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Data Protection Commission
21 Fitzwilliam Square South
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Sent via email to: info@dataprotection.ie

For the urgent attention of the Data Protection Commissioner and the DPC Policy & Guidance Unit

Dear Ms Dixon,

As you are aware, the Minister for Children Equality, Disability, Integration and Youth published the draft Birth Information and Tracing Bill on 12th January. The Bill progressed to second stage in the Dáil a week later, on 19th January.

While amendments will be proposed and the shape of the Bill may change considerably before it is enacted we are contacting you now because we have significant concerns about the Bill and the implications for affected people should it become law.

In particular, we are concerned about the restrictions placed upon the Right of Access under the General Data Protection Regulation (GDPR), the failure to carry out a required assessment of necessity and proportionality despite commitments to do so, and also the conceptual underpinnings of the Bill. The Department of Children, Equality, Disability, Integration and Youth acknowledges in Section 2.1.4 of its Data Protection Impact Assessment (DPIA) that the "same data sets will also be subject to FOI requests under the Freedom of Information Act 2014, and Subject Access Requests under the Data Protection Act 2018 and the General Data Protection Regulation 2018". However, the DPIA also states that the Department intends to produce **"guidelines...to ensure a standard method of processing requests for access to information, to guide data controllers and aid consistency of approach."** It is not unreasonable to suggest, therefore, that **this Bill will have a direct impact on GDPR practises for**

data controllers, and that it will in turn have a detrimental effect on the rights of data subjects. This will inevitably result in a large volume of complaints to your office. **We urge you as Data Protection Commissioner to intervene at this point to ensure that the Bill is GDPR compliant.**

We are also concerned that a piece of draft legislation with so many misunderstandings and misinterpretations of data protection law has made its way to the Dáil floor for debate, and the implications this has for future primary legislation with a data processing aspect, and any secondary legislation which may be made under this Bill. Particularly since the pre-legislative scrutiny hearings at the Joint Oireachtas Committee on Children, Disability, Equality and Integration were quite detailed and involved several contributions from your office and other experts in the area.

In the attached briefing note we set out our concerns under the below headings. We include a number of questions for the DPC on the data protection issues raised by this Bill. These questions relate both to some of the specific measures in the Bill and also the overall approach of the Government in relation to putting forward legislation which contains significant elements concerning the processing of personal data.

A. Observations on the Bill
B. Observations on the DPIA and other documents
C. How we foresee access to personal data in this context functioning should the Bill be enacted without amendments
D. Clarifications sought on the DPC's position in relation to the provisions of the Bill, both in general and more specifically
E. Clarifications sought on the DPC's position in relation to the contents of the accompanying documents

We again ask that you urgently intervene in this matter. In the coming weeks we will publish a briefing note and amendments on the Bill which we will share with your office. We have also submitted a complaint to the European Commission on this matter.

We look forward to your responses.

Yours sincerely,

Loughlin O'Nolan
Article Eight Advocacy

Claire McGettrick
Clann Project

NB: In line with the Clann Project's policy of transparency we will publish this letter on delivery, and any further correspondence on this matter.

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A. GDPR concerns about the Bill

1. A contradictory approach to a fundamental right

The Bill places many restrictions on the Right of Access; for example, the Bill redefines information under various categories, timeframes and institutions, which will in practice result in a restriction of the range of records to be made available to data subjects.

However, the accompanying documents to the Bill claim the Right of Access is not restricted. Section 6 of the FAQ document which accompanies the Bill states "This right is not restricted"[1] in its first paragraph, then proceeds in the following two paragraphs to describe a restriction in the form of the Information Session. Section 3.1 of the DPIA states that "Other rights will remain open to data subjects, including the right to make a subject access request"[2]. (We presume the Department means the Right of Access here, but the unusual phrasing which reduces a Charter Right to a right to *make a request* is noted.) The Minister repeated these claims of no restrictions during the Second Stage debates in the Dáil, saying the legislation "guarantees access to all information in every circumstance" and "people can gain full and complete access to their birth and early life information, as defined in law, in all circumstances, with no redactions, refusals or exceptions."

Therefore, seemingly acting on the mistaken understanding that the Right of Access is not restricted by the provisions of the Bill, the Department has not carried out an assessment of the necessity and proportionality of the restrictions on the Right of Access and documented this in its DPIA. This is not compliant with Article 35 GDPR: "The assessment shall contain at least … an assessment of the necessity and proportionality of the processing operations in relation to the purposes"[3].

2. The provisions of the Bill make it conceptually incoherent with its stated purpose

"The intention of the legislation is to provide relevant persons with clear and comprehensive rights of access to information which is central to their identity."[4]

"The Bill will provide a full and clear Right of Access to Birth Certificates, and Birth, Early Life, Care, and Medical information."[5]

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1. Department of Children, Equality, Disability, Integration and Youth, 'FAQs on Birth Information and Tracing Bill', January 2022, page 8
2. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, page 24
3. GDPR Article 35.7
4. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, page 1
5. Department of Children, Equality, Disability, Integration and Youth, 'FAQs on Birth Information and Tracing Bill', January 2022, page 2

One could reasonably expect legislation with this purpose to build upon the existing Right of Access mechanism provided by the GDPR and the *Data Protection Act 2018*, giving clear instruction to data controllers on how to process Subject Access Requests made under Article 15 GDPR. We would have especially expected this to be the case with this Bill since the data controllers in this area have a poor track record in correctly handling Subject Access Requests for personal data. Your office will be familiar with these issues due to complaints received in respect of these data controllers, and your correspondence with them.

However, the Bill does not do this. Instead, it creates multiple new routes for renamed data subjects to make renamed access requests to renamed data controllers. This will result in the restriction of access to personal data, the exclusion of data subjects and, as a result, a high volume of complaints both to your office and to the European Commission.

We have included a brief assessment of Tusla's current approach to responding to Subject Access Requests and in particular the reasoning underpinning its incorrect application of the Article 15.4 restriction at the end of this document.

3. Redefinitions

The Bill uses the GDPR definitions of "data controller", "personal data", "processing" and "consent", the last of these only in relation to two Sections, and the *Data Protection Act 2018* definition of "special categories of personal data".

In parallel with this, subcategories of personal data, data subject and data controller are created and defined in the Bill. This too will result in the restriction of access to personal data, the exclusion of data subjects, and inevitable complaints.

3.1 Subcategories of data controller

"information source", further subdivided into **"primary information source"** and **"secondary information source"**. The primary information sources are also relevant bodies. Secondary information sources may or may not be relevant bodies depending on designations made by the Minister.
"relevant body"
"recipient body" [Sections 6,7,8]

All of these subcategories of data controller remain data controllers as defined in the GDPR, with accompanying obligations. However, we foresee that several data controllers will claim they are not obliged to respond to Subject Access Requests made under Article 15 GDPR because they are not "relevant bodies" or "secondary information sources" designated by the Minister. This will inevitably result in numerous complaints to your office and to the European Commission.

3.2 Sub-categories of data subject

- "relevant person".

    - The Bill makes a peculiar temporal assertion in relation to relevant persons in the definition of "provided item" at line 24 on page 12, that one can become a relevant person at a certain point in time. This is not a characteristic of a data subject as defined by the GDPR.
- "qualifying relative" [Sections 26, 27, 28, 29, 30]
- "qualifying person"
- "applicant" Not defined in Section 2, Interpretation, but used as a modifier of the above subcategories of data subject in multiple different contexts [Sections 6, 7, 8, 9, 10, 13, 14, 21, 22, 23, 27, 28, 29, 30, 41, 57]

All of these subcategories remain data subjects as defined in the GDPR, with accompanying rights. However, we foresee that several data controllers will claim they are not obliged to respond to Subject Access Requests made by individuals who fall outside these definitions. This too will inevitably result in numerous complaints.

3.3 Sub-categories of personal data

- "birth information"
- "care information"
- "early life information
- "incorrect birth registration information"
- "medical information"
- "genetic relative information"
- "provided item"
- "relevant record"
- "a record of such class as the Minister may prescribe". [Section 9, Section 21, Section 27].
    - A Minister cannot prescribe what is and isn't personal data.

All of these subcategories remain personal data as defined in the GDPR and special categories of personal data as defined in the *Data Protection Act 2018*. These categories of information are open to a range of different interpretations, and given the poor record of data controllers in this area, we believe it is a certainty that much personal data will be held back, again resulting in a high volume of complaints.

4. Restrictions on the Right of Access

The Bill places restrictions on and interferes with the Right of Access, using the new definitions mentioned above.

4.1 Limiting the scope of personal data which must be included in a response to an access request.

By defining subcategories of personal data and establishing different processes by which individuals can make an application for these subcategories the Bill restricts the Right of Access.

The Bill does not provide a mechanism where a data subject can request all their personal data undergoing processing as is the case with a Subject Access Request made under Article 15 GDPR.

Instead, separate applications must be made for the distinct sub-categories of personal data created by the Bill.

Instead of requiring data controllers to provide data subjects with a full schedule of records held, the Bill states that "a relevant body ... may provide the relevant person with a statement setting out the early life information, care information or incorrect birth registration information to which the application relates that is contained in the records that it holds" [Section 11(2), repeated verbatim in Section 12(2)]. This is not equivalent to what must be provided to a data subject who makes a Subject Access Request.

The recently published European Data Protection Board draft guidelines on the Right of Access are unambiguous about this:

> The application of a differing regime for the exercise of a right in relation to some types of personal data, which has not been foreseen by the GDPR can be introduced exclusively by law, in accordance with Art. 23 GDPR (as further explained in section 6.4). Thus, controllers cannot limit the exercise of the right of access by unduly restricting the scope of personal data.[6]

As the Right of Access is not restricted by law this limiting of the scope of personal data is not compliant with the GDPR.

4.2 Establishing pre-conditions which must be met before the right can be exercised

4.2.1 Information session

[Sections 17, 7, 8, 9, 10, 38]

The Sections above establish an Information Session as a condition which must be met before the Right of Access can be exercised.[7]

An adopted person whose parent has registered a 'no contact' preference on the new Contact Preference Register will have to attend an Information Session before their (public) birth certificate is provided to them. One of the express purposes of the Information Session is to inform the adopted person of "the importance of…respecting the privacy rights"[8] of their parent.

The Government regards the Information Session as a safeguard to mitigate a possible risk to a third-party's privacy rights, however, there is no assessment of the necessity and proportionality of this measure. It is described in the DPIA as "an important mechanism in terms of recognising and balancing

6. European Data Protection Board, 'Guidelines 01/2022 on data subject rights - Right of access', paragraph 100, page 32

7. The Clann Project's submission to the Joint Oireachtas Committee on Children, Disability, Equality and Integration makes clear that the Information Session is also discriminatory and deeply offensive to adopted people.

8. Department of Children, Equality, Disability, Integration and Youth, 'FAQs on Birth Information and Tracing Bill', January 2022, page 9

the relevant person's right to their identity information with the parent's right to privacy"[9] and "The Department has worked intensively with the Office of the Attorney General and is satisfied that the balancing of rights within the proposed legislation is necessary and proportionate having regard to the importance of vindicating a person's fundamental right to their identity."[10]

An assertion of necessity and proportionality is not an assessment of necessity and proportionality.

We cannot see how compelling an individual to receive a telephone call acts as a safeguard to mitigate against possible unspecified and undescribed risks to a third-party's privacy rights.

It is however clear that this provision sets an impermissible pre-condition which must be met before a fundamental right can be exercised. It is a considerable distance from allowing individuals "to exercise that right easily" as stated in Recital 63 of the GDPR[11].

Moreover, as the Clann Project has consistently pointed out, birth certificates have been public documents in Ireland for over 150 years. Any person can visit the Research Room of the General Register Office (GRO) and view the indexes to the Registers of Births. Members of the public using the GRO's research services—including adopted people—do not have to attend compulsory meetings to have the importance of respecting people's privacy explained to them. Therefore, in requiring certain adopted people (and adopted people only) to attend an Information Session, the Bill discriminates against this cohort based on the circumstances of their birth, which is prohibited by Article 21 of the Charter of Fundamental Rights of the EU.

4.2.2 Third parties are deceased

[Sections 7, 8, 9, 10, 20, 21, 22, 23, 27, 28, 29]

The Sections above require that certain third parties are deceased before the Right of Access can be exercised. This is an extremely unusual and completely unnecessary pre-condition for the Bill to try and establish. Again, the Department has failed to grasp a) the concept of mixed personal data, and b) the fact that deceased persons do not have data protection rights.

4.3 Compelled consent

[Sections 6, 9]

Sections 6 and 9 use consent as a lawful basis for processing personal data and make the exercise of the Right of Access contingent on this consent being given. This is not an appropriate lawful basis for a public authority to use to process personal data. Nor is it valid consent as set out in GDPR Article 7.

Interestingly, consent in these Sections is not defined. The Bill accepts the GDPR definition of consent only in relation to Sections 38 and 39, set out in Section 38.

9. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 2.3.2, page 19
10. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 3.1, page 22
11. GDPR, Recital 63

5. Removal or modification of obligations of data controllers

The Bill removes or modifies the obligations of data controllers in a manner which does not agree with the GDPR.

The Bill imposes **no statutory time limit for responding to requests for personal data**. The phrase "without delay" is used on multiple occasions in this context. Without delay is not equivalent to "within one month of receipt of the request."[12]

The Bill **permits data controllers to specify the mode by which a request for personal data can be made** [Sections 6, 9, 10]:

> An application … shall … be in such form as the recipient body may specify.

The European Data Protection Board draft Guidelines on the Right of Access make it clear that it is not permissible for data controllers to specify their own format for a request:

> There are no specific requirements on the format of a request. The controller should provide appropriate and user-friendly communication channels that can easily be used by the data subject. However, the data subject is not required to use these specific channels and may instead send the request to an official contact point of the controller.[13]

The Bill permits data controllers to require **unspecified "contact details"** before the exercise of the Right of Access is permitted. Which is a requirement for individuals to provide personal data for a purpose other than identifying their personal data. [Sections 6, 7, 8]

This is also covered in the European Data Protection Board draft Guidelines: "It should be remembered that, as a rule, the controller cannot request more personal data than is necessary to enable this identification, and that the use of such information should be strictly limited to fulfilling the data subjects' request."[14]

5.1 Attempt to remove a data controller's obligations until it is designated by the Minister

Section 56 ("Processing of information contained in database and records of Commission of Investigation into Mother and Baby Homes") contains the following provision:

> The Minister for Children, Equality, Disability, Integration and Youth, where he or she is designated under section 55 as a relevant body, may, where necessary and proportionate for

12. GDPR, Article 12.3
13. European Data Protection Board, 'Guidelines 01/2022 on data subject rights - Right of access', page 2
14. European Data Protection Board, 'Guidelines 01/2022 on data subject rights - Right of access', paragraph 60, page 23

> the performance by him or her of his or her functions as a relevant body, process personal data, including special categories of personal data, contained in the copy of the database and copy of the related records of the Commission deposited with the Minister under section 4(1) of the Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records, and Another Matter, Act 2020.

This appears to be an attempt to remove the Minister's current and ongoing obligation to process Subject Access Requests made in respect of the records contained in the database and records of the Commission of Investigation.

Whether the Minister has designated himself or herself as a relevant body is immaterial to the determination of whether he or she is a data controller with obligations to give effect to data subject rights. Any attempt to evade those obligations will inevitably result in a high volume of complaints.

5.2 An instruction to data controllers to ignore their GDPR obligations

Part 7 of the Bill deals with safeguarding of relevant records. It contains a provision in Section 44(3) which seemingly directs data controllers to ignore their obligations to process personal data under the GDPR and give effect to data subject rights:

> Nothing in this Part authorises the use or disclosure of any information transferred to the Authority or retained by a primary information source under this Part other than in the performance by them of their functions under Parts 2, 3, 4, 5, 6 or 7.

6. No supervision, oversight or appeals mechanism

The Bill envisages a system which will be essentially self-regulating by the data controllers involved. There is no oversight body identified. There is no appeals mechanism described.

This does not agree with GDPR and Charter requirement for an independent public authority which monitors the processing of personal data:

> Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority')[15].

> 1. Everyone has the right to the protection of personal data concerning him or her.
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
> 3. Compliance with these rules shall be subject to control by an independent authority.[16]

15. GDPR, Article 51
16. Charter of Fundamental Rights of the European Union, Article 8 [PDF]

7. Designation of data controllers

In Section 60 the Bill designates "the Authority" (i.e., the Adoption Authority of Ireland) and "the Agency" (i.e., TUSLA) as data controllers "[f]or the purposes of this Act". The same Section states that the:

> person[s] to whom this section applies may, where necessary and proportionate for the performance of his, her or its functions under this Act, process personal data, including special categories of personal data, in accordance with the General Data Protection Regulation and the Data Protection Act 2018 and any regulations under section 61.

It is of concern that only two of these bodies to whom the section applies (the Authority, the Agency, an tArd-Chláraitheoir, a relevant body, a secondary information source) are "designated" as data controllers by the Section even though all are data controllers within the GDPR definition of the term.

A data controller is "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data"[17]

8. Principles of data protection

We believe the Bill is in breach of several principles of data protection, a situation which will result in a high volume of complaints unless the legislation is amended.

8.1 The principle of fairness

As the Bill contains provisions which limit the scope of personal data and places pre-conditions which must be met before the exercise of a fundamental right, we do not see how the above could comply with the principle of fairness in Article 5.1(a) GDPR.

8.2 The principle of accountability

This is an overarching principle which when read along with Article 24 GDPR requires controllers to meet their GDPR obligations and be able to demonstrate compliance. We do not see how this can be the case because of the various restrictions on the exercise of rights and the removal or alteration of obligations outlined above. These issues constitute only a representative sample of the problems with the Bill.

The aim in Section 59 of the Bill to provide immunity to both individuals and public authorities seems to be an attempt to evade accountability and also an attempt to restrict the Charter right to an effective remedy.

17. GDPR, Article 4(7)

B. Observations on the DPIA and other documents

The Department published the latest version of its DPIA on the same day the Bill was published. The publication of the DPIA is a step in the right direction towards transparency; however, there are significant gaps in the assessment.

1. No assessment of necessity and proportionality of the restrictions on Right of Access

There is no assessment of the necessity and proportionality of the restrictions placed on the Right of Access under the Bill, a sample of which are discussed above. The necessity and proportionality assessment in Step 3 on pages 22 to 25 relates only to Section 62 of the Bill.

In respect of the provisions of the rest of the Bill the DPIA merely makes an *assertion* of necessity and proportionality without any assessment. An assertion is not an assessment.

2. The Charter of Fundamental Rights is absent from the Bill, the DPIA and all other accompanying documents

Neither the Bill nor the DPIA make any mention whatsoever of the Charter of Fundamental Rights. At the very least the DPIA should contain the following elements, all of which are clearly impacted by the provisions of this Bill:

- An assessment of any impact on the privacy and data protection rights in Articles 7 and 8 respectively of the Charter of Fundamental Rights;
- An assessment of any impact on the right to non-discrimination in Article 21 of the Charter of Fundamental Rights;
- An assessment of any impact on the right to an effective remedy in Article 47 of the Charter of Fundamental Rights.

3. Release of genetic relative's medical data

On the topic of the "release of medical data of a genetic relative" in 2.1.3, the DPIA says the following:

> the following measures and safeguards are provided for in order to mitigate the risk of a genetic relative being identified
>
> - Only information that is relevant to the maintenance of management of the persons health, i.e. a genetic or hereditary medical condition, will be released;
> - The information will be released with no identifying information present;
> - The release of the information will be to a GP for onward transmission to the person.[18]

18. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 2.1.3, page 12

Assuming these safeguards will be applied sequentially, the requirement that personal data *from which identifying information has already been removed* should be released through a general practitioner is completely unnecessary as a measure to protect against the risk of a genetic relative being identified. This constitutes forced disclosure of a data subject's personal data to a third party.

4. Interference with the obligations of data controllers

The DPIA states there will be "multiple data controllers who would have different storage and access methods''[19] and that the "same data sets will also be subject to FOI requests under the Freedom of Information Act 2014, and Subject Access Requests under the Data Protection Act 2018 and the General Data Protection Regulation 2018"[20].

The DPIA goes on to state that "guidelines will be produced to ensure a standard method of processing requests."[21] This appears to suggest that the Department is planning to issue guidelines to data controllers which will bring them in line with the limited access system the Bill envisages. If this comes to pass, it will result in widespread misinterpretation of GDPR rights and a high volume of complaints.

The DPIA also states that a measure to "ensure data quality and data minimisation" is that "Data can only be processed in line with this legislation."[22] This does not agree with the GDPR as it appears to preclude data controllers from meeting their obligations under the GDPR.

5. Scope of personal data to be released

The DPIA states that a measure to "ensure data quality and data minimisation" is that "The categories of information to be release[d] are specified"[23]. This appears to be a misunderstanding of the scope of personal data which is required to be released on foot of an Article 15 Subject Access Request, and a misunderstanding of the principle of data minimisation. **A data subject is entitled to access all of their personal data.**

The DPIA does not contain any detailed assessment of **how the envisaged processing operations will comply with the principles in Article 5 GDPR**. As noted elsewhere we find it difficult to see how this system as envisaged can comply with the principles of fairness and accountability in particular.[24]

Despite the restrictions placed on the Right of Access described above, the DPIA states that the Right of Access is not restricted, creating an **extremely unusual and unnecessarily confusing situation for individuals and data controllers** which is explored in more detail in the next section.

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19. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 2.1.4, page 12
20. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 2.1.4, page 12
21. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 2.1.4, page 12
22. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 3.5, page 24
23. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 3.5, page 24
24. GDPR, Article 5.1(a) and Article 5.2

C. How we foresee the parallel systems functioning

In broad terms the Bill seems to seek to establish a system of limited access to personal data **which will exist in parallel** to the system of access to personal data which already exists under the GDPR and *Data Protection Act 2018*.

> Data subjects will be able to assert their GDPR rights to access and rectification under the GDPR separate to the provisions of this legislation.[25]

The Minister for Children stated in writing last January[26] that he accepts the long-established principle of primacy of EU law. If there is a conflict between national law and EU law a public body is obliged to abide by the superior EU law and set aside the conflicting provisions in domestic law and "must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means."[27]

However, the system created by the Bill will in its operation cause significant confusion around the exercise of the Right of Access, which in itself could be interpreted as a further restriction of the right at the administrative implementation level, and the obligations of data controllers.

The principal data controllers involved in the envisaged system are the Adoption Authority of Ireland and the Child and Family Agency Tusla, and other data controllers the Minister may designate as "relevant bodies" (Section 55), or "secondary information sources" (Section 43.2)

It is important to note that all of these data controllers are still obliged to be able to "demonstrate that processing is performed in accordance with this Regulation."[28] and are "responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')"[29] i.e. the other six principles of data protection.

Since the Bill contains pre-conditions which must be met before the Right of Access can be exercised and limits the scope of personal data to be released to data subjects it is clearly in conflict with the GDPR.

It is therefore entirely foreseeable that individuals will submit applications under the proposed legislation **and at the same time subject access requests under Article 15 GDPR, or indeed bypass**

25. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 2.3.2, page 19
26. Thomas Pringle TD, Tweet containing screenshots of letter from the Minister for Children, 22nd January 2021
27. Case C-378/17, 'Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission', 4 December 2018, paragraph 50
28. GDPR, Article 24
29. GDPR, Article 5.2

the new system altogether in order to receive the fullest amount of their personal data which is held by the data controllers who are also "relevant bodies" in the terminology of the proposed legislation, as well as other data controllers who are not covered by this legislation.

Another reason this is likely to be the case is that the Bill does not include any mechanism to appeal a decision taken by a data controller/relevant body to limit or refuse access to personal data, as mentioned previously. There is no oversight or supervisory body in this new system which plays a role similar to the one the DPC does in the existing GDPR access system. Nor are there any statutory time limits within which a data controller must respond, unlike the existing GDPR access system.

The data controllers are obliged by multiple judgments of the CJEU to set aside any of the limitations on types of personal data and subcategories of data subject created by the Bill and respond to the Subject Access Requests received without applying any of the restrictions the Bill attempts to impose. However, given that the Department plans to issue "guidelines…to ensure a standard method of processing requests"[30], some data controllers may refuse to comply with their obligations under GDPR.

Data controllers will also foreseeably claim they are not obliged to respond to Subject Access Requests made under Article 15 GDPR because they are not "relevant bodies" or "secondary information sources" designated by the Minister.

We note that the Minister for Children, Disability, Equality, Integration and Youth has written to adopted people who have raised concerns about the Bill in recent days and implied that the only way in which their access to limited subsets of their personal data is "absolutely guaranteed" will be through the system established by the Bill.

The above situation will result in multiple complaints to your office and to the European Commission which could be for the most part avoided if the Bill when it is enacted is compliant with the GDPR.

30. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 2.1.4, page 12

D. Clarifications sought: the Bill itself

We would be grateful if the DPC could respond with clarifications of the DPC's position in relation to the questions below, bearing in mind that the contents of this Bill when enacted will obviously inform secondary legislation made under the powers granted to the Minister in Section 61, and any future primary legislation which contains provisions relating to the processing of personal data:

Q1	Does the DPC feel it is appropriate to enact a piece of national primary legislation which allows **pre-conditions for exercising the Right of Access to be set**, as discussed above?
Q2	Does the DPC feel it is appropriate to create a piece of national primary legislation which contains **provisions for compelled consent?**
Q3	Does the DPC feel it is appropriate to create a piece of national primary legislation which contains **provisions for forced disclosure of special categories of personal data to a third-party** (a) a medical practitioner and (b) the Adoption Authority of Ireland, for no discernible purpose and as a pre-condition to the Right of Access?
Q4	Does the DPC feel it is appropriate for a piece of national primary legislation to **create an enclave of data controllers designated by Ministerial order (section 55) which do not have to abide by the principle of accountability** in certain of their processing operations? (Sections 44, 55, 56, 59)

E. Clarifications sought: other documents

The accompanying documents to the bill make some assertions about data protection law in general. We would like clarification on the DPC's position in relation to these for our own future reference as some of them appear to represent a rather radical reinterpretation of data protection law which, if accurate, would have far-reaching ramifications. We are also interested in the DPC's views on the DPIA when read alongside the Bill as published.

1. The DPIA

The quotes below are taken from the DPC's Opening Statement to the 2nd November pre-legislative scrutiny session of the Joint Committee on Children, Disability, Equality, Integration and Youth.

As highlighted above, we do not think the DPIA is at all sufficient in its assessment of the system envisaged by the Bill.

Q5	Reading the latest version of the DPIA alongside the published Bill, **is the DPC still of the view that this DPIA "represents a considered approach to identifying and mitigating any risks to the personal data of individuals arising from the operation of the Bill's provisions"?**
Q6	Reading the latest version of the DPIA alongside the published Bill, **is the DPC still of the view that this DPIA "contains an assessment of the necessity and proportionality of data processing in the context of the Bill"** of sufficient detail?

2. Mixed personal data

On page 1 of its Regulatory Impact Analysis[31] the Department asserts that "Data Protection legislation" is "not designed to deal with the release of shared personal data (i.e. information which is the personal data of more than one person)".

We completely disagree.

Q7	Does the DPC agree with the Department's claim that **"Data Protection legislation" is "not designed to deal with the release of shared personal data"?**

2.1 The relationship between the Right of Access and the right to restriction of processing in relation to records containing mixed data.

When discussing the restriction of the right to restriction the DPIA makes the assumption that a data subject exercising their right to restriction "on the grounds that they believe there are inaccuracies"[32] means no processing of personal data can take place for the purpose of responding to Subject Access

31. Department of Children, Equality, Disability, Integration and Youth, 'Birth Information and Tracing Bill 2022 Regulatory Impact Analysis', January 2022
32. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 3.1, page 23

Requests by other data subjects whose personal data is contained in the same records.

"During the time that the data controller is carrying out the verifications, the data cannot be processed and this will have implications for an application made by an adopted person. In cases where accuracy cannot be verified or remains contested, it could result a restriction of lengthy and indefinite duration, during which time the rights of the other party (i.e. the applicant) to their origins information cannot be vindicated."[33]

This appears to conflict with the European Data Protection Board draft Guidelines on the Right of Access, which state the Right of Access "includes the obligation to give information about data that are inaccurate or about data processing which is not or no longer lawful."[34]

Q8	What is the DPC's view on this? Does the exercise of the right to restriction by one data subject entirely prevent the release of personal data from a record containing mixed data to another data subject until the accuracy of the data has been confirmed?

3. The GDPR has "evolved since its recent inception"

This is repeated across several documents [FAQ document, page 16; DPIA, page 22].

We do not think the GDPR has evolved since it became law in April 2016. The *understanding* by public sector data controllers of data subject rights and data controller obligations under the GDPR may be evolving, albeit slowly. The GDPR itself remains unchanged.

Q9	Does the DPC think the GDPR has evolved since its inception?

33. Department of Children, Equality, Disability, Integration and Youth, 'Data Protection Impact Assessment', January 2022, section 3.1, page 23
34. European Data Protection Board, 'Guidelines 01/2022 on data subject rights - Right of access', paragraph 36, pages 16-17

APPENDIX: TUSLA AND ARTICLE 15.4

This section contains a brief analysis of what appears to be Tusla's current approach to dealing with Subject Access Requests and in particular the application of the Article 15.4 restriction. Since the new access system developed in the Bill and the existing one based on the GDPR and the Data Protection Act are intended to operate in parallel we feel it is worth highlighting the shortcomings and misinterpretations that already exist.

We are aware that your office has had correspondence with Tusla on the matter of its interpretation of Article 15.4 GDPR. Obtained under FOI, this correspondence shows your office both questioning Tusla's current approach to handling Subject Access Requests and applying the Article 15.4 restriction in particular, and disagreeing with a proposed new interpretation.

As the document titled 'Access Requests Standard Operating Procedure Draft 2.2' [PDF] remains on the Tusla website, directly linked to from the main data protection page, we can only reasonably assume the interpretation of Article 15.4 described as "Tusla's current approach to SARs" in the correspondence discussed below remains the same. This is despite your office taking issue with and requesting more information about the current approach.

Correspondence

In a letter from Tusla to your office dated 8th February 2020 (from context presumably 2021 was intended), Tusla's current interpretation of Article 15.4 is described (quotations in **blue** below).

The DPC responded with observations on 23rd February 2021 (quotes in **green** below).

Our analysis of Tusla's current interpretation of Article 15.4 is that it is incorrect and extremely unorthodox. It appears to assume that the GDPR grants rights to personal data itself, rather than individuals, highlighted below.

> As regards adverse effects, released personal data will typically be subject to processing by the requester in the course of a purely personal or household activity. As such processing falls outside the GDPR's material scope, released personal data will be subject, irreversibly, to lesser protections vis-à-vis processing to which the GDPR applies. Because released personal data will be irreversibly stripped of the protections afforded by the GDPR, the Agency considers that release of the birth mother's name will necessarily adversely affect her right to protection of her personal data.

The GDPR provides rights to data subjects i.e. natural persons. It does not provide rights to personal data which is released as part of a response to a Subject Access Request.

The only logical conclusion to this convoluted and misguided interpretation is that mixed personal data could never be released as part of a Subject Access Request since it would "necessarily adversely affect [a third party's] right to protection of [their personal data]".

Your office also expressed surprise at this approach.

> 6. The DPC questions this approach; it appears that Tusla considers the very act of providing a data subject with their personal data, which includes mixed personal data, will adversely affect the rights and freedoms of others due to the fact that the personal data would no longer fall within the scope of the GDPR. To automatically consider that a data subject exercising their Right of Access will adversely affect the rights of others without any other analysis appears contrary to the requirement to apply any limitation on an EU right in a strict manner. It is also unclear whether in all instances the release of the personal data would fall outside the GDPR's material scope. The DPC also notes that birth certs, with the requester's birth mother name, is already publically available in the Register of Live Births, stored in the Research Room in the General Registrar's Office while also appreciating that the requester may not have the searchable criteria available to them to find this information.

Tusla further asserts that it has no lawful basis to make an assessment of the likely effect on the rights and freedoms of others, bar their right to protection of their personal data.

> Release of mixed data, as well as adversely affecting the right to protection of personal data, may also give rise to further adverse effects. As the circumstances surrounding a request will dictate the specific nature of adverse effects precipitated by request-handling and because reasons must be given for any restriction of the right to access, Tusla's application of Art 15(4) GDPR must be informed by the requester and birth mother's individual circumstances.
>
> To the extent that information relating to their circumstances may be collected only from the requester and birth mother, insofar as collection would require the birth mother be informed of the request's existence and nature, and because the applicable data protection legislation does not discretely authorise such processing, the Agency considers that the collection of information relating to the requester and birth mother's circumstances may infringe the GDPR's provisions concerning lawfulness. Consequently, such processing may give rise to unauthorised disclosure and may occasion a personal data breach.

This appears to create a situation in which the data controller has decided:

A. it cannot make an adequate assessment of the likely effects on the rights and freedoms of others, as required by Article 15.4,
B. unless it informs a third-party, thereby interfering with the requester's privacy; and
C. that any response to a SAR which includes mixed data may constitute a personal data breach

This is then taken to justify a refusal to release personal data contained in records which hold mixed data.

Your office also questioned this approach:

> 8. The DPC questions Tusla's position that because the GDPR does not discretely authorise the contacting of the third party, the collection of such personal data from the third party may

> infringe the GDPR's provisions concerning lawfulness and would suggest Tusla provide further clarification as to why they consider this the case.

The Access Requests Standard Operating Procedure Draft 2.2 document

An example of how Tusla staff should handle a Subject Access Request relating to the archive of the Mother and Baby Homes Commission of Investigation is provided in the Access Requests Standard Operating Procedure Draft 2.2 document at page 28:[35]

In the Summary column Tusla describes the correct application of the Article 15.4 restriction as follows:

> Art. 15(4) is applicable only when personal data's release to the requester will result in a concrete adverse effect on a specific right or freedom enjoyed by another person. The concrete adverse effect on a specific right or freedom must be cited when applying Art. 15(4).

In the Example column the process is described as follows:

> Michael B. submits an access request to Tusla for birth and adoption information. A record holder retrieves a document listing Gabrielle B. as Michael's mother. An enclosed note states that during her engagement with the Adoption Information and Tracing Service, Gabrielle indicated that she doesn't wish to interact with Michael.
>
> The requester and associated persons' individual circumstances are considered to assess whether the release of mixed personal data, i.e. personal data relating to both Michael and Gabrielle, will adversely affect Gabrielle's rights and freedoms.
>
> A Social Worker is consulted to obtain information needed to inform the restriction's application. As Gabrielle has indicated that she doesn't wish to interact with Michael, it appears likely that the release of mixed personal data will adversely affect her right to respect for private and family life.

This is not evidence of a "concrete adverse effect". It is speculation ("it appears likely") unsupported by any evidence from this jurisdiction or others.

This is not a balancing test, this is reasoning using the architecture of the restriction to arrive at a predetermined outcome. No account is taken of the adverse effect on the requester's rights and freedoms. Since no "concrete adverse effect" is put forward no account can be taken of the severity or likelihood of the unmentioned and undescribed risk.

The European Data Protection Board draft Guidelines on the Right of Access cover this scenario: "The general concern that rights and freedoms of others might be affected by complying with the request

35. Tusla, 'Access Requests Standard Operating Procedure Draft 2.2', August 2021, page 28

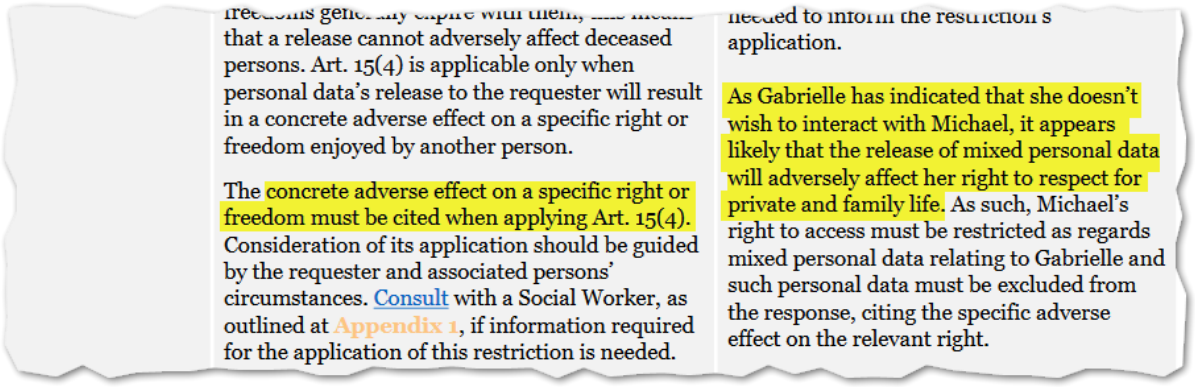
for access, is not enough to rely on Art. 15 (4) GDPR. In fact the controller must be able to demonstrate that in the concrete situation rights or freedoms of others would factually be impacted."[36]

This is the only example provided in the Standard Operating Procedure document of how to handle a Subject Access Request relating to personal data contained in the archive of the Mother and Baby Homes Commission, and indeed the only example of how to apply the Article 15.4 restriction. As such it can only be considered as providing a considerable nudge in the direction of applying the restriction on incorrect grounds to staff tasked with handling Subject Access Requests relating to the archive of the Mother and Baby Homes Commission of Investigation, and other Subject Access Requests which relate to the personal data of adopted persons.

The example concludes with a refusal to release personal data from a record which contains mixed data:

> As such, Michael's right to access must be restricted as regards mixed personal data relating to Gabrielle and such personal data must be excluded from the response, citing the specific adverse effect on the relevant right.[37]

To reiterate, there is no concrete adverse effect cited in this example despite the Summary column (at left below) clearly stating this must be the case.



freedoms generally expire with them, this means that a release cannot adversely affect deceased persons. Art. 15(4) is applicable only when personal data's release to the requester will result in a concrete adverse effect on a specific right or freedom enjoyed by another person.

The concrete adverse effect on a specific right or freedom must be cited when applying Art. 15(4). Consideration of its application should be guided by the requester and associated persons' circumstances. Consult with a Social Worker, as outlined at Appendix 1, if information required for the application of this restriction is needed.

needed to inform the restriction's application.

As Gabrielle has indicated that she doesn't wish to interact with Michael, it appears likely that the release of mixed personal data will adversely affect her right to respect for private and family life. As such, Michael's right to access must be restricted as regards mixed personal data relating to Gabrielle and such personal data must be excluded from the response, citing the specific adverse effect on the relevant right.

This interpretation conflates and confuses an indication of a contact preference with an adverse effect on "the rights and freedoms of others".

Since this remains Tusla's current interpretation of Article 15.4 we see no reason to expect the data controllers covered by the provisions of the Birth Information and Tracing Act would change their behaviour in relation to Subject Access Requests made under the GDPR.

We think it eminently foreseeable that this misinterpretation of Article 15.4 will continue to be used, i.e., withholding of personal data and attempting to funnel individuals into the more limited system created by the Bill. As above, this will inevitably lead to complaints to your office.

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36. European Data Protection Board, 'Guidelines 01/2022 on data subject rights - Right of access', paragraph 170, page 50
37. Tusla, 'Access Requests Standard Operating Procedure Draft 2.2', August 2021, page 28