

21 January 2021

Ms. Ita Mangan
Director
Mother and Baby Homes Commission of Investigation
73 Lower Baggot St
Dublin 2

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

Dear Ms. Mangan

Further to our letter dated 14 January and our email of 15 January to the Mother and Baby Homes Commission of Investigation, the Data Protection Commission ('DPC') is contacting you in respect of the legislation referenced above ('the 2020 Act'). We are disappointed not to have received your response to the queries raised in our letter dated 14 January.

The DPC remains concerned about the processing of personal data that is taking place pursuant to section 6 of the 2020 Act and whether that processing complies with the GDPR and with the right to the protection of personal data and the right of access to personal data that are provided for in Article 8 of the EU Charter of Fundamental Rights. We set out these concerns below and we raise a number of queries with the Commission in order to assess these concerns. As data controller of the personal data that is contained in the records of the Commission, the Commission is obliged to process this personal data in compliance with the EU Charter and with the GDPR, and these obligations must be considered alongside any requirements and/or restrictions that are contained in the 2020 Act or in the Commissions of Investigation Act 2004 (as amended). In addition, under Article 31 of the GDPR, the Commission (as data controller) is obliged to cooperate with the DPC in the performance of tasks. A key task of the DPC is to monitor and enforce the application of the GDPR, and the purpose of our communications to-date has been to understand whether the processing which is being undertaken by the Commission in the course of its wind-down is compliant with the GDPR and it is in this context that the DPC has raised queries with the Commission. Failure to respond to the DPC's queries amounts to a breach of the Commission's duty of cooperation under Article 31 of the GDPR.

As a preliminary matter, and pursuant to your obligations under Article 30(4) GDPR and Article 31 GDPR, please furnish to us by return the Commission's full Record of Processing Activities which it is obliged to maintain pursuant to Article 30(1) GDPR. This Record of Processing Activities should include details of the processing that is being conducted by the Commission in relation to redactions under Section 6 of the 2020 Act and the processing which is involved in the transfer of personal data to the Minister for Children, Equality, Disability, Integration and Youth ('the Minister') and to Tusla.

A. Right of access to records of witness evidence

Further to Section 6 of the 2020 Act, we understand that the Commission is in the process of conducting redactions, where requested by witnesses, to its records of witness evidence. We have reviewed a copy of the standard letter which is sent by the Commission to witnesses for the purpose of Section 6 of the 2020 Act. That letter does not provide the witnesses with any details of the records which are within the scope of a redaction request, and does not provide them with access to those records. We are also aware that some witnesses may wish to access those records in order to see and fully understand the record of their evidence and/or to enable them to meaningfully request redactions and/or to understand the consequences of redaction.

Section 6 of the 2020 Act does not deal with access to the relevant records. We note that Section 39 of the 2004 Act purports to restrict the Article 15 GDPR right of access, but only to the extent that such restrictions are necessary and proportionate to safeguard the effective operations of the Commission and the future cooperation of witnesses to commissions of investigation. It is not possible to exclude the Article 15 GDPR right in a blanket fashion as it is a superseding right, and this is in part reflected in the language of Section 39 (as amended).

Further, whilst Section 39 of the 2004 Act purports to exclude the Article 15 right of access (subject to the qualifications contained in it), the legislation does not restrict individuals' rights under Articles 12, 13, 14 or 16 – 22 GDPR. These rights include, for example, the right to rectification of personal data under Article 16 GDPR, the right of erasure under Article 17 GDPR, and the right to restriction of processing under Article 18 GDPR.. Many of these rights cannot be meaningfully exercised without the individual being afforded their right of access to their personal data.

It is also important to note that redaction and/or erasure of personal data is an act of processing that is regulated by the GDPR, and which therefore must be carried out in compliance with the GDPR.

In these circumstances, can the Commission please respond to the following queries:-

(Firstly, related to the confidentiality that was undertaken to witnesses and how this affects the processing of their personal data)

1. Please specify the statutory provisions that underpinned the Commission's guarantee of anonymity and confidentiality to the witnesses that appeared before the Confidential Committee.
2. Please explain how witness testimonies were recorded by the Confidential Committee and where these testimonies were stored.
3. Please explain whether the form created by the Confidential Committee summarising the evidence given by the witness at their hearing is considered to be official record of the witness's testimony.
4. Please specify whether electronic recordings were taken of any or all of the hearings conducted by the Confidential Committee. If yes:-
 - o Please specify whether the electronic recordings are still in existence and where they stored, or,
 - o Please specify whether the electronic recording were destroyed and the lawful basis for this processing operation pursuant to Article 6 GDPR, and/or

- Please specify whether the Commission intends to destroy the electronic recordings and if so, set out the lawful basis for this processing operation pursuant to Article 6 GDPR.
5. Section 6 of the Commission of Investigation (Mother and Baby Homes and certain related Matters) Records, and another Matter, Act 2020 provides that a person who gave evidence or any document to the confidential committee of the Commission may request the Commission to redact from that evidence or document all personal data relating to that person prior to the document or evidence being deposited with the Minister for Children. Please set out all evidence and documents that a witness can request to be redacted pursuant to this provision.

(Secondly, relating to the witnesses' rights of access specifically)

6. Given that the right of access to personal data is a specific and fundamental right provided for under Article 8 of the EU Charter and under Article 15 GDPR (with the limits on restrictions to that right having to comply with Article 23 GDPR), can the Commission please advise whether it will afford witnesses their Article 15 right of access, where it may be sought by them?
7. If the Commission will afford witnesses their Article 15 right, can you please confirm the basis and reasons for the Commission's failure to provide the right of access and how this position has been determined in light of the obligations of Article 8 of the EU Charter and of the GDPR?
8. Please confirm what information has been provided to witnesses by the Commission concerning those witnesses' right of access to records of their evidence and personal data.
9. Please confirm whether and to what extent the Commission will afford witnesses their other rights under Articles 12, 13, 14 and 16 – 22 GDPR.
10. If the Commission will not (or does not intend to) afford witnesses those rights, please confirm the basis and reasons for the Commission's position in this regard, and how this position has been determined in light of the overriding obligations of Article 8 of the EU Charter and of the GDPR.

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

We note that the records of the Commission, and in particular the evidence provided to and/or obtained by the Commission, will contain not only personal data relating to the witnesses to the Commission, but also the personal data of third parties (for example, relating to children of the mothers who gave evidence). Some of the personal data of these third parties will be mixed with the personal data of the witnesses, particularly in the cases of mothers who provided evidence concerning their children. In light of the redaction process that the Commission is carrying out under Section 6 of the 2020 Act, it would appear likely that the personal data of these third parties is in danger of being redacted and therefore permanently destroyed.

Noting the issues set out in Section A above, and in particular that the act of redaction and/or erasure of personal data is an act of processing which is regulated by the GDPR, can the Commission please respond to the following queries:-

1. If a request for redaction of records of evidence is made to the Commission by a witness, and that record also contains the personal data of a third party (e.g. the child of a mother who resided in one of the homes), what consideration has been (or will be) given by the Commission as to whether and how to retain the personal data of that third party? Linked to this, what steps will be taken by the Commission to retain such personal data? For example, instead of permanently redacting the personal data, will the Commission place a statement beside the personal data in question?
2. What documented rules and/or guidelines are being used by the Commission in relation to the redaction of such personal data of third parties? Please furnish us with copies of such documented rules and/or guidelines.
3. If the Commission does not propose to retain such personal data (i.e. the personal data of the third party), what basis and reasons does the Commission have for taking such a position, in light of the obligations contained in Article 8 of the EU Charter and in the GDPR?
4. Please confirm whether and to what extent the Commission will afford these third parties their data protection rights as contained in Articles 12– 22 GDPR.
5. If the Commission will not (or does not intend to) afford these third parties their data protection rights, please confirm the basis and reasons for the Commission’s position in this regard, and how this position has been determined in light of the overriding obligations of Article 8 of the EU Charter and of the GDPR.

C. Redaction process itself and the consequences for affected individuals

As above, the redaction process that is being carried out by the Commission pursuant to Section 6 of the 2020 Act is an act of processing that is regulated by the GDPR. In addition to the concerns we raise above, the actual process and consequences of the Commission’s redaction exercise is unclear. While we note your email of 12 January, where you state that the Commission is redacting “*all information that could lead to the identification of the witness is redacted. That includes the names of family members*”, we also note that what is permitted to be redacted pursuant to Section 6 of the 2020 Act is potentially much broader. Section 6 provides that “*all personal data relating to that person*” can be redacted following a redaction request in writing to the Commission from a witness who gave evidence or any document to the confidential committee. However, it is unclear, for example, whether the redaction process results in a permanent and irrevocable erasure of the information/personal data in question, and, if so, how this may impact on the rights of affected data subjects (including third party data subjects) should they later request access to that personal data.

To assist the DPC in understanding the redaction process, please respond to the following queries:-

1. Please furnish a copy of the documented rules, guidelines, processes and/or procedures that are being followed by the Commission in respect of the carrying out of the redactions (redactions pursuant to Section 6 of the 2020 Act). To the extent that such rules, guidelines, processes and/or procedures are not documented, please provide a full explanation of same.
2. In relation to the “database” and “related records” (as identified and defined by the 2020 Act), please confirm what effects (if any) the redaction of records pursuant to Section 6 of the 2020 Act

will have on the contents of such database and related records. For example, if there is overlap in the information contained in a record which is to be redacted pursuant to Section 6 of the 2020 Act with any information which is contained in the database or in a related record, please confirm whether a redaction has been or will also be made to that information in the database or related record.

3. In order to get a fuller understanding of the redaction process, please confirm how far along the redaction process is and, if the six week period has passed as set down in Section 6 of the 2020 Act, please confirm how many witnesses in total responded to the Commission, requesting redaction.
4. Please confirm the nature of the redactions that have been and will be carried out in relation to the personal data contained in the relevant records. Specifically, what is the specific redaction process and/or how is redaction effected? Will those redactions be permanent and/or irreversible? If so, how is this said to be the case? What happens to the original record once the redaction is carried out? If reversible, how can redactions be reversed? Will the redacted records remain in a searchable format? If so, what categories of data will they be searchable by?
5. As above, your email of 12 January states that the Commission is redacting "*all information that could lead to the identification of the witness is redacted. That includes the names of family members*". However, what is permitted to be redacted pursuant to section 6 of the Act is broader in that it provides that "*all personal data relating to that person*" can be redacted following a redaction request in writing to the Commission from a witness who gave evidence or any document to the confidential committee. Please outline how you determine what constitutes personal data for redaction purposes and set out the categories of personal data you are redacting.
6. Please identify the lawful basis pursuant to Article 6 and Article 9 GDPR under which the evidence and records as set down in section 6 of the Act can be redacted.
7. Explain how the redaction of records will affect the ability of the Minister to access the personal data of the data subjects mentioned in said records. In particular, confirm whether, following the redaction of said records, it will be possible to search these records
 - a. By institution,
 - b. By date,
 - c. By name.

D. Transmission of records to the Department and Tusla

We note that the Commission is in the process of preparing its files for transmission to the Minister/Department and Tusla pursuant to Section 43(2) of the 2004 Act and pursuant to the 2020 Act, and has already provided a database to Tusla.

The DPC is concerned with the lack of clarity with respect to the content of the database and related records that have been and/or will be transferred to Tusla and to the Minister pursuant to the 2020 Act. We also understand there is an electronic repository of information which was used to record the information provided by witnesses to the Confidential Committee. However, it is not clear whether this is part of the database as defined in Section 1 of the 2020 Act or considered a separate record repository.

In addition, it is not clear the extent to which the files and records (including the database and related records, as defined in the 2020 Act) will be covered by the restrictions contained in Sections 11(3) and 39 of the 2004 Act.

The DPC is concerned to have a full picture of precisely what personal data is to be transferred to the Minister and to Tusla, and the extent to which such personal data may be affected by the restrictions in Sections 11(3) and 39 of the 2004 Act.

To assist the DPC in this regard, please respond to the following queries:-

1. By reference to the Commission's Record of Processing Activities, its transparency communications pursuant to Articles 12 – 14 GDPR or otherwise, please identify (a) the categories of personal data that are contained/to be contained in the records which will transfer to the Minister and to Tusla pursuant to Section 43(2) of the 2004 Act and pursuant to the 2020 Act, and (b) the record repositories of these categories of personal data (e.g. whether they are contained in the database defined in Section 1 of the 2020 Act, in the related record(s) defined by Section 1 of the 2020 Act and/or in any records covered by Section 11(3) of the 2004 Act). As part of this information, please specifically identify what categories of personal data are covered by Section 11(3) of the 2004 Act and in what record repositories such categories of personal data are contained.
2. Please identify any overlaps in these categories of personal data as between the database, the related record(s) and the records covered by Section 11(3) of the 2004 Act.
3. Please confirm whether, in respect of any personal data that are not covered by Section 11(3) of the 2004 Act, these personal data will be separately provided and identified to the Minister and to Tusla. In this regard, the DPC wishes to understand whether it will be clear to the Minister and to Tusla what records (containing personal data) are not covered by the Section 11(3) obligation and are not "sealed" in this respect.
4. Please specify any differences in content with respect to the database that was deposited with Tusla and the copy of the database that will be deposited with the Minister.

E. Additional concerns and queries

The DPC notes on page nine of the Report of the Confidential Committee to the Commission of Investigation into Mother and Baby Homes October 2020, it states that all audio recordings of witness hearings were destroyed after the report was added to the Confidential Committee electronic repository of information. Please confirm whether the recordings were actually destroyed and the lawful basis for such processing.

Finally, we note the very sensitive nature of the personal data that you are processing and the significant impact it may have on the data subjects in question. We trust that in this spirit, and taking into account your obligations to cooperate with the Data Protection Commission pursuant to Article 31 GDPR you will respond in full to the queries raised in this letter. Please also note, for the avoidance of doubt, that the queries raised in this letter now supersede the queries raised in our letter of 14 January and our email of 15 January.

The DPC is aware that the Mother and Baby Homes Commission of Investigation is due to be dissolved at the end of February, as a result, time is of the essence to receive a response to the questions posed. Please therefore respond to the queries raised in this letter by 5pm on Thursday 28 January 2021.

In addition, given the potential impact on data subjects' rights, we request that the Commission consider suspending its process of redaction pending your response to these queries.

Yours sincerely

A handwritten signature in blue ink that reads "Caoimhe Sheridan". The signature is written in a cursive style.

Caoimhe Sheridan
Assistant Commissioner