Relevant Standing Orders

Questions to be answered

3.6 (1) A Question shall be answered orally unless the Member, when tabling the Question, has indicated that a written answer is required or, if it has not been asked by virtue of the provision of Standing Order 3.5.1(2), a written answer shall be given.

(2) In the case of any Question to which an oral answer is required –

(a) the Speaker shall call upon the Member in whose name it stands and the Member so called shall rise and ask the Question and the person questioned shall answer..

Reasons for refusal to answer

3.10 (1) At discretion an answer to a Question may, on application to the Speaker, be declined by the Member questioned as being contrary to public interest.

(2) If a Member to whom a tabled Question is addressed declines to answer it on the ground that to do so would be contrary to the public interest, that Member shall no later than 24 hours before the sitting confirm in writing to the Speaker the reasons for refusal.

(3) If a Member to whom a supplementary Question is addressed declines to answer it on the ground that to do so would be contrary to the public interest, that Member shall no later than 24 hours after the sitting confirm in writing to the Speaker the reasons for refusal.

(4) The Speaker shall report to the House at the sitting at which the Question is tabled, or in the case of a supplementary Question at the next sitting, whether the Speaker is or is not satisfied that it would be contrary to the public interest for the Question to be answered, and may give reasons.

Until 2007, the Speaker was not permitted to give reasons for the decision. Following referral of the issue by Speaker Rodan to Standing Orders Committee on 27 March 2007, the Committee reported that:

After careful consideration your Committee were generally of the view that the obligation on the Speaker never to give reasons was misconceived. The intention appears, clearly enough, to avoid a situation in which a matter of sensitivity becomes public knowledge, which is indeed the object of the procedure when such exceptional situations do occur.

There may, however, be cases in which the Speaker can give a very broad indication of the reason why a refusal has been upheld, and we consider that it should be a matter for his discretion whether to do so. Your Committee are confident that the Speaker of the House will hold a fair balance between a genuine need for confidentiality in the public interest, and the constitutional rights of Members in holding the Executive to account.

The rule was changed to the current Standing Order on 23 October 2007, where the Committee’s recommendation was approved. In the interests of openness and transparency, I believe that the Speaker ought to give reasons unless there are good reasons for not doing so.

1 PP77/07
2 Ibid para 5
3 Ibid para 6
Precedent

There is not a lot of Manx precedent to draw on since 2007 in terms of Ministers refusing to answer a question.

The “public interest” is the only reason given but is not strictly defined. It is not merely matters in which the public are interested, but must balance parliament’s right to hold the executive to account with the harm that would be done if the information in question were published. There is no exemption on the Isle of Man for the time or effort required to produce the information requested.

Freedom of Information

The test for answering a question in parliament should be no lower than the standard set for Members of the Public seeking information under the Freedom of Information Act. Consideration of a parallel FOI request is not a reason to delay an answer to a Parliamentary Question.

The Question

The following Question was tabled forWritten Answer on 9th June 2020:

*The Hon. Member for Douglas Central (Mr Thomas) to ask the Chief Minister:

If he will list public documents made since 16th March 2020 under regulations under the Emergency Powers Act 1936, broken down by (a) who made it (b) date made; and (c) how published (i) at the time it was made; and (ii) now, giving the Universal Resource Locator used; what consideration has been given to laying such documents before Tynwald; what plans he has to revoke the Interpretation (Public Document) (Exemption) Order 2020 [SD No 2020/0225]; and if he will make a statement?

Chief Minister’s Request

The Chief Minister emailed me on Friday 5 June at 15.56 requesting permission not to answer. The time requirement of an application at least 24 hours prior to the sitting is therefore met.

The Chief Minister distinguishes between two categories of public documents made under the Emergency Powers Act 1936: those that are of a general character and those of a private character. The former apply to classes or groups of persons, and it is agreed that these can be published.

The latter apply to individuals. These would include a list of “the directions to self-isolate, exemption notices, consents to enter the Isle of Man, etc.”

His reasons for not providing the information are as follows:

- Publication could be contrary to the Island’s data protection legislation
- Publication could potentially be a breach of an individual’s right to private and family life under Article 8 of the European Convention on Human Rights
- As many hundreds of these documents have been issued or made, preparation of an anonymised list of these documents by date and who made them would be a disproportionate and unjustified use of limited resources
Advice

Advice was sought from the Clerk of Tynwald in his role as Counsel to the Speaker. The Clerk of Tynwald wrote:

The key point is that the documents are not administrative decisions but legislative ones. Although they are expressed as exceptions to the general law, they are different from administrative decisions not to enforce the law because the private document confers a right on the recipient to behave in an exceptional way. That right is enforceable against others. If a citizen attempted to stop a person in possession of a private exemption document from doing what they had an exceptional right to do they would be liable for assault, for example, in a way that would not be the case if no personal document had been issued.

It is not appropriate for any legislation to be private and neither should the personal details about why it is issued, nor to whom, be withheld. There is a basic right for the public (and their representatives) to know what the law is. This takes precedence over the other considerations mentioned.

There are two practical points. The first is that a failure to reply may lead to a Freedom of Information request. The courts will decide the issue, ultimately. I doubt that the decision will be in the Government’s favour. The second is that public confidence in the fairness of the process of granting exemptions demands that they be published in order to demonstrate that there is no favouritism.

My advice is that the request should be denied.4

Given the unusual status of the request, I sought representations from the Attorney General, who replied in the following terms:

Many thanks for affording me the opportunity on behalf of the Chief Minister to offer my observations on the advice you have received from the Clerk of Tynwald.

I do not respond to challenge the Clerk but rather to ask that you take what I say into account when reaching your own determination of the matter. I mentioned during our brief telephone conversation yesterday that I did not draft the Chief Minister’s response personally but I did see it before it was sent to you and was asked in particular to consider the public interest issue in the context of the response made. I obtained an explanation of the issues the question posed by Mr Thomas raised with particular reference to the detail requested and did myself form a view that all the documents in question were not legislative in nature. I am aware the Clerk takes a different view and I happy to explain my thinking and the basis upon which my view was formed.

I had in mind the definition of a public document in Section 15(1) of the Interpretation Act as “an order, proclamation, warrant, scheme, rule, regulation, byelaw, resolution, notice or other document (whether or not it is legislative in character) made under an Act or a Measure or made under any EU authorising legislation

There is no reference to a Direction in the definition and the Emergency Regulations which provide for the ability to make directions do not themselves prescribe the form of a direction, they describe the content and often refer to publication. The common intent of the directions

4 Email from Roger Philips 6/6/20 12.29.
under the Regulations is to enable the operation of the overarching Regulations which Regulations are themselves legislative in nature.

As the Chief Minister points out in his response a good number of directions issued under the Emergency Regulations are personal by nature. There have however also been directions issued which have been of general application which became necessary as the emergency evolved. Those that have been issued to individuals I did not consider as public documents as given the wording of Section 15(1) they did not fall within the definition of having a legislative character which test I suggest must be the basis on which the personal directions are considered in the context of Mr Thomas’ question. I make brief mention that a great number of personal directions have been given for example in respect of those who tested positive for Covid19 (the headline figure is 336) who were give a direction to self-isolate; those persons who took advantage of the repatriation scheme, those issued with conditions attached to Key Workers entering the Island. All of those directions are not published on the government’s website whereas directions of general application issue under Regulations should be.

Is there any public interest in this private directions being treated as a public document? Apart from the issue of protecting an individual’s Human Rights to privacy and the Governments obligations to protect all individuals in this regard I could not see any public interest that need to be protected by providing public the personal information Mr Thomas requested. I note the Clerk’s views to the contrary which you will no doubt consider carefully. I should add that I do not agree that a personal direction of the types I have referred to above by way of example amount to any change in the law. The law, if we describe the Regulations as such provide, for general public restrictions but at the same time provide for the possibility of exemptions being issued under a direction. If there is ever any concern for example of an arm of Government acting inappropriately in dealing with the issue of personal directions under the Regulations then of course there are other avenues that can be followed to scrutinise the decisions made without a breach for private and family life under Article 8 of the Convention on Human Rights.

The public’s right to know as referred to by the Clerk is an interesting point and I can mention the distinction of when by definition is a public document is nevertheless administrative in character although issued under legislation. I refer to a driving licence permitting an individual to drive where by law the only persons entitled to require to see it are the police and a traffic warden; the public have no right to know.

Finally, there is one matter raised by the Clerk where I have to disagree and that is in relation to the point he makes with reference to a Freedom of Information request. I consider that a refusal to provide what would be personal information which identifies to whom the directions have been issued would be upheld by the Courts unless at the time the direction was issued the individual concerned had agreed to the publication of such personal information.

I hope Mr Speaker my comments may be of assistance to you.
Reason 1 – Data Protection

Article 86 of the General Data Protection Regulation as it applies in the Island states:

*Processing and public access to official documents*

*Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union law (as applied to the Island by or under the authority of an Act of Tynwald) or Manx law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation.*

The legal bases which apply to the processing of personal data by the Scottish Parliamentary Corporate Body in connection with Parliamentary questions and motions are:

*Article 6(1)(e) GDPR – processing is necessary for the performance of a task carried out in the public interest, and section 8(d), Data Protection Act 2018 – processing is necessary for the exercise of a Crown function.*

It therefore appears that Article 86 permits the publication of the data requested.

There can be no question of sensitive personal information being released as the regulations deal with “potentially infectious persons”, not infectious persons. Nothing therefore can be imputed about their health status by reason of disclosing the direction.

Reason 2 – Article 8 – Right to family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Section 6(1) of the Human Rights Act 2001 states that “It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”. However, section 6(3)(b)(iii) specifically excludes the House of Keys from the definition of a public authority.

As such I do not see that the House of Keys is bound by Article 8 in exercising its privilege.

Reason 3 – The legislative character

Section 15 of the Interpretation Act 2015 states

15 (1) *A public document is an order, proclamation, warrant, scheme, rule, regulation, byelaw, resolution, notice or other document (whether or not it is legislative in character) made under an Act or a Measure or made under any EU authorising legislation.*

(2) *But a document made under an Act or a Measure or any EU authorising legislation is not a public document if it is declared not to be one by —*

---

6 https://www.parliament.scot/Privacy-Notice/ProcessingParliamentaryQuestionsandMotions.pdf
(a) the Act or Measure or EU authorising legislation under which it is made; or

(b) an order of the Council of Ministers (an “exemption order”).

Tynwald procedure – negative.

(3) In a public document, a reference to a public document generally includes a reference to the provisions of that particular public document and of any other public document.

The Attorney-General argues that directions are not documents of a legislative character, as they are not mentioned in the list under s.15(1), and were therefore never intended for publication. I do not see the list of documents given in s.15(1) as an exhaustive list, not least since it refers to “or other document” which gives it a ‘catch all’ status.

Section 15(2) which provides for a mechanism to exempt a public document from publication using the Tynwald negative resolution procedure. An order, the Interpretation (Public Document) (Exemption) Order 2020 was made declaring “Any public document made, issued or given under any Regulations made by Order of the Governor in Council under section 4 of the Emergency Powers Act 1936 in connection with the Coronavirus pandemic is declared not to be a statutory document.”

This procedure means that directions do not take the form of statutory documents (and so do not need to be laid), but that is not the same as defining whether they are still public documents.

Reason 4 – disproportionate and unjustified use of limited resources

Tynwald has hitherto proved unwilling to set an arbitrary limit on the cost of producing answers in terms of disproportionate time to produce the answer through a manual trawl of public records. It has been alluded to in written answers on a number of occasions, but has not been insisted upon by the questioner subsequently. There is currently no ruling by a Manx presiding officer as to the utilisation of this consideration as part of a public interest test. It should not be used as an excuse for poor record keeping or poor systems, but equally questions can be foreseen that would require very significant costs if they require information to be calculated or reconfigures, especially if asked for a large number of years’ worth of data. In this case, it is the publication of several hundred directions. Although it is not clear at this stage why publishing them would take disproportionate time or expense to collate.

Reason 5 – Other remedies

The Attorney General states “are other avenues that can be followed to scrutinise the decisions made without a breach for private and family life under Article 8 of the Convention on Human Rights”, although none is offered.

Public interest test

This is an interesting situation which we have arrived at because of the unusual process of legislating in an emergency, and using a peculiar tool of tertiary legislation called a ‘direction’ to grant individuals specific exemptions to the general law. These exemptions are different from those such a driving licence because of the way in which they are made. For the reasons stated I do believe that they are documents of a legislative character. I also cannot consider an exemption on human rights or data protection grounds, although I fully understand Government’s motives for advancing these arguments.

7 SD2020/0225
It is noted that those documents that Government have conceded are of a public nature are released tomorrow as a first opportunity to answer the written question.

I am happy to use my powers under standing order 3.6(5) to allow time for further discussion between the Government and the Questioner regarding the information required. I would be happy to convene a meeting of the parties to discuss this if agreement between them cannot be reached. At all times, I will seek to balance the public interest between disclosure of information and accountability to parliament, and the cost to the taxpayer of producing the information required.

J P WATTERSON SHK
9 JUNE 2020