

01 February 2021

Ms. Maeve Doherty
DPO and Solicitor to the Commission
Mother and Baby Homes Commission of Investigation
73 Lower Baggot St
Dublin 2
By email

Re: Commission of Investigation (Mother and Baby Homes and certain related Matters) Records, and another Matter, Act 2020

Dear Ms. Doherty

Thank you for your letter dated 28 January 2021 in response to our letters dated 14 January and 21 January 2021, and for separately confirming that you are the DPO to the Commission. We note that a number of our queries have regrettably not been responded to. We highlight these below, and reiterate our request for these responses.

Firstly, to deal with the issue which you have taken with the timing for response to our queries, we consider that the time afforded was not in any way unreasonable in the circumstances – given that the Commission is actively in the process of redacting personal data and will be dissolved by 28 February, the queries need to be addressed quickly. In addition, in line with its obligations as data controller (including to have a record of processing activities and detailed transparency information concerning those processing activities), the relevant information should have been immediately to hand, and this of itself unfortunately raises issues about the Commission’s compliance with its GDPR obligations.

Secondly, we disagree that we have conflated any issues. To the extent that the Commission’s data processing activities and the lawful basis for same have been or remain unclear (either to us, or to Tulsa and the Department from whom we have sought similar information), we respectfully suggest that this is due to the lack of information from the Commission. In addition, we note that no record of processing activities exists in line with Article 30 GDPR which documents the Commission’s redaction process, and the summary of processing activities listed in your letter does not appear to be complete and would not in any event constitute a record of the kind required by Article 30 GDPR. (We deal with this latter point in further detail below.)

A. Right of access to records of witness evidence

In response to Issue A, we note your explanation of the background to the establishment of the Commission. We fully appreciate the central importance of maintaining the confidentiality of witnesses to the Commission.

You have explained the Commission's legal basis (in terms of statutory provisions) that underpinned its guarantees of anonymity and confidentiality by referring to SI 57/2015 and Section 6 of the 2020 Act. However, prior to the enactment of Section 6 of the 2020 Act, the Commission had already decided upon a process whereby, to give effect to witness confidentiality, it would destroy the original notes of the witness interviews and the original electronic recordings of the witnesses' oral testimony, but would retain a summary of the evidence along with the other documents and information which you have outlined at page 5 of your letter.

As you know, deletion of personal data is an act of data processing, and it requires a legal basis under the GDPR, both under Article 6(1) and, where special category data is processed (deleted), under Article 9(2) GDPR.¹ The Commission appears to have interpreted the guarantee of confidentiality (and concomitant obligations of confidentiality) as an obligation to destroy certain records of personal data (and not others), and it is unclear why a distinction was drawn between these original records of evidence and those others which you have described (which were not deleted or de-identified, at least before Section 6 of the 2020 Act came into effect). It may be that witnesses explicitly consented to those acts of deletion, but this would have to have been done by means of full information being provided to them about the full consequences of deletion for them, including by leaving them unable to query the Commission's summary of their evidence by reference to the original, full record of that evidence. In addition, the relationship between the Commission (as data controller) and the witness (as data subject) is an imbalanced one, and per the GDPR, it would not in such circumstances be generally open to the Commission to rely on consent (under Article 6(1)(a) GDPR) or explicit consent (under Article 9(2)(a) GDPR) to ground the Commission's processing activities (and indeed you characterise the witnesses' disclosures of their personal data as having been "induced"). (It is also important to note in this regard that consent is not the only legal basis for the processing of personal data that is recognised by Article 8 of the EU Charter, contrary to what you assert elsewhere in your letter.) Rather, we would expect the Commission to be able to point to a legal provision that underpinned these acts of processing under Article 6(1)(c) GDPR or Article 6(1)(e) GDPR (which in turn, as you know, must meet the requirements under Article 6(4) GDPR), and, in relation to special category data, under Article 9(2)(g) GDPR (which legal provision would itself require provision of suitable and specific measures) or possibly Article 9(2)(c) GDPR. Therefore, by reference to the justification which you have provided for deleting the notes and recordings of the witness evidence, we request that you identify the specific legal basis for these acts of processing (deletion), by reference to Articles 6(1) and 9(2) GDPR and by reference to any underlying legal provisions that necessitated this processing.

In addition, where you refer to "personal dictaphone recordings" (at page 5 of your letter) can you please explain what you mean by this? Do you mean that the notetaker had their own Dictaphone (or similar recording device) provided to them by the Commission, or that they recorded witness testimony using their personal mobile phone or other personal device that was not in the control of the Commission?

We also note at page 8 of your letter (under the heading discussing Article 17 GDPR), you state that you do not have any requests from the "contributors" (witnesses) who have sought redaction to be involved in redaction in the manner we described; however, you confirm that some witnesses have sought copies of their contributions in their entirety in order to enable them to consider whether they seek to protect their identities although it is unclear from your response to the DPC as to whether the Commission has supplied these. It therefore seems that witnesses are given a simple binary option – either to have their personal

¹ Where processing of personal data was carried out prior to 25 May 2018, it required a legal basis under section 2A, and where sensitive personal data was processed, under section 2B of the Data Protection Acts 1988 and 2003.

data redacted or not, and it is the Commission which decides what information to redact. It is unclear from your responses whether and to what the person is permitted to input into the process (and are advised about such a right by the Commission). It is also unclear whether the Commission is treating such requests by individuals as Article 15 GDPR and Article 17 GDPR requests (and consequently is complying with its obligations under those provisions) and/or whether the Commission has even advised individuals about their rights under Articles 12 – 22 GDPR.

Please therefore specifically respond to the queries raised under queries 5 – 10 of Section/Issue A of our letter dated 21 January 2021 (using the same numbering), as you have not provided specific responses to these. In addition, please provide us with a copy of the transparency information, including any updates to that transparency information that was provided by the Commission to witnesses.

B. Rights of data subjects other than witnesses to the Commission

We note that you have responded to the queries concerning third parties and redaction as raised in our letter dated 14 January 2021, and have not directly addressed the numbered queries in our letter dated 21 January 2021. In any event, your position seems to be that the data protection rights of such third parties in the view of the Commission could never override the rights to confidentiality of the witnesses (whose testimony/personal disclosures you characterise as being induced by the guarantee of confidentiality).

However, you might please confirm whether any consideration was given to preserving the original notes and records of the witnesses' evidence rather than automatically deleting them such that at least the records could be preserved to allow a proper balancing assessment to later take place. In addition, we note that Section 6 of the 2020 Act only permits the Commission to redact "all personal data relating to that person" (our emphasis) and not the personal data relating to other persons (e.g. children) who may have been discussed by the witness.

As above, under Section A, your interpretation and understanding of Article 8 of the EU Charter is incorrect, in that consent is not the only legal basis envisaged for the processing of personal data. In addition, Article 17 GDPR only applies to the personal data of the person concerned, and they cannot exercise a right of erasure in respect of third party personal data. As such, we do not accept your points III or IV at pages 7 – 8 of your letter.

Therefore, please specifically respond to the numbered queries 1 – 5 set out in Section B of our letter dated 21 January 2021 (using the same numbering).

C. Redaction process itself and the consequences for affected individuals

We note that you have provided certain clarifications in response to the queries we raised under Issue C of our letter dated 21 January 2021. However, many of your responses are unclear and a number of our queries remain unanswered. Therefore, for the avoidance of doubt, please specifically respond to the numbered queries 1, 2, 4, 5, 6 and 7 (using the same numbering) which were set out under Issue C of our letter.

D. Transmission of records to the Department and Tulsa

Again, as with Issue C, we note that you have provided certain clarifications in response to the queries we raised under Issue D of our letter dated 21 January 2021. However, many of your responses are unclear

and a number of our queries remain unanswered. Therefore, for the avoidance of doubt, please specifically respond to the numbered queries 1 – 3 (using the same numbering) which were set out under Issue D of our letter.

Article 30 Record of Processing Activities

We note that the Commission has not prepared any record of its processing activities concerning its erasure of witness personal data (i.e. erasure which took place prior to the enactment and commencement of Section 6 of the 2020 Act) or concerning its redaction activities pursuant to Section 6 of the 2020 Act. In addition, we are of the view that the list you furnished in your response letter is not sufficient to comprise a record of the Commission's data processing activities as required under Article 30 GDPR, such that would describe all of the processing activities conducted by the Commission and (critically) which would demonstrate to the DPC how the Commission has met its data protection compliance obligations including its accountability obligations under Article 5(2) GDPR and Article 24(1) GDPR.

In light of the imminent dissolution of the Commission, and the apparent ongoing redaction of records (despite our request that the Commission would give consideration to the suspension of such activities pending response to our queries), and given that you are already on notice of our queries, please respond by **5pm** this **Thursday 4 February 2021** to the queries (including reiterated queries) as set out in this letter. Please also note a copy of this letter will be forwarded to the Minister for Children, Equality, Disability, Integration and Youth.

Yours sincerely



Caoimhe Sheridan
Assistant Commissioner