



## **Data Protection Impact Assessment**

### **Gender Recognition (Disclosure Of Information): Exception regarding management of offenders**

#### **The Gender Recognition (Disclosure Of Information) (Scotland) Order 2023**

**Version date: November 2023**

**Review date:**

The purpose of the Gender Recognition (Disclosure of Information) (Scotland) Order 2023 is to put beyond doubt that it is not an offence for staff involved in offender management in Scotland to disclose protected information acquired legitimately in their official capacity where disclosure is necessary for the purposes of offender management.

The text of the proposed legislation/amendment is attached at Annex A.

The Gender Recognition Act 2004 (the Act) enables people to change their legal sex by obtaining a Gender Recognition Certificate (GRC). Section 22(1) of the Act states that it is an offence to disclose protected information acquired in an official capacity. 'Protected information' is information about a person's application for a GRC or, if the application is granted, their gender history. Section 22(4) lists circumstances in which it is not an offence to disclose protected information. This includes disclosures made in accordance with provision made by an Order by the Scottish Ministers. The purpose of this instrument will be to expressly provide that it is not an offence to disclose protected information where disclosure is necessary for the purposes of offender management.

Scottish Prison Service (SPS) staff, justice social work services, the Parole Board for Scotland and others involved in the supervision, management and rehabilitation of persons charged with or convicted of offences may on occasion be required to disclose protected information in the course of their duties. It is important that staff can disclose such information if necessary in the course of carrying out their duties. There are existing exceptions which already enable this to happen such as where an individual gives consent or for the purposes of investigating a crime. But we consider that express provision is required to put beyond doubt that disclosure for these purposes is not an offence under section 22(1) of the Act.

All exceptions to the section 22(1) offence are only for circumstances where disclosing this protected information is necessary and proportionate. Although the Order makes provision to allow for disclosure at different points in the justice system including supervision of an individual on bail or release on license or their management in custody, the disclosure has to be necessary for a particular purpose. The purpose of disclosure is most likely to be to reduce risk of harm to the individual or others. This may relate to decisions around support packages which may include accommodation or access to particular services. For example, if it is necessary for information of existence/application of a GRC to be shared for the purposes of allocation of appropriate accommodation either in custody or on release from custody to allow full consideration of the interests of both the person concerned and others in the accommodation setting.

Protected information may be recorded as part of SPS's prisoner record. It might be necessary to disclose protected information to safeguard a prisoner with a GRC, to safeguard other prisoners in the same prison as them; to make practical arrangements to properly care for the prisoner; or to make collective decisions about a prisoner with a GRC. Allowing disclosure will also help to ensure an individual with the GRC can access appropriate support and programmes in the community on release from prison or following a non-custodial disposal of their case at court.

This Data Protection Impact Assessment (DPIA) works in conjunction with the [Article 36\(4\) ICO](#) consultation form submitted in advance of this, as the proposal requires consultation with the Information Commissioner's Office (ICO). Having submitted the consultation form, engagement has also taken place with ICO and this DPIA has been updated following consideration. ICO sought assurance that any exception is not too broad and application of the exemption is only in circumstances where disclosure is necessary, legitimate and proportionate. ICO also sought assurance around unintended consequences for individual rights and freedoms.

## 1. Contact and schedule information

1.1	SG department	Justice
1.2	Contact email	david.doris@gov.scot
1.3	Data protection support email Data protection officer	<a href="mailto:dpa@gov.scot">dpa@gov.scot</a> <a href="mailto:dataprotectionofficer@gov.scot">dataprotectionofficer@gov.scot</a>
1.4	Is your proposal primary legislation, secondary legislation or other form of statutory measure?	Secondary legislation (negative procedure)
1.5	What stage is the legislative process at? Please indicate any relevant timescales and deadlines.	It is anticipated the order will be laid around 5 December.

## 2. Introductory information

	<b>Questions</b>	<b>Comments</b>
2.1	Summary of proposal	The purpose of the Gender Recognition (Disclosure of Information) (Scotland) Order 2023 is to put beyond doubt that it is not an offence for staff involved in offender management in Scotland to disclose protected information acquired legitimately in their official capacity where that is necessary for the purposes of offender management.
2.2	Description of the personal data involved  Please also specify if this personal data will be special category data, or relate to criminal convictions or offences	The personal data involved concerns an individual's gender, their gender reassignment status, their application for a GRC or their gender history. This may be special category data insofar as it reveals information about their health.
2.3	Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons?  If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights, or use of social profiling to inform policy making.	It may do. As the purpose of the Order is to clarify existing law rather than a new proposal, the impact will be minimal. The disclosure of protected information may result in safeguarding being provided for the individual and may also assist in the planning of, and access to, supports and programmes for the individual when in the community following release from prison, while on bail or while serving a community sentence. But that is already the case. If the increased clarity improves confidence for those deciding whether to disclose protected information it may have a small impact on the numbers of disclosures. However, the requirement in the Order that disclosure must be necessary for the purposes set out should minimise any practical impact of the Order.
2.4	<b>Necessity, proportionality and justification</b>  What issue/public need is the proposal seeking to address?	Legislating to put beyond doubt that it is not an offence for staff involved in offender management in Scotland to disclose protected information acquired legitimately in their official

	<b>Questions</b>	<b>Comments</b>
	<p>What policy objective is the legislation trying to meet?</p> <p>Were less invasive or more privacy-friendly options considered, and if so why were these options rejected?</p> <p>Are there any potential unintended consequences with regards to the provisions e.g., would the provisions result in unintended surveillance or profiling?</p> <p>Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.</p>	<p>capacity where that is necessary for the purposes of offender management. In considering whether disclosure is necessary, specific purpose should be considered, such as preventing risk of harm to the individual or others, and any disclosure should be clearly justifiable and proportionate.</p> <p>In the period to end March 2023, there were 23 transgender individuals in prison in Scotland. Publications (sps.gov.uk). The transgender population represents around 0.3% of the total prison population. Although it is not known exact numbers of this cohort who have/have applied for a GRC, SPS have indicated that only a small proportion of transgender individuals in custody over a period of time have had a GRC. There is no available data regarding the numbers of transgender individuals subject to offender management arrangements within the community.</p> <p>While this order may impact on a small number of individuals, in regard to the individuals themselves and the staff involved in management of offenders, it is a proportionate and necessary measure.</p> <p>It is also recognised that this instrument relates to the right to privacy and concerns a vulnerable group of society. Exceptions to offences under section 22(1) should only be considered where necessary and proportionate, especially given the interaction with right to privacy. Although the numbers of transgender individuals subject to offender management arrangements are low, and the number of individuals either applying for or who have been granted a GRC is lower still, it is important that relevant staff are able</p>

	Questions	Comments
		<p>to carry out their duties, where disclosure is necessary for a legitimate purpose, and our assessment is that clarity on the existence and extent of this exception is required.</p> <p>This instrument will ensure protected information can be lawfully shared when appropriate and necessary. This helps ensure that those affected can be safeguarded (in prison or the community) and enabled to access appropriate supports and programmes.</p> <p>The objective cannot be fulfilled using no or less personal data as the disclosure of information will only be used when necessary. It is important that there is a clear exemption for those disclosing information in an official capacity as part of necessary work to support effective offender management.</p>
2.5	<p>Will the implementation be accompanied by guidance or by an associated Code of Conduct?</p> <p>If the latter, what will be the status of the Code of Conduct? (statutory or voluntary?_</p>	<p>Implementation will be supported by Scottish Prison Service guidance in relation to prisoners. Consideration will also be given to how aspects of guidance can be used to support justice social work and others</p>

### 3. Data Controllers

Organisations	Scottish Prison Service (SPS), Justice Social Work (JSW), Parole Board for Scotland (PBS).
Activities	SPS: Information is collected about transgender people in custody for the

purposes of ensuring these individuals are admitted, placed and managed in the prison estate in a way that allows SPS to manage risk and at the same time as it protects their rights, including their safety, security and wellbeing and the rights and safety of other people in custody and staff through minimising and mitigating any negative impacts and that measures taken are proportionate.

**JSW:**

JSW play a key role in offender management throughout the criminal justice process. They may already disclose protected information to the police, Crown Office and Procurator Fiscal Service and Courts through existing exceptions in section 22(4) of the Gender Recognition Act 2004. They also share information with SPS, the Parole Board for Scotland, other MAPPA Responsible Authorities and others. It may be necessary for them to disclose protected information as part of these activities to ensure an offender is appropriately supervised and cared for. JSW will be subject to their own local authority data sharing agreements. Managers should ensure that their data protection officer is aware and has taken into account that the rights of those with a Gender Recognition Certificate are balanced with the JSW role in public protection.

**PBS:**

The PBS has a responsibility to consider whether certain prisoners should be released from prison on licence. It can recommend release on licence subject to certain conditions. Protected information may be relevant to the conditions the PBS recommends and it is necessary that protected information can be shared with the PBS and disclosed by them when necessary for putting in place conditions as to the management of the offender. As data

		<p>controllers and processors the PBS are aware of their obligations in terms of data protection. Information, which is included in the dossier referred to the PBS when they are considering a case, is available to PBS members and staff handling the case and is provided to the prisoner and his/her representative.</p>	
<p>Is the organisation a public authority or body as set out in Part 2, Chapter 2, Section 7 of the Data Protection Act 2018?</p>		<p>Yes</p>	
<p>Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 6 for the collection and sharing of personal data – general processing</p>	<p>Article 6(1)(e) – public task (as read with section 8(c) and (d) of the Data Protection Act 2018)</p>	<p>Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 9 – special category data or Article 10 – criminal convictions data</p> <p>Include condition from Schedule 1 or 2 of the Data Protection Act 2018</p>	<p>To the extent that the personal data relevant to this Order relates to health – article 9(2)(h). It meets the condition at paragraph 2 of part 1 of schedule 1 of the Data Protection Act 2018.</p>
<p>Law Enforcement – if any law enforcement processing will take place – lawful basis for processing under Part 3 of the Data Protection Act 2018</p>	<p>Section 35(2). Consent for disclosure (processing) will normally be sought but where it is not or cannot be given it may also be necessary for the performance of a task carried out by SPS, a local authority, the Parole</p>	<p>Legal gateway for any sharing of personal data between organisations</p>	<p>Sections 1, 10 and 11 of the Management of Offenders etc. (Scotland) Act 2005, Rule 5 of the Parole Board (Scotland) Rules, section 3(3) of the Prisons (Scotland) Act 1989, Part 1 of the Prisoners and Criminal</p>



	<p>Board for Scotland or others involved in offender management to execute a criminal penalty or to safeguard public security.</p> <p>The conditions in both paragraphs 1 and 3 of schedule 8 of the Data Protection Act 2018 will be met.</p> <p>The relevant organisations will each have data protection policies in place.</p>		<p>Proceedings (Scotland) Act 1993, Section 27 of the Social Work (Scotland) Act 1968, rule 12 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011</p>
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#### 4. Consultation

	Questions	Comments
4.1	<p>Have you consulted with the ICO using the Article 36(4) form?</p> <p>(please provide a link to it)</p> <p>If the ICO has provided feedback, please include this.</p>	<p>Yes. Feedback was provided on a call and has been factored into an updated DPIA.</p> <p>As noted, ICO sought assurance that any exception is not too broad and application of the exemption is only in circumstances where disclosure is necessary, legitimate and proportionate. ICO also sought assurance around unintended consequences for individual rights and freedoms.</p>
4.2	<p>Do you need to hold a public consultation and if so has this taken place? What was the result?</p>	<p>No. However, there has also been informal consultation with the Equality Network, Scottish Trans, Stonewall, the Parole Board for Scotland and Social Work Scotland. SPS support the order and comments from Equality Network are noted. Other organisations did not comment.</p>
4.3	<p>Were there any Comments/feedback from the</p>	<p>The Equality Network noted reference in the equivalent order in England and Wales</p>

	Questions	Comments
	public consultation about privacy, information or data protection?	included disclosure of information for the purpose of the “development or assessment of policies”. It was considered this was too widely drawn, and care should be taken to ensure any equivalent provision is sufficiently tightly defined to make clear which bodies it related to.

## 5. Further assessment and risk identification

<Use this section to identify risks which are further detailed in section 6>

	Question	Comments
5.1	Will the proposal require the creation of new identifiers, or require the use of existing ones?	Existing
5.2	Will the proposal require regulation of: <ul style="list-style-type: none"> <li>• technology relating to processing</li> <li>• behaviour of individuals using technology</li> <li>• technology suppliers</li> <li>• technology infrastructure</li> <li>• information security</li> </ul>	Not in addition to existing arrangements.
5.3	Will the proposal require establishing or change to operation of an established public register (e.g. Accountancy in Bankruptcy, Land Register etc.) or other online service/s?	No
5.4	Please provide details of whether the proposal will involve the collection or storage of data to be used as evidence or use of investigatory powers (e.g.in relation to fraud, identify theft, misuse of public funds, any possible criminal activity, witness information, victim information or other monitoring of online behaviour)	No
5.5	Would the proposal have an impact on a specific group of persons e.g. children, vulnerable	Yes, transgender individuals and staff working in offender management.

	Question	Comments
	<p>individuals, disabled persons, persons with health issues, persons with financial difficulties, elderly people? (Please specify) In what way?</p>	
5.6	<p>Is there anything potentially controversial or of significant public interest in the policy proposal as it relates to processing of data? For example, is the public likely to view the measures as intrusive or onerous?</p> <p>Are there any potential unintended consequences with regards to the provisions e.g. would the provisions result in unintended surveillance or profiling.</p> <p>Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.</p>	<p>This policy relates to an individual's right to privacy as well as the management of offenders.</p> <p>The Equality Act 2010 Code of Practice states: <i>2.27 "Transsexual people should not be routinely [unnecessarily] asked to produce their Gender Recognition Certificate as evidence of their legal gender. Such a request would compromise a transsexual person's right to privacy. If a service provider requires proof of a person's legal gender, then their (new) birth certificate should be sufficient confirmation."</i></p> <p>Additionally, by limiting the use of disclosure under this instrument to specific purposes and stipulating that disclosure must be "necessary", rather than merely expedient, the right of prisoners and those supervised in the community will not be adversely affected.</p>
5.7	<p>Are there consequential changes to in other legislation that need to be considered as a result of the proposal or the need to make further subordinate legislation to achieve the aim?</p>	No
5.8	<p>Will this proposal necessitate an associated code of conduct? If so, what will be the status of the code of conduct (statutory, voluntary etc.)?</p>	No. However, staff will be supported by guidance and training.

	<b>Question</b>	<b>Comments</b>
<b>5.9</b>	<p>Have you considered whether the intended processing will have appropriate safeguards in place, for example in relation to data security, limitation of storage time, anonymisation? If so briefly explain the nature of those safeguards</p> <p>Please indicate how any safeguards ensure the balance of any competing interests in relation to the processing.</p>	<p>All information held in PR2 (SPS system for management of individuals) is only accessible by SPS staff and criminal justice partners based in prison establishments ie prison based social workers. All electronic records will be held on a password protected device and devices must be locked when not in use.</p> <p>Information held in paper files are managed in line with SPS records management policies.</p> <p>Other partners (including JSW, Escort Provider, Parole Board for Scotland, MAPPA Partners etc) will use existing systems for processing very sensitive personal data including special category and criminal offence data.</p>
<b>5.10</b>	<p>Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons? If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights or use of social profiling to inform policy making.</p>	<p>The Order is designed to clarify that it is not an offence for staff in offender management to disclose protected information when it is necessary to do so for the purposes in the Order. It should not result in a change in existing data processing by any of the data controllers or processors engaged by the Order. However, by providing this clarity, the Order may impact on decisions made by SPS staff in particular in relation to decisions or discussions about putting an individual on Talk to Me, SPS' suicide prevention strategy. SPS staff may need to share information about a person's application for a GRC as it may be a source of the individual's distress and poor health. In these cases it may not impact on decisions but it may provide necessary context to inform their management. And it may be used by those working with offenders in the community or considering their release to the community when determining what supports and programmes would be suitable for that person. It is therefore expected that the impact on the</p>

	<b>Question</b>	<b>Comments</b>
		individual whose data is being processed will be a positive one.
<b>5.11</b>	Will the proposal include automated decision making/profiling of individuals using their personal data?	No
<b>5.12</b>	Will the proposal require the transfer of personal data to a 'third country'? (Under UK GDPR this is defined as country outside the UK.)	No

## 6. Risk Assessment

Risk	Solution or mitigation	Likelihood (Low/Med/High)	Severity (Red/Amber Green)	Result
<p><b>6.1.1 Risk to individual rights</b></p> <ul style="list-style-type: none"> <li>• <b>right</b> to be informed</li> <li>• <b>right</b> of access</li> <li>• <b>right</b> to rectification</li> <li>• <b>right</b> to erasure</li> <li>• <b>right</b> to restrict processing</li> <li>• <b>right</b> to <b>data</b> portability</li> <li>• <b>right</b> to object</li> <li>• <b>rights</b> in relation to automated decision making and profiling</li> </ul> <p>Will this initiative result in any detriment if individuals do not want their personal data to be processed? This is particularly relevant if special category data is being processed</p>	<p>Any processing of such data will primarily be following agreement with the relevant individual, or clearly based on public task (for which the processing of data is necessary and proportionate).</p>	<p>Low</p>	<p>Green</p>	<p>Mitigated</p>
<p><b>6.2.1 Privacy risks</b></p> <p>Purpose limitation</p>	<p>It is considered the scope is proportionate and limited to fulfil the necessary purpose. All data flow will only occur when disclosure is necessary</p>	<p>Low</p>	<p>Green</p>	<p>Mitigated</p>

Risk	Solution or mitigation	Likelihood (Low/Med/High)	Severity (Red/Amber Green)	Result
	and proportionate to fulfil legitimate professional duties.			
Risk of protected information being shared for reasons other than offender management	<p>The Order is clear on the limits within which protected information may be shared. However, the Scottish Government will seek to mitigate this risk through guidance and encouraging the relevant bodies and organisations effected by the Order to provide appropriate training to staff. Interpretation of a necessary purpose should be relatively narrow to ensure individual rights and freedoms are protected and there is a clear link to preventing risk of harm, for example.</p>	Low	Green	Mitigated
<p><b>6.2.2 Privacy risks</b></p> <p>Transparency – data subjects may not be informed about the purposes and lawful basis for the processing, and their rights</p>	<p>This Order seeks to clarify the law. Each of the relevant bodies or organisations whose staff may disclose protected information under this Order has existing data protection processes in place. They are all experienced in</p>	Low	Green	Mitigated

Risk	Solution or mitigation	Likelihood (Low/Med/High)	Severity (Red/Amber Green)	Result
	<p>handling extremely sensitive personal data and are aware of the requirement to safeguard individual rights and freedoms. The Scottish Government will seek to mitigate this risk by providing guidance and encouraging those bodies and organisations to provide appropriate training to staff. This will help mitigate risk of unintended consequences.</p>			
<p><b>6.2.3 Privacy risks</b> Minimisation and necessity</p>	<p>This Order seeks to clarify the law. The proposed additions to the exceptions to the Section 22(4) offence continue to be only for circumstances where disclosing this protected information is necessary to fulfil professional duties relating to offender management. Interpretation of what is necessary should include careful consideration of specific need for disclosure, to help ensure any disclosure of protected</p>	Low	Green	Mitigated



Risk	Solution or mitigation	Likelihood (Low/Med/High)	Severity (Red/Amber Green)	Result
	<p>information is proportionate. Given the small numbers anticipated to fall into this category it is predicted that there will be minimal cases per year. Each of the relevant bodies or organisations whose staff may disclose protected information under this Order has existing data protection processes in place. They are all experienced in handling extremely sensitive personal data. The Scottish Government will seek to mitigate this risk by providing guidance and encouraging those bodies and organisations to provide appropriate training to staff.</p>			
<p><b>6.2.4 Privacy risks</b> Accuracy of personal data</p>	<p>This Order seeks to clarify the law. Each of the relevant bodies or organisations whose staff may disclose protected information under this Order has existing data protection processes in place. They are all experienced in accurately recording and</p>	Low	Green	Mitigated

Risk	Solution or mitigation	Likelihood (Low/Med/High)	Severity (Red/Amber Green)	Result
<p><b>6.3.1 Security risks</b></p> <p>Keeping data securely Retention</p>	<p>handling extremely sensitive personal data in a manner which respects individual rights and freedoms. The Scottish Government will seek to mitigate this risk by providing guidance and encouraging those bodies and organisations to provide appropriate training to staff to ensure the continued accurate recording and handling of personal data .</p> <p>This Order seeks to clarify the law. Each of the relevant bodies or organisations whose staff may disclose protected information under this Order has existing data protection processes in place around holding sensitive data safely and data retention processes and policies. They are all experienced in handling extremely sensitive personal data. The Scottish Government will seek to</p>	Low	Green	Mitigated

Risk	Solution or mitigation	Likelihood (Low/Med/High)	Severity (Red/Amber Green)	Result
	mitigate this risk by providing guidance and encouraging those bodies and organisations to provide appropriate training to staff.			
<b>6.3.2 Security risks</b> Transfer – data may be lost in transit	This Order seeks to clarify the law. Each of the relevant bodies or organisations whose staff may disclose protected information under this Order has existing data protection processes in place. They are all experienced in handling extremely sensitive personal data and ensuring safe data flow arrangements . The Scottish Government will seek to mitigate this risk by providing guidance and encouraging those bodies and organisations to provide appropriate training to staff.	Low	Green	Mitigated
<b>6.3.3 Security risks</b>				
<b>6.4.1 Other risks</b>				

**Data Protection Officer (DPO)**

The DPO may give additional advice, please indicate how this has been actioned.

<b>Advice from DPO</b>	<b>Action</b>
No major concerns. This aligns with the order in England and Wales and is information the relevant organisations are already processing.	

**I confirm that the Gender Recognition (Disclosure Of Information) (Scotland) Order 2023 has been sufficiently assessed in compliance with the requirements of the UKGDPR and Data Protection Act 2018**

<b>Name and job title of a IAO or equivalent</b>	<b>Date each version authorised</b>
Quentin Fisher, Interim Deputy Director	November 2023