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Mr Dale Sunderland
Deputy Commissioner
Data Protection Commission
21 Fitzwilliam Square South
Dublin 2
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Sent via email to: consultation@dataprotection.ie

Dear Mr Sunderland,

Thank you for your letter of 2nd March in response to our previous letter of 10th February. Your letter gives us a greater sense of your office's understanding of the anticipated workings of the Birth Information and Tracing Bill and deftly handles the questions we raised.

Unfortunately, your response raises many further questions. We were surprised to see your office use the same language as the Department of Children, Equality, Disability, Integration and Youth in relation to the right of access - *"the right of an individual to make a subject access request"*. The Charter and the GDPR do not grant a right to make a request, they give a right to access personal data. This misrepresentation by the Department is illustrative of a larger obsession with the minutiae of processes and bureaucratic proceduralism at the expense of outcomes for individuals.

You state that *"nothing in the Bill at this time seeks to **explicitly** restrict the scope of any such obligations"* [the obligations of data controllers]. We respectfully disagree.

Data controllers are obliged to give effect to data subject rights. The Department has claimed across the Bill itself and the DPIA that the right of access is not explicitly restricted. Yet, taking the most obvious example, compelling certain data subjects to attend an Information Session before they can even exercise this right is a serious restriction of the right, the necessity and proportionality of which

has not been documented as required by the GDPR. As such it brings the provisions of the Birth Information and Tracing Bill into direct conflict with the provisions of the GDPR. For convenience we'll call this **an implicit restriction**.

The theory: a framework within a framework

Your position is that the Bill creates a *"specific **framework** for the provision of certain records to individuals in the context of their birth information" which "should run in tandem with the pre-existing, statutory, Right of Access and avoid any conflict with the facilitation of that right."*

The Department modified its DPIA on 11th February to include the following on page 22: *"The Birth Information and Tracing Bill is, therefore, framed as enabling legislation which sits within the **framework** of the GDPR."*

So it seems what we have in theory is a small framework (the Birth Information and Tracing Bill) constructed within a large framework (the GDPR). The Department and its agencies contend that they can make **rules in legislation and subsequently in policy around access to personal data which apply within the small framework and that these rules can differ from the rules which apply within the large framework, while maintaining that the rules of the large framework also apply.** Is your office comfortable with this approach?

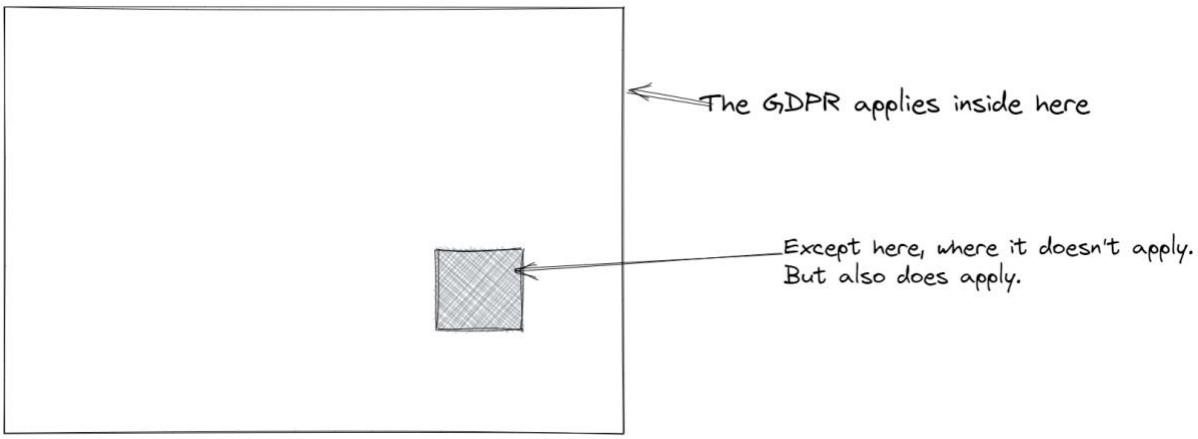

Fig 1: A small framework within a larger framework

This approach takes on a surreal air when we consider what the large and small frameworks are in legal terms. The large framework is an EU Regulation which has **primacy over any conflicting national legislation**. The small framework is **national legislation which must be set aside** by public authorities if its provisions conflict with any EU legislation. The two data controllers which will be most involved in the operation of the system proposed in the national legislation are both public authorities.

Your position is that any conflict between the EU Regulation and the national legislation can be **resolved through guidance and policies** at the administrative level: *"we consider that the successful implementation of a mechanism for the provision of birth information that does not interfere with the data protection rights of individuals will need to be underpinned by clear guidance and operational policies for the relevant data controllers."*

However, as this would require making guidelines which conflict either with the provisions of the Birth Information and Tracing Bill or the provisions of the GDPR it is not an issue which can be resolved at the administrative level. This is not a situation in which 'fix it in post' is an appropriate approach.

Article 24 GDPR requires data controllers to implement technical and organisational measures including, where appropriate, data protection policies in order to ***"be able to demonstrate that processing is performed in accordance with this Regulation."*** As the Department has not complied with its obligations under Article 23 to make explicit the interference with the Article 15 right of access, we do not see how the data controllers in question will be able to demonstrate their compliance.

A quick switch from the theoretical to the practical may help illustrate this.

An implicit restriction in practice

As you will be aware, there *is* a mechanism in the GDPR which allows the rules in the small framework of domestic legislation to differ from the rules in the large framework of the GDPR. **This mechanism is set out in Article 23 GDPR.**

As above, the Bill does not *explicitly* place any restrictions on the Article 15 right of access by using the mechanism in Article 23 GDPR. This means **any implicit restrictions placed on the right of access are unlawful under the GDPR**.

As an example, we'll imagine the Bill has been enacted in its current state and we'll again use the obligation for certain data subjects to attend an Information Session (Section 17 of the Bill) **before they can access their personal data**. This is triggered if one of their parents has expressed a preference for no contact.

Setting this as a precondition constitutes a **serious restriction to the right of access in Article 15** GDPR. An interference which could only be justified by both:

- **Explicitly restricting** the right of access in the Bill using the Article 23 mechanism and
- **Documenting the necessity and proportionality** of this restriction as required by Article 23

To be very clear, the Department characterises the Information Session as a necessary safeguard to protect a parent's right to privacy. **If a measure is used as a safeguard to protect one right this does not mean it ceases to be a restriction of another right**. This is precisely why a necessity and proportionality assessment is required by Article 23 GDPR. A necessity and proportionality assessment of this implicit restriction of the right of access has not been carried out.

Moreover, the Department has not complied with the European Data Protection Board's (EDPB) Guidelines 10/2020 on Restrictions under Article 23 GDPR. It has failed to provide any *'evidence describing the problem'* (i.e., proof that mothers' privacy will be breached by the release of a public document) or of how that alleged problem *'will be addressed by'* the Information Session. Nor has it made any effort to demonstrate *'why existing or less intrusive measures cannot sufficiently address*

it'.[1] For example, the Department has ignored the fact that protections against harassment already exist in law and offer protection from unwanted contact. Simply put, we think it very unlikely the Information Session restriction could be adequately justified had any attempt been made to do so.

Can your office clarify whether it is still your position that *"nothing in the Bill at this time seeks to* ***explicitly*** *restrict the scope of any [data controllers'] obligations",* even though no assessment of its necessity and proportionality has been documented?

In our example below, there are three data subjects, **April**, **Bob** and **Ciara**. All three are adopted people seeking similar personal data from the same data controller. The personal data is straightforward for the data controller to locate. One of the parents of all three of these data subjects has expressed a no contact preference. This triggers the Bill's Information Session requirement which must be met before the data controller can release some of the data subjects' personal data (i.e., their birth certificate and/or birth information).

April makes an application for her personal data using the system proposed in the Bill. The data controller does not release her personal data until she attends an Information Session. This restriction of her GDPR right of access is, in the Department's mind, permissible within the small framework of the national legislation, even though no assessment of its necessity and proportionality has been documented and the restriction would be unlawful should she step outside the boundaries of the small framework of the Bill. Even though the restriction is being applied within the framework of the GDPR, and within your office's regulatory remit.

Bob makes an Article 15 Subject Access Request for a similar piece of his personal data to the same data controller. The data controller is obliged to respond using the procedures set out in the GDPR and associated guidance. Bob must be given access to his data and, since he is outside the Bill's proposed system, he cannot be required to attend an Information Session.

Ciara makes an application for a similar piece of her personal data using the system proposed in the Bill. She writes "*This is also a Subject Access Request under Article 15 GDPR*" on her application. Does Ciara have to attend an Information Session before her personal data is released?

How does your office foresee resolving these scenarios through the use of guidelines and procedures which are to be developed by the data controllers involved?

- If **April** refuses to attend the Information Session and instead complains to your office that her right of access is being unlawfully restricted, what will your response be?

- If the data controller refuses to release personal data to **Bob** unless he attends an Information Session and he complains to your office, what will your response be?

- If the data controller refuses to handle **Ciara**'s application as a Subject Access Request made

[1] European Data Protection Board Guidelines 10/2020 on Restrictions under Article 23 GDPR, paragraph 14.

under Article 15 GDPR and Ciara complains to your office, what will your response be?

Adopted people have made it clear on numerous occasions that the Information Session is discriminatory and offensive to them. So it is reasonable to say they will take the same route as Bob or Ciara **if they know it is available to them** and avoid the Information Session entirely.

The public authorities involved in this proposed system have shown **a marked preference for favouring national law which conflicts with EU law despite their obligation to do the opposite**. We are aware your office is dealing with this as a live issue in relation to the release of medical data by the Department of Children and the misapplication of S.I. 82/1989, as well as Tusla's refusal to release social work data due to the misapplication of S.I. 83/1989.

It is therefore not unreasonable to assume that these data controllers **will continue to favour the national law** i.e., the provisions of the Birth Information and Tracing Bill. Which will result in delays, confusion, breaches of the GDPR, complaints to your office, complaints to the European Commission and quite possibly litigation. **None of which are the outcomes being sought by adopted people from this Bill.**

To conclude,

- We do not think the creation of a system of access to personal data which exists in a liminal space both inside and outside the scope of the GDPR simultaneously is what EU legislators envisaged. Nor do we think it is something which your office should tacitly support.

- We do not see the Bill in its current state as being compliant with the GDPR or the Charter. Implicit restrictions of rights and obligations must be made explicit using the mechanism in Article 23 otherwise they are unlawful.

- We do not see the operational problems created by the Bill as being resolvable through the development of guidelines and policies after the Bill has passed.

We look forward to your response.

Yours sincerely,

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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.