Ms Éilís Fallon  
Committee Secretariat  
Committee of Public Accounts  
Leinster House  
Dublin 2  

26 November 2019  

Your Ref: PAC32-I-1655  

Dear Ms Fallon,  

I refer to your letter of 13 November 2019 regarding the meeting of the Committee of Public Accounts (the Committee) of Thursday 7 November 2019.  

Your letter sought the views of the Data Protection Commission (DPC) in relation to the Department of Finance (the Department) and other public bodies providing the Committee with details of fees paid to barristers.  

You provided a copy of the letter to the Committee from the Department dated 16 October 2019 along with the relevant extracts of the transcript of the Committee meeting held on 7 November 2019 to assist in setting out our views.  

At the outset, it is my understanding that the practice of disclosing the names of barristers along with the fees paid to them by government departments and public bodies is a long-standing one. Such disclosure has arisen, for example, following a request under the Freedom of Information Act 2014, in response to a parliamentary question or under a scheme of voluntary disclosure by the public body concerned. The voluntary disclosure of certain payments forms part of the Public Service Reform Plan. However for the present purposes, I will focus my response specifically on the data protection issues to be considered in the context of disclosure.
As a preliminary comment, I am not clear on what has precipitated the apparently recent change in practice on the part of certain public bodies. The lawful bases for processing (and therefore disclosure) set out under the Data Protection Acts 1998 to 2003 have not undergone any material amendment as a result of the adoption of the GDPR. I understand that a number of government departments and public bodies continue to disclose payments made to barristers and other natural persons.

It will generally be the case that information, including information concerning income earned or payments made, relating to individuals acting as sole traders, such as barristers, is ‘personal data’ for the purposes of the GDPR and the Data Protection Act 2018.¹

As you will be aware, there are a number of potential legal bases under Article 6 GDPR that legitimise the processing of personal data and it is the responsibility of a data controller to identify the legal basis on which they rely for processing personal data, and to ensure that it is, in all the circumstances, appropriate for them to rely on that legal basis. This will necessarily require the data controller to carry out an assessment of the relevant factors, including the purposes for which the processing is taking place, the nature and extent of the processing in question and the type(s) of personal data being processed.

In addressing the issues on which the Committee has asked the DPC for its view, as we do not have the full facts from the Department or access to the advice they have received, we consider that it may be helpful to explain the position which the DPC took in a recent analogous situation. In the context of the DPC’s recent responses to the Committee on foot of requests for certain information to it concerning expenditure on legal services, the DPC considered that it was necessary to process the personal data of barristers, who had rendered legal services to the DPC and accordingly, whose fees had been paid by the DPC. This was done in reliance on the legal basis for processing set out in Article 6(1)(f) of the GDPR, in pursuit of our legitimate interest to be transparent and accountable financially as a public sector body funded by the exchequer.²

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¹ This being “information relating to an identified or identifiable natural person”, within the meaning of personal data as defined in Article 4(1) of the GDPR.

² It should be noted that under Article 6(1) of the GDPR, the legitimate interests legal basis cannot form the legal basis for processing of personal data carried out by public authorities in the performance of their tasks. The DPC’s position is that the tasks of a public body relate to the substantive tasks of a public body (e.g. relating to the purpose for which the public body was established). Accordingly, the obligation, arising from the status of a public body, to be transparent and financially accountable in relation to expenditure of public funds, is an ancillary issue to the tasks of a public body and therefore Article 6(1)(f) may form the legal basis for processing carried out in this context.
The legitimate interests legal basis for processing personal data requires a balancing test to be conducted by the data controller at the outset, in order to weigh the legitimate interests being pursued (i.e. the purposes of the processing) against the impact of the processing on the data subject concerned and assess whether such processing would represent a disproportionate interference with the data subject’s rights. For that reason, before taking a decision on disclosure of the various individual barristers’ names and associated fees, it was necessary for the DPC to consider under Article 6(1)(f) of the GDPR whether the interests of the barristers in question to protect their personal data (i.e. their identity, the fact they had advised the DPC and the details of the payments made to them by the DPC arising from their delivery of professional legal services to the DPC) overrode the interest of the DPC as a public sector body to be transparent in accounting for its finances and expenditure of public funds. In the circumstances, we considered this was not the case as the barristers had undertaken work for a public body, (which in the majority of cases related to litigation which was in the public domain) and could have no expectation that the legal fees expended by the DPC as a public body would not be subject to parliamentary and public scrutiny (particularly given that the DPC is under an obligation pursuant to Section 19 of the Data Protection Act 2018 to account, where requested by an Oireachtas Committee, for the general administration of the office). In addition and significantly, the disclosure of fees paid by a public body to an individual barrister in respect of certain matters generally will not disclose the full salary or financial circumstances of that barrister. For these reasons, the DPC considered that disclosure of the legal fees paid in any given year has a limited and proportionate impact on the barrister’s right to privacy and protection of their personal data.

Connected to my broader comments above on legal basis, it will be a matter for an individual public body to assess whether disclosure of fees paid out of public funds to individuals, whether barristers or otherwise, is appropriate having regard to any relevant legal basis and appropriate safeguards. Factors that may be of relevance in relation to the disclosure of the payment of fees may include: the public interest in value for money; the nature of the services for which fees were paid and the level of such fees; transparency and accountability in the use of public funds, the lawful functions of the Committee in scrutinising such payments and the objectives to be met by the Committee receiving this information to the level of detail requested; and the extent to which such disclosure might disclose the global financial circumstances of the individual concerned.

I note that during the course of its deliberations, the Committee suggested that a recommendation be made to the Department of Public Expenditure and Reform that tenderers for publicly funded contracts should be told that their fees and costs will be disclosed as part of that process. This office supports that recommendation.
I trust that the above is of assistance in addressing the matters being deliberated by the Committee. While it is not possible to comment in absolute terms on any given scenario, the information above is provided to assist the Committee in understanding the relevant principles engaged in circumstances where personal data is being disclosed publically before the Committee. These issues may equally apply where the Committee becomes a data controller, holding personal data which has been disclosed to it in the course of performance of its functions.

Yours sincerely,

Colum Walsh
Deputy Commissioner