

## Joint Committee on Children, Disability, Equality, and Integration

Pre-legislative scrutiny of the Birth Information and Tracing Bill - GDPR concerns with the provisions of the Bill.

### Opening Statement of Fred Logue

Cathaoirleach

Many thanks for your invitation to attend this meeting as part of the pre-legislative scrutiny of the Birth Information and Tracing Bill, specifically to discuss GDPR concerns with the provisions of the Bill.

My name is Fred Logue and I am principal solicitor in FP Logue solicitors. We have a specialist information law practice which includes advising individuals in relation to data protection rights. I have acted in many cases trying to help people who have been adopted access information about their birth and early life and am happy to share my experience with those cases with a view to improving the heads of bill.

My first thought when I read the draft heads was that it was starting from the wrong place.

From my reading, the Bill is drafted from the point of view that it is giving people a new right to access information that they currently don't enjoy. However this point of departure is misconceived because adopted people already have a right to access to their information.

First of all, birth certs are public documents and there is no legal prohibition on access. Anyone can access any birth cert from the GRO. For adopted people, the barriers to access are practical rather than legal because in many cases they don't have enough information about themselves to identify their own birth cert. That being said, many adopted people do succeed in solving the puzzle and are able to access their birth certs from the GRO.

In addition to our system of open access to birth certs, the GDPR gives adopted people a right of access to all information relating to them held by data controllers whether public or private and including the Adoption Authority and Tusla etc. However access in these cases is being blocked, unlawfully in my view, by what I consider to be an unwritten or de facto policy to deny access to most of adoption information, and certainly information that would help adopted people find out the identity of their parents and other relatives. This is achieved through misinterpretation of European data protection law and a policy of applying national law over EU law. Weak enforcement by the Data Protection Commission means that individuals don't have an effective way of enforcing their rights in this regard.

The point I am making here is that these rights exist and will continue to exist irrespective of what the proposed legislation provides. There is a risk, however, that incomplete legislation will actually make things worse by creating a limited parallel access regime alongside GDPR rather than complementing it or giving further effect to GDPR rights.

Individuals will be confused as to their rights and data controllers will inevitably rely on the narrower national legislation without regard to the overriding EU law rights leading to further frustration of access rights for adopted people.

In my view the drafters of the Bill need to go back to the drawing board and produce a heads of Bill which is intended to give full effect to adopted people's subject access rights and should remove all provisions which are in conflict with pre-existing data protection rights.

Some of these conflicts include:

1. The material scope of what information is accessible is too narrow and unnecessarily granular. The legislation should provide for access to birth certs and all other information relating to the adopted person as the starting point.
2. The proposed age limit in Heads 3 and 5 conflicts with GDPR
3. The proposed fee in Head 3 is incompatible with GDPR which provides for access free of charge except in exceptional circumstances
4. The mandatory information session is prima-facie incompatible with GDPR and constitutes a restriction on the right of access.
5. The requirement that "medical information" be provided through the applicant's nominated medical practitioner in Head 10 is incompatible with GDPR and is a restriction on the right of access. In fact there is no reference in GDPR to medical information, the correct terminology is "health information"
6. Head 13(4) seems to be aimed at ensuring non-disclosure outside of the legislation but will inevitably be interpreted as non-disclosure under the GDPR subject access right, particularly by public bodies who are not willing to meet their obligations to disapply national law that conflicts with EU law.
7. The restriction on the right to compensation in Head 38 and 39 is fundamentally incompatible with GDPR and clearly invalid. I am actually stunned that the drafters of the Heads included such an obviously invalid provision.

The Heads propose several restrictions on data protection rights. While the GDPR acknowledges that rights may be restricted, it is clear from the legislation that such restrictions must only be used if very stringent conditions are satisfied.

The European Data Protection Board has recently published some very good guidance on how restrictions are to be applied and given legal effect<sup>1</sup>. The drafters should examine these guidelines carefully.

The restrictions under Article 23 GDPR proposed in Heads 10 and 40 do not come close to meeting the required standard under EU law and will almost certainly be invalid if carried forward into legislation in this format.

In particular the residual restriction in Head 40 is entirely misconceived and is almost certainly going to lead to arbitrary and unlawful outcomes from the legislation if it is enacted.

It should also be noted that there will be a right of access to any new registers or other information generated by the tracing aspects of the legislation. Again subject access rights need to be expressly provided for in the legislation so that it is clear whether and to what extent individuals have a right of access to this information. If there are to be restrictions on access then those restrictions must be set down in law and comply with article 23 GDPR.

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<sup>1</sup> [https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-102020-restrictions-under-article-23-gdpr\\_en](https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-102020-restrictions-under-article-23-gdpr_en)

Finally I would like to stress also that the Adoption Authority and/or Tusla should not be given the power to draw up guidelines in relation to how the access regime is to be administered, particularly where such guidelines may restrict the right of access. Any guidelines should be made by the relevant Minister and the legislation should set out in detail the scope of the Guidelines. Any substantive matters should be in the legislation in any event and there should not be any possibility of guidelines being used to affect substantive rights, no matter who produces them.

Thank you for your time I am happy to answer any questions the committee may wish to put to me.

Fred Logue

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