios:

- Employers temperature checking their employees.

In this context, the most relevant lawful bases may be -

- Article 6 of the GDPR: *compliance with a legal obligation*¹; and
- Article 9 of the GDPR: *obligations relating to employment, social security and social protection*²

- Authorities temperature checking at Gibraltar’s entry and exit points.

In this context, the most relevant lawful bases may be -

- Article 6 of the GDPR: *Legitimate interests*³; and,
- Article 9 of the GDPR: *Health or social care*⁴ or *public health*⁵.

- Temperature checking visitors (e.g. customers).

Businesses e.g. shops, may wish to temperature check visitors to their premises in the interest of health and safety for both employees and customers.

The Commissioner empathises with these businesses but considers temperature checking visitors could be excessive and possibly in breach of data protection law. The Commissioner has concerns about the proportionality of temperature checking visitors. When used, data controllers should give their use careful consideration prior to the deployment of equipment which checks the temperature of individuals and

¹ Article 6(1)(c) of the GDPR

² Article 9(2)(b) of the GDPR & schedule 1, part 1, paragraph 1(1) of the DPA

³ Article 6(1)(f) of the GDPR

⁴ Article 9(2)(h) of the GDPR & including schedule 1, part 1, paragraph 2 of the DPA

⁵ Article 9(2)(i) of the GDPR & including schedule 1, part 1, paragraph 3 of the DPA

should be able to demonstrate why temperature checking visitors is absolutely necessary.

- Further to the identification of a lawful basis, data controllers need to ensure compliance with the data protection principles in Article 5 of the GDPR.
- Forced/imposed temperature checks may be unlawful if less intrusive measures are possible. Where possible, making these optional may be more appropriate.
- A data protection impact assessment is likely to be necessary, particularly where large numbers of individuals are being checked. The Commissioner strongly recommends the publication of data protection impact assessments.
- Data controllers will likely be required to document appropriate data protection policies when temperature checks are being carried out.

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1. INTRODUCTION

The Gibraltar Regulatory Authority, as the Information Commissioner (the "Commissioner"), notes rapid developments in the use of technology to support the fight against COVID-19. Amongst these developments is the use, or proposals to use, thermal imaging cameras to check the body temperature of individuals.

As with any emerging technology, it is important to recognise the data protection and privacy risks that may arise from the use of technology. Data protection supports innovation by assuring the public that their data is protected.

Thermal cameras (as well as temperature checks that do not involve thermal cameras), capture information relating to an individual's body temperature, which is data concerning an individual's health. Data concerning an individual's health is a 'special category' of personal data under the EU General Data Protection Regulation 2016/679 (the "GDPR") and as such is considered sensitive and requires greater protection. This is because use of this data could create significant risks to the fundamental rights and freedoms of individuals.

Carrying out temperature checks is an intrusion, which can only be justified in very limited circumstances. Temperature checks may not necessarily be reliable as there are a variety of reasons that may cause fever and COVID-19 infected individuals do not always have fever. The necessity of temperature checks and the proportionality of their intrusion should therefore be very carefully considered as there may be less intrusive and more appropriate alternatives.

2. LAWFUL BASIS

To process personal data legitimately under the GDPR and the Data Protection Act 2004 (“DPA”), data controllers need to have a ‘lawful basis’. Identifying the lawful basis that is being relied on to process personal data is a fundamental step in ensuring data protection compliance (see our [Guidance Note on Identifying the ‘Lawful Basis’](#)).

Temperature checks involve the processing of an individual’s body temperature, which is data concerning an individual’s health. Data concerning an individual’s health is a ‘special category’ of personal data under the GDPR and as such is considered more sensitive and requires greater protection. This is because use of this data could create significant risks to the fundamental rights and freedoms of individuals. As a special category of personal data, a lawful basis must be identified in Articles 6 and 9 of the GDPR.

In the following, consideration is given to the following three scenarios:

- (a) Employers carrying out temperature checks on their employees.
- (b) Authorities carrying out temperature checks at Gibraltar’s entry and exit points.
- (c) Businesses carrying out temperature checks on visitors to their premises e.g. customers.

2.1. EMPLOYERS CHECKING EMPLOYEES

In regard to Article 6 of the GDPR, the following are lawful bases that may be relevant:

- (a) Compliance with a legal obligation⁶. This is relevant if temperature checks are necessary to comply with legislation e.g. employment, health and safety, and/or other law imposing healthy and safety obligations.
- (b) Vital interests⁷. Data controllers are likely to be able to rely on vital interests as their lawful basis if they need to process the personal data to protect someone’s life. In regard to vital interests it is important to note that recital 46 of the GDPR refers to the processing of personal data for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters. However, it is also important to note the clear limitations in regard to the use of vital interest as a lawful basis; recital 46 of the GDPR clarifies that “the processing of personal data based on the vital interest of another natural person should in principle take place only where the processing cannot be manifestly based on another legal basis”.
- (c) Legitimate interests⁸. The legitimate interests can be the interests of the data controller or the interests of third parties. They can include commercial interests, individual interests or broader societal benefits. If data controllers choose to rely on legitimate interests, they are taking on extra responsibility for considering and protecting people’s rights and interests – data controllers should be able to demonstrate having undertaken a balancing exercise between the legitimate interests identified and the rights of the individuals. The

⁶ Article 6(1)(c) of the GDPR

⁷ Article 6(1)(d) of the GDPR

⁸ Article 6(1)(f) of the GDPR

processing must be necessary. If data controllers can reasonably achieve the same result in another less intrusive way, legitimate interests will not apply (e.g. offering employees the opportunity to carry out self-temperature checks and asking them to report high fever is less intrusive than forcing all employees to conduct temperature checks).

From the abovementioned lawful bases, in first instance it is the Commissioner's view that *compliance with a legal obligation*⁹ may be the most relevant lawful basis. Reliance on *vital interests*¹⁰ may be difficult where there are other lawful bases available, whilst reliance on *legitimate interests*¹¹ may be difficult where less intrusive alternatives exist.

In regard to *consent*¹² this is unlikely to be suitable given the imbalance of power between the employee and the employer.

In regard to Article 9 of the GDPR, the following are lawful bases that may be relevant:

- (a) Vital interests¹³. On the basis that employees cannot provide valid consent due to the imbalance of power, this lawful basis may be relevant. However, as noted in the foregoing, it should only be relied on when the processing cannot be manifestly based on another lawful basis.
- (b) Employment, social security and social protection¹⁴. This may be the most appropriate lawful basis where the processing is necessary to protect employees in accordance with employment law, social security and social protection.

Where this lawful basis is relied on it is important to note that the data controller is required to implement **an appropriate policy document** and additional safeguards as per schedule 1, part 4 of the DPA.

- (c) Health or social care purposes¹⁵. This lawful basis relates to the processing of personal data for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services.

It is important to note that this lawful basis can only be relied on when the data is processed by or under the responsibility of a health professional or a social work professional; or by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law¹⁶. For this reason, it is difficult to envisage this lawful basis being relied on by most employers to temperature check their employees.

Where this lawful basis is relied on it is important to note that the data controller is required to implement **an appropriate policy document** and additional safeguards as per schedule 1, part 4 of the DPA.

⁹ Article 6(1)(c) of the GDPR

¹⁰ Article 6(1)(d) of the GDPR

¹¹ Article 6(1)(f) of the GDPR

¹² Article 6(1)(a) of the GDPR

¹³ Article 9(2)(c) of the GDPR

¹⁴ Article 9(2)(b) of the GDPR & schedule 1, part 1, paragraph 1(1) of the DPA

¹⁵ Article 9(2)(h) of the GDPR & schedule 1, part 1, paragraph 2 of the DPA

¹⁶ Article 9(3) of the GDPR & section 13(1) of the DPA

(d) **Public Health**¹⁷. This lawful basis provides for the processing of personal data where it is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices.

It is important to note that this lawful basis can only be relied on when the data is processed by or under the responsibility of a health professional or a social work professional; or by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law¹⁸. For this reason, it is difficult to envisage this lawful basis being relied on by most employers to temperature check their employees.

Where this lawful basis is relied on it is important to note that the data controller is required to implement **an appropriate policy document** and additional safeguards as per schedule 1, part 4 of the DPA.

In regard to the abovementioned lawful bases, in first instance it is the Commissioner's view that *obligations relating to employment, social security and social protection*¹⁹ may in most cases be the most relevant lawful basis. Reliance on *vital interests*²⁰ may be difficult where there are other lawful bases available, whilst reliance on the lawful bases relating to *health or social care purposes*²¹ or *public health*²² may be impractical for most employers to temperature check their employees.

Reliance on explicit consent²³ is doubtful in the employment context due to the imbalance of power.

2.2. AUTHORITIES TEMPERATURE CHECKING AT ENTRY AND EXIT POINTS

Without repeating the lawful bases referred to in the foregoing section in relation to temperature checks being carried out by employers on employees, it is the Commissioner's view that in regard to temperature checks carried out by the authorities at Gibraltar's entry and exit points, the following may be the most relevant lawful bases provided the relevant conditions are met -

(a) Article 6 of the GDPR: *Legitimate interests*²⁴; and

(b) Article 9 of the GDPR: *Health or social care purposes*²⁵ or *public health*²⁶.

¹⁷ Article 9(2)(i) of the GDPR & including schedule 1, part 1, paragraph 3 of the DPA

¹⁸ Article 9(3) of the GDPR & section 13(1) of the DPA

¹⁹ Article 9(2)(b) of the GDPR & schedule 1, part 1, paragraph 1(1) of the DPA

²⁰ Article 9(2)(c) of the GDPR

²¹ Article 9(2)(h) of the GDPR & including schedule 1, part 1, paragraph 2 of the DPA

²² Article 9(2)(i) of the GDPR & including schedule 1, part 1, paragraph 3 of the DPA

²³ Article 9(2)(a) of the GDPR

²⁴ Article 6(1)(f) of the GDPR

²⁵ Article 9(2)(h) of the GDPR & including schedule 1, part 1, paragraph 2 of the DPA

²⁶ Article 9(2)(i) of the GDPR & including schedule 1, part 1, paragraph 3 of the DPA

2.3. TEMPERATURE CHECKING VISITORS

Businesses (e.g. shops), may wish to temperature check visitors (e.g. customers) to their premises in the interest of health and safety. The Commissioner empathises with these businesses but considers that temperature checking visitors could be excessive and possibly in breach of data protection law.

In the foregoing scenarios i.e. temperature checks at 1) Gibraltar's entry and exit points, and 2) the workplace, the context in which the checks would take place are limited to specific places and areas in the daily lives of individuals. However, if all businesses (and other organisations) were to temperature check visitors to their premises, it could lead to a community where the public's body temperature is always being monitored, whether entering into a shop, restaurant, office, hair salon, etc., leading to widespread and continuous monitoring of the public. Whilst a temperature check in one establishment may be a limited intrusion, it is in the context of widespread use that the legitimacy of temperature checking visitors needs to be considered.

It may be argued that *Legitimate interests*²⁷(in regard to Article 6 of the GDPR) and *employment, social security and social protection*²⁸ (in regard to Article 9 of the GDPR) may be considered relevant lawful bases in this context. However, the widespread use of temperature checks amplifies the need to ensure that the measure is absolutely necessary and proportionate in this particular context.

Lawful bases commonly refer to processing that is necessary for a particular purpose e.g. legal obligation, vital interests etc. The necessity of the processing is therefore an important factor. For example, employers may find it necessary to carry out checks on employees to meet a compliance obligation and the authorities may find that it is necessary to carry out temperature checks for public health reasons under the responsibility of the relevant authorities and in accordance with their public functions. However, the necessity for a business to temperature check visitors to its premises is less certain; for example, whilst shop staff may spend an extensive amount of time in close proximity of each other, shop staff do not spend an extensive amount of time in close proximity of each visitor. Further, other measures may be implemented to limit exposure to visitors.

Also in regard to the necessity and proportionality of temperature checking visitors, it is important to recognise that these are intrusions on privacy and that their widespread use could significantly impact the freedoms of an individual and may be unwarranted given that –

- (a) temperature checks may not necessarily be reliable as there are a variety of reasons that may cause fever; and
- (b) COVID-19 infected individuals do not always have fever.

²⁷ Article 6(1)(f) of the GDPR

²⁸ Article 9(2)(b) of the GDPR & schedule 1, part 1, paragraph 1(1) of the DPA

3. DATA PROTECTION PRINCIPLES

Further to the identification of a lawful basis, data controllers need to ensure compliance with the data protection principles in Article 5 of the GDPR, which can be summarised as follows:

- (a) Lawfulness, fairness and transparency - ensure that individuals are informed²⁹ about any temperature checks being carried out.
- (b) Purpose limitation - only use the temperature checks for specific purposes and no more. The criteria to determine when the temperature checks are used and removed should be clear. Temperature checks should cease when they are no longer necessary.
- (c) Data minimisation - ensure that only the data that is absolutely necessary is processed e.g. do not keep a record of temperature checks unless absolutely necessary. It is important to reiterate that forced temperature checks may be unlawful if less intrusive measures are possible. Where possible, making these optional may be more appropriate.
- (d) Accuracy - where needed, ensure that records are accurate.
- (e) Storage limitation - delete any data recorded as soon as it is no longer necessary.
- (f) Integrity and confidentiality (security) – secure the data with technical and organisational measures.
- (g) Accountability – the data controller should be able to demonstrate compliance e.g. document policies and decisions taken.

4. DATA PROTECTION IMPACT ASSESSMENTS

Consider whether a data protection impact assessment (“DPIA”) is required (see our guidance [here](#)). A DPIA is likely to be necessary, particularly where large numbers of individuals are being checked. The Commissioner strongly recommends the publication of DPIAs.

5. APPROPRIATE POLICY DOCUMENT

Data controllers should note that an “appropriate policy document” is required when data processing is based on certain lawful bases (as set out in the foregoing).

Notwithstanding that some legal bases may not specifically require an appropriate policy document, it is the Commissioner’s view that data controllers will likely be required to

²⁹ In accordance with Article 13 of the GDPR

document appropriate data protection policies in accordance with Article 24 of the GDPR when temperature checks are being carried out.

6. FURTHER DEVELOPMENTS

The Commissioner will remain engaged in this work, locally and internationally, and shall update his guidance as matters develop and where appropriate. Consideration will be given to any directions or advice given by national health authorities or other relevant bodies such as the World Health Organisation in relation to the use of temperature checks in the fight against COVID-19.

IMPORTANT NOTE

This document is purely for guidance and does not constitute legal advice or legal analysis. All organisations that process personal data need to be aware that the GDPR and the DPA will apply directly to them. The responsibility to become familiar with the GDPR and the DPA and comply with its provisions lies with the organisation.

Where necessary, the Commissioner will review this Guidance Note in accordance with any updates or other developments. In the event of any conflict or inconsistencies between this Guidance Note and the GDPR and the DPA, the GDPR and the DPA will take precedence.

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