



Ms. Helen Dixon
Commissioner for Data Protection
Data Protection Commission
21 Fitzwilliam Square South
Dublin 2
D02 RD28

25 January 2021

**Re: Commission of Investigation (Mother and Baby Homes and certain related matters)
Data protection issues**

Dear Ms. Dixon,

Thank you for your correspondence of 21 January last regarding concerns reported in the media about a number of matters relating to data protection and the records of the Commission. In your letter, you reference the ability of witnesses to access records of their evidence for the purpose of considering what redactions the Commission might apply to those records; the rights of third parties (e.g. the children of mothers who were resident in the homes) in relation to the potential redaction of their personal data (which may be mixed in with the personal data of the mothers); and what rights of access and other GDPR-provided rights individuals will be entitled to invoke once the Commission's records come into the Minister's possession and into the possession of Tusla.

As you are aware, I have sought a meeting with you to discuss these important matters. In advance of that, I thought it would be helpful to provide some context and clarifications in respect of these matters.

The Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records, and Another Matter, Act 2020, Number 20/2020 ('the 2020 Act').

In your correspondence you reference the 2020 Act. As you are aware, this Act was introduced in order to protect and preserve the Commission's records. Its aim was to prevent their destruction specifically so that they can be made available to those seeking access to their personal information. The urgency attached to the legislation was highly regrettable but unavoidable given the Commission's stated position in its Sixth Interim Report (and in



subsequent correspondence) that it believed it would have to redact its records prior to depositing them with me on 30 October 2020. In the case of the invaluable database created by the Commission, the Commission itself noted that this redaction would have amounted to its effective destruction.

The 2020 Act requires the Commission's database and related records to be transferred unredacted to Tusla. This transfer has happened and Tusla is now in possession of the unredacted database and related records. I understand that Tusla published its DPIA in respect of these records last Friday, 22nd January. In accordance with the 2020 Act, a copy of this same material, namely the complete and unredacted database and related records, will be submitted to myself, as the specified Minister, once the full archive is deposited with me in February.

The 2020 Act requires the full archive to be deposited unredacted with myself as Minister by 28 February. The only exception to this is provided for in section 6 of the Act.

Section 6 of the 2020 Act

Section 6 of the 2020 Act responded to concerns raised in the Seanad during the passage of the legislation in relation to an expectation of privacy which, it is understood, was given in the leaflet provided to those who attended the Confidential Committee. The concerns centred on the fact that people, who voluntarily came forward to tell their story to the Confidential Committee, believed that they would remain fully anonymous and their name would never remain in any record associated with the Confidential Committee, even one that would be generally inaccessible for 30 years. Equally, it was noted during the Seanad debate that some people who told their stories may wish their names to remain attached to their story for posterity.

In both cases, I was deeply concerned with trying to respect the agency of each person to decide on whether their story - as captured within the archive - is anonymous or bears their name. Many of these people have undoubtedly had difficult experiences in the past where agency and autonomy was taken away. Section 6 was introduced to address both viewpoints and, in so doing, respect each person's agency and right to decide in respect of their name remaining attached to their story as told to the Confidential Committee. The section relates solely to the written record of the stories voluntarily told to the Confidential Committee which were unchallenged accounts provided on an understanding of anonymity and which were not provided under oath. The section does not relate to any other records provided to, or created by, the Commission.

I have sought, and received, assurances from the Attorney General that section 6 of the Act is not incompatible with the GDPR.

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In terms of the practical application of section 6, my Department has confirmed with the Commission that the only data in question is the name and contact details of the person who attended the Confidential Committee, as attached to the anonymous story which they voluntarily told to the Committee. No institutional or other records are at play.

Section 11(3) of the Commissions of Investigation Act 2004

You have asked whether I am considering making an application to the High Court for the Commission to be relieved of obligations under section 11(3) of the 2004 Act in order to give effect to the access rights of individuals. Whilst acknowledging that the Commission of Investigation is independent in the operation of its functions, advices received by my Department are that section 11(3) of the 2004 Act must be interpreted and applied subject to the GDPR. This being so, section 11(3) must be interpreted as meaning that the prohibition on disclosure or publication of any evidence given or the contents of any document produced by a witness while giving evidence in private does not apply to the disclosure of personal data contained in any records of a commission of investigation to a data subject in order to comply with the GDPR. This being the case, I would not envisage an application to the High Court as being necessary as I would see that section 11(3) does not prohibit the appropriate disclosure of personal data. That said, there would be nothing to prevent the Commission making such an application should it take a contrary view.

On foot of your correspondence, I have written to the Commission setting out my understanding of the position with regard to section 11(3), as grounded in advices I have received, noting that these advices were received in the context of the Department's management of subject access requests for personal information contained within the Commission's archive, once deposited with me. In my letter I also highlighted the concern that I know we all share to support clarity in relation to these matters.

Management of Subject Access Requests to the Commission Archive

As mentioned, the Commission is due to deposit its archive with me next month. I and my Department are working intensively to prepare for receipt of the archive. We have sought very extensive legal advices from the Office of the Attorney General and have also met with independent experts in the area of GDPR. I am very grateful for the engagement to date with the Data Protection Commissioner and look forward to consultation in the context of drafting the Department's policies and procedures building on the basic principles which we shared with your Office last week. My intention is to publish the Department's policies and procedures following that consultation and ahead of 28th February. I can assure you that our intention is to manage subject access requests in relation to the Commission's archive in an efficient, effective and transparent manner, in full compliance with the Data Protection Regulatory Framework.

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Information and Tracing Legislation

I am also working as a priority to introduce Information and Tracing legislation which will give people the fullest possible access to their birth and early life information. The database and related records which were transferred to Tusla will greatly support timely access to such information in accordance with this proposed new legislation.

I trust that this response is helpful and provides some reassurance on this very important and sensitive issue in advance of our meeting.

Yours sincerely,

Roderic O'Gorman, T.D.

Minister for Children Equality, Disability, Integration and Youth