An Coimisiún um Chosaint Sonraí
Data Protection Commission

Ms Claire McGettrick
Clann Project
and
Mr Loughlin O'Nolan
Article 8 Advocacy

Re: Birth Information and Tracing Bill 2022

BY EMAIL

2 March 2022

Dear Ms McGettrick and Mr O'Nolan,

I refer to your letter of 10 February 2022.

In the first instance, I would like to take this opportunity to thank you for your engagement on this matter, and for articulating your concerns regarding the development of the Birth Information and Tracing Bill 2022 in an in-depth and considered manner.

As you will be aware, the DPC is currently engaged with the Department of Children, Equality, Disability, Integration and Youth in consultation on the Bill. This consultation is in accordance with Article 36(4) GDPR, under which State bodies developing legislative proposals have a statutory obligation to consult with the DPC when the legislation in question foresees or requires the processing of personal data under the GDPR. In the context of this consultation, and our deliberations on the Bill, your questions and concerns are welcomed.

As an appendix to this letter, you will find answers to the specific questions that you set out in your letter of 10 February. I would also like to offer some general observations on the issues that you have raised.

The DPC's understanding of this legislative measure is that it is intended to implement a specific framework for the provision of certain records to individuals in the context of their birth information. As such, the mechanism to be developed by the legislation should run in tandem with the pre-existing, statutory, Right of Access and avoid any conflict with the facilitation of that right. This is the primary principle guiding the DPC in consultation with the Department on the Bill.

With regard to any restriction or interference with the Right of Access by the Bill's provisions, the DPC notes that the Department recognises that, regardless of the mechanism to be put in place, the right of an individual to make a subject access request remains in place. While the

birth information mechanism will relate to specific categories of records, including records that constitute personal data, we understand that it is not intended to provide a route for obtaining access to all personal data undergoing processing, and that this pre-existing right will remain unaffected. With regard to the Guidelines of the EDPB on the right of access, to which you refer, the DPC as a member of that body is cognisant of the position set out therein and this will further inform the Article 36 consultation process with the Department.

On the effect of the Bill upon the obligations of data controllers, we note that nothing in the Bill at this time seeks to explicitly restrict the scope of any such obligations. Therefore, we consider that all such obligations with regard to facilitation of the Right of Access remain standing. With regard to the mechanism for the provision of birth information under the Bill, we consider it necessary for the Department to ensure that this does not lead to a situation that provides for competing or contradictory obligations for data controllers, and this will be a focus of our engagement.

Your letter of 10 February also raises a concern that the Bill does not envisage an oversight or supervisory body with regard to its envisaged framework. I wish to assure you that the DPC does not consider that the legislation can serve to remove any processing of personal data from its regulatory remit, and indeed it would not be within the scope of the Bill to attempt to do so.

In conclusion, and taking into consideration your concerns on the functioning of the anticipated parallel systems, 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. Indeed, it is likely that Article 24(2) GDPR will oblige such controllers to implement data protection policies specific to the implementation of the mechanism. This important consideration will remain part of the DPC's ongoing consultative engagement with the Department.

Yours sincerely

Dale Sunderland
Deputy Commissioner

Appendix: Response to questions raised in the letter of 10 February 2022.

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?
The establishment in legislation of a framework for the provision of certain records or sets of records to individuals does not inherently conflict with the Right of Access. The DPC has been clear that this framework, which may provide for the release of records that constitute personal data, cannot compromise the pre-existing obligations of data controllers under the GDPR, nor interfere with the right of access.

Q2. Does the DPC feel it is appropriate to create a piece of national primary legislation which contains provisions for compelled consent?
The GDPR is clear that consent as a legal basis for the processing of personal data under Article 6(1)(a) must be freely given, specific, informed and unambiguous. The first element, freely given, precludes the compelling of consent for the processing of personal data.
Consent, outside its specific meaning as a legal basis for the processing of personal data under the GDPR, can have separate meanings and it is not within the remit of the DPC to comment on the appropriateness or otherwise of such 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?
We understand that this question relates to the release of medical data of a genetic relative of the applicant. The Department must be cognitive of the forthcoming revision of the Data Protection (Access Modification) (Health) Regulations 1989 in drafting these provisions, as the new or amended Regulations will provide the framework for the provision of health data to an individual making a DSAR.

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)
Primary legislation cannot put in place provisions which obviate the obligations of data controllers under the GDPR other than through specific provisions that accord with Article 23 GDPR.

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"?
The views of the DPC on the Bill, the DPIA, and any ancillary documentation are part of the ongoing consultative process with the Department under Article 36(4) GDPR. It is not appropriate to discuss the position of the DPC on these issues outside this context at the current time.

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?
See above re Q5

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"?
The data protection legislative frameworks provide for the right of access to personal data, as defined under Article 4(1) GDPR. Where the release of personal data to an individual requires the release of the inextricably linked personal data of a third party, Article 15(4) provides for an assessment of any adverse effect that such release may have upon the rights and freedoms of the third party.

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?
Article 18(2) GDPR outlines the extent to which the processing of personal data subject to restriction may be conducted by a data controller. Where such personal data is the subject of a DSAR made by another individual, the controller should assess on a case-by-case basis whether any restrictions to that individual's right of access are applicable, including consideration of any adverse effect upon the rights and freedoms of the first data subject in accordance with Article 15(4).

Q9. Does the DPC think the GDPR has evolved since its inception?
A legislative instrument cannot evolve; it can be amended, updated or repealed by further legislative instruments. What can be considered to have evolved since the entry into force of the GDPR is the interpretation and application of its provisions in practice, based upon a number of factors including guidance published by the Supervisory Authorities and the EDPB. There have also been a number of Statutory Instruments made under the Data Protection Act 2018, which can be considered to have developed the canon of the data protection legislative frameworks with which data controllers must comply, and this is expected to continue to be the case in the future.. This is the context in which we understand the comments of the Department to have been made.