

**JOINT SUBMISSION TO THE OIREACHTAS JOINT COMMITTEE ON JUSTICE
REGARDING THE GENERAL DATA PROTECTION REGULATION**

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INTRODUCTION

This submission focuses on the personal data rights of adopted people (including those illegally, informally and otherwise unlawfully adopted), mothers, individuals who were placed in state care, and others affected by Ireland's so-called 'historical' system of family separation and institutionalisation.

The recently published [Report](#) of the Mother and Baby Homes Commission of Investigation (MBHCOI) does not mention the [EU General Data Protection Regulation](#) (GDPR) anywhere within its pages, despite the Commission being subject to GDPR from May 2018 and notwithstanding that the core issue under investigation was – and is – the denial of personal and family identity.

With this egregious gap in its analysis, the MBHCOI saw fit to conclude in its Report that the criticism by 'many...former residents...of the information and tracing arrangements in place' is 'unfair and misplaced'.ⁱ The MBHCOI described criticisms of TUSLA by those who have been denied basic information about the circumstances of their (frequently unlawful) separation from relatives as 'vitriolic'.ⁱⁱ Regarding records in the possession of dioceses and religious orders, the MBHCOI determined – without reference to GPDR – that 'Diocesan records and the records of the religious orders involved in the institutions are the property of the holders and they have the right to determine who gets access.'ⁱⁱⁱ

Throughout its investigation period, the MBHCOI refused to give to any survivor or adopted person a transcript of their own testimony as recorded by the Commission.^{iv} During its investigation the MBHCOI further refused all requests by survivors and adopted people for their own personal data or records of their disappeared baby or other relative (that the Commission had gathered from TUSLA or religious or other sources).^v This was despite:

- (i) the fact that, upon the entry into force of the GDPR, section 39 of the Commission of Investigations Act 2004 (as amended by section 198 of the Data Protection Act 2018)

provided for restriction of the Article 15 GDPR right of access only ‘to the extent necessary and proportionate to safeguard the effective operation of commissions and the future cooperation of witnesses’; and

(ii) section 12(1) of the Commissions of Investigation Act 2004, which states:

‘a commission shall disclose to a person –
(a) who is directed to attend as a witness before the commission,
(b) who attends voluntarily to give evidence to the commission, or
(c) about whom evidence is given to the commission,
the substance of any evidence in its possession that, in its opinion, the person should be aware of for the purposes of the evidence that person may give or has given to the commission’

Upon the MBHCOI Report’s publication, it transpired (from page 11 of the Confidential Committee Report Chapter of the MBHCOI’s Report) that the Commission had deleted the audio recordings of approximately 550 survivors’ and adopted people’s testimony. The Commission did so without creating a full transcript of each person’s evidence,^{vi} without using consent forms, and without providing written warning in advance.^{vii} It also did so in apparent contravention of section 43 of the Commissions of Investigation Act 2004, which requires every Commission of Investigation at the end of its work to ‘deposit with the specified Minister all evidence received by and all documents created by or for the commission’, ‘documents’ being expressly defined to include ‘records of interviews’.

These findings and procedures of the MBHCOI are symptomatic of an ongoing situation of continuing gross and systematic human rights violations by the Irish State against individuals and families who were subjected to institutionalisation and to coercive and unlawful separation during the 20th century.

The Clann Project and Conall Ó Fátharta (formerly of the *Irish Examiner*), among others, repeatedly notified successive Governments of the MBHCOI’s blanket withholding of personal data from the very individuals whom its work purported to serve. Not only did the Government fail to act to protect the data rights of these individuals, but the Minister for Children insisted in September and October 2020 (until compelled through public pressure to acknowledge the direct effect in Irish law of GDPR and reverse his position) that he intended to ‘seal’ for 30 years the entire archive due to be deposited by the MBHCOI in his Department.^{viii}

Similarly, in 2019, the Minister for Education introduced a Bill (entitled the Retention of Records Bill 2019) which proposed to ‘seal’ for at least 75 years every single document in the archives of the Commission to Inquire into Child Abuse (CICA), the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee. It was only through survivors’ mobilisation of public concern, an emergency sitting of the Oireachtas Education Committee, and survivors’ and other experts’ urgently-composed written and oral submissions (which among other things highlighted the existence of GDPR, which prohibits such blanket restrictions on personal data access) that this Bill was abandoned.^{ix} Still today, the archives concerned lie in limbo as the Government continues to fail to deposit them in the National Archives of Ireland (as the Commission to Inquire into Child Abuse Act 2000 requires in respect of the CICA archive^x).

In the past fortnight alone, the authors of this submission have been contacted by individuals who, for example:

- (i) have been informed by the Department of Children on a blanket basis that it will not be providing any data relating to their deceased mother to them from the MBHCOI archive (failing to recognise that personal data may be mixed, i.e., relating to more than one person at the same time – and, although not entirely relevant to this submission, failing to direct the person to the Freedom of Information Act); and
- (ii) are being refused access to the information which TUSLA holds demonstrating their identity at birth, having been told recently by TUSLA that they were illegally registered on their birth certificate as the child of a couple who were not their natural parents (and therefore were not ever legally separated from their natural family through adoption, and are not the natural child of the parents they always believed themselves to have been born to).

The MBHCOI spent only €11.5 million of its €23 million budget allocation (page 15, Introduction Chapter, MBHCOI Final Report).

Therefore, there is €11.5 million currently available to support immediate and wide-ranging measures to respect, protect and fulfil the information rights of those who are continuing to experience the abuse of secrecy.

The remainder of this submission explains that:

1. The State is routinely denying adopted people knowledge of their birth name in order to prevent them from accessing their publicly registered birth certificate; we argue that this is contrary to the GDPR, EU Charter and European Convention on Human Rights (ECHR), which require that any interference with the right of personal data access must be based on clear and accessible law, and necessary and proportionate;
2. The State and other data controllers are routinely misinterpreting GDPR rules to deny adopted people, mothers and others who were placed in state care access to their personal data, notably mixed personal data which names other people – whether family members or professionals – who were intimately involved in their life;
3. There is a need for the State to proactively monitor, guide, and make swift decisions on complaints about, the practice of all controllers of so-called ‘historical’ abuse, institutionalisation, ‘care’ and adoption records; we recommend the resourcing of a dedicated part of the Data Protection Commission for this purpose. [Section 12](#) of the Data Protection Act 2018 provides that ‘the functions assigned to the [DPC] by virtue of its being the supervisory authority for the purposes of the Data Protection Regulation and the Directive, the general functions of the Commission shall include...such other functions as may be assigned to it from time to time by or under any other enactment’.
4. The forthcoming legislation on adoption information must provide, as the Adoption Rights Alliance (ARA) draft Bill proposes: (1) unconditional access to birth certificates for adopted people and people placed in informal care arrangements; (2) a clear statutory right

of access to one's own 'care' or adoption file, and to records concerning a family member who died in 'care' or adoption; (3) a statutory right of access to State administrative records for survivors, adopted people and natural mothers; (4) the safeguarding and centralisation of all relevant records in an independent repository where access is provided by professional archivists; (5) an enhanced tracing service; (6) placement of the National Adoption Contact Preference Register (NACPR) on a statutory footing; and (7) the right to know you are adopted.

5. If the Government's forthcoming legislation on adoption information is to contain any restrictions on the right of access to personal data, those restrictions must comply with Article 23 GDPR and related provisions of the EU Charter and ECHR.
6. The Government's forthcoming legislation on adoption information must not contain restrictions on access to birth certificates under any circumstances.

The ongoing dignity violations, and continuing violations of Irish Constitutional, and European and international human rights, law must cease.

It is imperative that from this moment on, the right to the truth (which is the first requirement of redress) underpins all of the Irish State's efforts to achieve compliance with GDPR in the realm of adoption and so-called 'historical' institutionalisation and family separation.

1. BIRTH CERTIFICATES

The GDPR defines personal data as follows:

'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Therefore, a person's birth identity is their personal data to which they have a right under Article 15 GDPR.

Since 1864 all Irish birth certificates have been publicly available in the General Register Office. Adopted people are the only people in Ireland who are denied the ability to retrieve their own birth certificate, because institutions and individuals in control of adopted people's files (including TUSLA and the Adoption Authority of Ireland (AAI)) routinely refuse to inform adopted people of their name at birth or to provide adopted people with their unredacted adoption / early life file.

In the absence of an explicit right for adopted people to access their birth certificates, [Adoption Rights Alliance](#) (ARA) provides [information and resources](#) to assist adopted people and others affected by adoption in locating their birth certificates and obtaining adoption records.^{xi} The methodology was first developed in the early-1990s by AdoptionIreland, ARA's predecessor organisation, and ARA has since expanded its guides to incorporate data protection rights and genetic genealogy resources. Over the past thirty years, countless adopted people have made use of these methods to obtain their birth certificates.

It is also crucial to note that an adopted person's birth certificate contains considerably less information than that belonging to a non-adopted person. For example, an adopted person's birth certificate generally does not have the name of the father, the father's occupation and the parents' address(es).

The continuing refusal to tell adopted people their name at birth, or to provide them with their publicly registered birth certificate, is in our view contrary to the GDPR, the EU Charter of Fundamental Rights and the European Convention on Human Rights, as well as being unconstitutional.

Article 15(4) GDPR states that the right of access to one's personal data 'shall not adversely affect the rights and freedoms of others'. Controllers of adopted people's personal data *appear* to be relying on this provision; however, it is not clear that they are because there is no public access to the Attorney General's advice to data controllers, for example, or to TUSLA's official interpretation of the law.

Article 15(4) GDPR is not a free-for-all provision allowing data controllers to withhold any mixed data where they believe that its release to one person to whom it relates may have an adverse impact on another person to whom it relates.

Article 15(4) must be interpreted in light of Article 23 GDPR. According to Article 23 GDPR, the fundamental right of access to one's personal data can lawfully be restricted only if there is clear legislation that allows for such restriction and the restriction is a necessary and proportionate measure in a democratic society and respects the essence of the fundamental rights and freedoms at issue. (These criteria are discussed further at section 4 below, which refers to the European Data Protection Board's Guidance on Article 23 GDPR.)

Article 15(4) GDPR must also be interpreted in harmony with Article 8(2) of the Charter of Fundamental Rights of the European Union which states that '[E]veryone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.' The EU Charter provides in Article 52(1) that the rights and freedoms recognised by the Charter (including the right of access to personal data in Article 8(2)) can be limited only where the following conditions are met:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

Additionally, Article 52(3) of the EU Charter specifies that:

'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [the European Convention on Human Rights], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

Article 8 of the European Convention on Human Rights states that the State may only interfere with the right to respect for private and family life where such interference is 'in accordance with the law and is

necessary in a democratic society’ for the pursuit of a legitimate aim – which the European Court of Human Rights has interpreted to require that the interference is only such as is ‘proportionate to the legitimate aim pursued’.^{xii}

There is no clear legislation that specifies how Irish controllers of adopted people’s personal data should make decisions regarding its release. The European Court of Human Rights has held that ‘in accordance with the law’ means, under Article 8 ECHR, that the law must be ‘accessible to the persons concerned and foreseeable as to its effects’.^{xiii} Similarly, the Court of Justice of the European Union has held that the ‘provided for by law’ requirement of Article 52(1) of the Charter means the same as it does under Article 8 ECHR, and that the law must clearly define the scope and manner of permissible interferences, so as to protect individuals from abuse of power.^{xiv}

It is not clear what law TUSLA, the AAI or other data controllers are currently relying upon in order to justify the withholding of adopted people’s name from them. Certainly, no legislation has at any time during the 20th century provided for ‘anonymous birth’ such that a mother’s identity could be withheld from public view on the Register of Births.

In fact, in February 2020 the Court of Appeal decided in *Habte v Minister for Justice and Equality* [2020] IECA 22 that there is an unenumerated Constitutional right ‘to have [one’s] identity correctly recognised by the State’.^{xv} Mr Justice Murray explained (at para 31):

The trial Judge rooted this conclusion, in part, in the widespread recognition of the right in international instruments (Article 24(2) of the International Covenant on Civil and Political Rights, and Article 7 of the Convention on the Rights of the Child) and the view that this right both necessarily inhered in Article 8 of the European Convention on Human Rights and was a corollary to the right to protection of data provided for in Article 8 of the Charter on Fundamental Rights of the European Union (in which connection the Judge further referred to section 74(3) of the *Data Protection Act 2018* and section 9 of the Freedom of Information Act 2014). He said (at para. 44):

‘...there is an implied constitutional onus on the State arising from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution to accurately record and represent central aspects of personal identity.’

In any event, and in addition, **the withholding of adopted people’s identity at birth cannot be said to satisfy the GDPR, EU Charter and ECHR requirements of necessity and proportionality because:**

- (1) a record of one’s identity is one of the most, if not *the* most, important forms of personal data;**
- (2) birth certificates are already public documents;**
- (3) access to personal data is a different matter to being enabled to contact a person; and**
- (4) contact between relatives can be voluntarily managed through a well-resourced and statutorily based National Adoption Contact Preference Register (NACPR).**

A Legal Opinion published in November 2019 by Professor Conor O’Mahony, Dr Fred Logue, Dr Maeve O’Rourke, Dr James Gallen, Dr Eoin Daly, Reader Máiréad Enright, Dr Sinéad Ring, Rossa

McMahon (solicitor) and Dr Laura Cahillane concluded, likewise, that a proportionate way of balancing the rights of adopted people and their parents would be to properly resource the voluntary NACPR while providing personal data access so that all relatives are enabled to manage their own family relationships without unnecessary and arbitrary State coercion and intrusion.^{xvi}

2. ADOPTION FILES, EARLY LIFE FILES AND MOTHERS' FILES

The vast majority of adoption agencies have now closed, and therefore most adoption files are now held by TUSLA. In today's *Irish Examiner*, Elaine Loughlin [reports](#) that TUSLA holds 70,000 adoption files while the AAI states that it holds more than 4,000 'incomplete' adoption files.^{xvii}

As noted above, the GDPR defines personal data in terms of a person's 'physical, physiological, genetic, mental, economic, cultural or social identity'. In this regard, adoption records contain personal data about the adopted person themselves, such as their physical condition and circumstances during their early months and years, including their place of birth, their care records, the names of the people responsible for their care, their genetic background, and their cultural and social identity which includes the adopted person's original name, their natural parents' names, their natural family members' names and the circumstances surrounding their adoption.

ARA runs a [peer support group](#) of over 2,500 adopted people, natural mothers, natural fathers and relatives. Members report that since the implementation of GDPR, their treatment at the hands of TUSLA has worsened considerably. In recent years, adopted people have exercised their rights as data subjects and have made subject access requests to their adoption agencies, the AAI and TUSLA. In all cases that ARA is aware of, the records provided have been heavily redacted, and even information which has already been provided by the applicant as part of their subject access request (e.g., their original identity), if it is personal data that is shared with another person, has been removed. The rationale for these redactions – if any is given – is generally that the records contain 'third party information'. That is to say, any mixed personal data in the record is considered 'third party information' and withheld on a blanket basis unless express consent has been given by the person who shares it to its release. Adopted people are therefore routinely refused data relating to them which relates at the same time, for example, to the adopted person's natural mother, adoptive parents, family members, social workers or others involved in the adoption process.^{xviii} The adopted person is denied recognition as a full data subject with the same entitlement to information about themselves as any other Irish citizen or person subject to EU law.

The blanket redaction of mixed personal data, save where the express consent of the person who shares the data has been obtained, also means that natural parents are routinely prevented from knowing all available information about their treatment and the circumstances of their separation from their child.

These practices appear quite clearly to be contrary to the GDPR; the Court of Justice of the European Union (CJEU) held in *Nowak v Data Protection Commissioner of Ireland* (Case C-434/16, 20 December 2017) that information may be linked to more than one individual and this does not affect the right of access. According to the CJEU at para 45 of the *Nowak* judgment: 'The same information may relate to a number of individuals and may constitute for each of them, provided that those persons are identified or identifiable, personal data'. The rules discussed in Section 1, regarding the circumstances in which interferences with the right of access to personal data under Article 15 GDPR will be permissible, therefore apply equally to mixed personal data.

TUSLA has acknowledged that it undertakes a practice of ‘risk assessing’ all adopted people who request their records.^{xix} Adopted people have been categorised as a ‘threat’; the Irish State has consistently taken a punitive and restrictive approach to providing them with their personal data.^{xx} Rather than advocating reparation for a closed and secret, and routinely forced, adoption system, Government proposals have framed adopted people as untrustworthy individuals from whom their mothers need to be protected. No other cohort of Irish citizens is discriminated against in this manner, and it is time to resolve this issue once and for all. Since 2001, the Government has made a number of unsuccessful attempts to legislate for access to records for adopted people. Each of these Government schemes has prescribed (unwarranted and punitive) measures designed to ensure that adopted people do not contact their natural mothers. In addition, none of these schemes has provided for mothers’ access to their personal data. These proposals have been rejected by adopted people and many mothers as gross infringements of their rights.

The available evidence simply does not support the ‘adoption myths’ upon which previous Government proposals have been based. Click here for a briefing note from Claire McGettrick which demonstrates how this is the case. The briefing note also outlines (i) how adopted people can already obtain their birth certificates, (ii) how they are marginalised by the current system, (iii) what legislative proposals would be acceptable to them, and (iv) a simple short-term solution which would allow adopted people to access their birth certificates.

It should not be forgotten that adoption (and ‘informal’ adoption) during the 20th century in Ireland was generally forced and frequently illegal. This closed, secret system obliterated the identities of thousands of adopted people while disappearing children from their mothers and their wider families. The Irish State is obliged to remedy these abuses, rather than continuing to unjustifiably and unlawfully deny adopted people their identity and mothers their rights of access to their own personal data (including mixed data that records the interactions of other individuals, including professionals and religious personnel, with them).

GDPR and relatives of the deceased

Recital 27 GDPR clarifies that deceased persons do not have rights under GDPR. Therefore, the GDPR is not applicable to the data of deceased persons save to the extent that the data relates to a living person (in which case the living person has a right to access it under Article 15 GDPR).

However, the State’s current interpretation of Recital 27 appears to be that, because the GDPR does not apply to deceased persons the State is entitled to refuse to release all personal data relating to such persons.

In response to subject access requests from relatives of deceased people for personal data held in the Commission of Investigation archive, the Department of Children, Equality, Disability, Integration and Youth has stated in March 2021:

Please note the GDPR does not apply to the personal data of deceased persons and access requests seeking the personal data of deceased persons cannot be processed by the Department.

This position does not take into account the fact that deceased persons do not have data subject rights and thus such rights do not have to be taken into account in any balancing test used to determine the

release of mixed data. Moreover, as noted above, the Court of Justice of the European Union (CJEU) acknowledged in *Nowak v Data Protection Commissioner of Ireland* (Case C-434/16, 20 December 2017), information may be linked to more than one individual and this does not affect the right of access: ‘The same information may relate to a number of individuals and may constitute for each of them, provided that those persons are identified or identifiable, personal data’ (para 45 of the *Nowak* judgment).

The Government must ensure a clear pathway for mothers, adopted people and all those placed in care arrangements to access their own care and adoption files.

While more appropriately viewed as a matter of Constitutional and ECHR rights (rather than strictly GDPR rights), it is crucial to note that relatives also require access to information about the fate and whereabouts of their family member(s) who died while in an institutional or other 'care' setting. Notably and worryingly, such a right of access is not included in the Government's current General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill.

3. NEED FOR IMMEDIATE SUPERVISION OF ALL DATA CONTROLLERS OF ADOPTION AND ‘HISTORICAL’ INSTITUTIONAL AND CARE-RELATED RECORDS

In October 2020, following the reversal of its policy to ‘seal’ for 30 years all records received from the MBHCOI, the Government **promised** additional resources to the Department of Children, Equality, Disability, Integration and Youth and TUSLA to ensure the immediate implementation of GDPR rights in respect of the MBHCOI archive. In January the Clann Project **called for** the swift recruitment of data protection law expert committees, who are independent of government Departments and TUSLA, to administer the data protection obligations of the Department and TUSLA.

In addition, independent expertise should also be provided to the Adoption Authority of Ireland and to the **myriad other controllers of adoption and institutional records**.

We strongly believe that it is necessary to immediately create and resource a **dedicated unit of the Data Protection Commission, with a dedicated Advisory Committee** including those with direct experience of adoption, institutionalisation and State care, and human rights expertise, to ensure in relation to all institutional, adoption and 'care'-related records:

- (1) Cataloguing / identification of the location of all archives of historical institutional, adoption and care-related records;
- (2) Major improvements in data controllers' practice, including through published guidance and proactive monitoring and investigating of such practice;
- (3) The provision of accessible information and assistance to data subjects (bearing in mind the varied and particular needs of those affected);
- (4) Efficient and transparent appeals from contested decisions of data controllers; and
- (5) Detailed recommendations, following consultation with those affected, on future elements of the legislation to underpin the promised National Archive of Historical Care-Related Records.

Section 12 of the Data Protection Act 2018 provides that ‘the functions assigned to the [DPC] by virtue of its being the supervisory authority for the purposes of the Data Protection Regulation and the

Directive, the general functions of the Commission shall include...such other functions as may be assigned to it from time to time by or under any other enactment’.

4. FORTHCOMING INFORMATION AND TRACING LEGISLATION AND THE GDPR

On 19 January 2021, Roderic O’Gorman, TD, Minister for Children, Equality, Disability, Integration and Youth stated that:

Progressing Information and Tracing legislation is an absolute priority for myself, for the Taoiseach and for the entire government. I have already been engaging with the Attorney General intensively to this end, approaching the issue **in a manner grounded in GDPR, where the right of an individual to access personal information about themselves is central**. My department and the Attorney General’s Office are working with a view to have Heads of Bill of Information and Tracing legislation by end March/ early April. This can then proceed rapidly to pre-legislative scrutiny.^{xxi}

We urge the Oireachtas Justice Committee to review the [alternative Adoption \(Information and Tracing\) Bill](#) which ARA published and submitted to Government in November 2019. Drafted by Claire McGettrick, Dr Maeve O’Rourke, Reader Máiréad Enright and Dr James Gallen the proposed Bill draws on GDPR provisions and amends the Government’s 2016 Bill to provide for:

- a) Unconditional access to birth certificates for adopted people and people placed in informal care arrangements;
- b) A clear statutory right of access to one’s own ‘care’ or adoption file and to records concerning a family member who died in ‘care’ or adoption;
- c) A statutory right of access to State and administrative records for natural mothers, survivors and adopted people;
- d) The safeguarding and centralisation of all relevant records in an independent repository where access is provided by professional archivists;
- e) An enhanced tracing service;
- f) Placement of the National Adoption Contact Preference Register (NACPR) on a statutory footing; and
- g) The right to know you are adopted.

Restrictions on the right of access: GDPR requirements

Given that the Minister intends to ground the legislation in the GDPR, it is essential that all the requirements of the Regulation are met. In addition to providing data subjects with rights and data controllers with obligations to allow the exercise of these rights, the GDPR also sets out a framework for any intended restriction of these rights through legislative measures. Any national law which imposes restrictions on data subject rights must meet the requirements of Article 23 GDPR.

It must be stated up front that any restriction on a person’s access to their birth certificates will not, in our opinion, meet the requirements of Article 23 GDPR because – as explained above at section 1 – such a restriction would not be necessary and proportionate in Ireland’s democratic society where all birth certificates are public documents. ARA will not support any Information and Tracing Bill that proposes a restriction of rights to one’s birth name or birth certificate.

The Heads of the Government’s promised Information and Tracing Bill have not yet been published; therefore, it is not yet clear what, if any, restrictions on data subject rights the Government will propose in its Bill. If any restrictions are proposed, they must comply with Article 23 GDPR.

Article 23 GDPR allows legislative measures which restrict data subject rights only where the legislative measure meets all of the following criteria:

- (1) Firstly, as the European Data Protection Board (EDPB) explains, to satisfy Article 23 GDPR any restriction of rights must pursue a clear objective (i.e. restrictions cannot be made simply for the purpose of restricting rights) and the **objective** which the restrictions seek to achieve must be clearly stated. The EDPB states that the ‘link between the foreseen restrictions and the objective pursued should be clearly established and demonstrated in the concerned legislative measure or additional supplementary documents.’^{xxii}
- (2) Restrictions are only permitted for the purpose of safeguarding one or more of an exhaustive list of interests (Article 23(1)). If one or more of these grounds is not present then the restrictions cannot be lawful.
- (3) The legislative measure must respect the essence of data subjects’ rights (Article 23(1)). The EDPB explains that ‘One of the main objectives of data protection law is to enhance data subjects’ control over personal data concerning them. Any restriction shall respect the essence of the right that is being restricted. This means that restrictions that are extensive and intrusive to the extent that they void a fundamental right of its basic content, cannot be justified.’
([EDPB Guidelines 10/2020 on restrictions under Article 23 GDPR, para 14](#))
- (4) Any proposed restrictions must pass a **strict necessity** test per the case law of the CJEU ([EDPB Guidelines, para 39](#)). If the strict necessity test is satisfied, the restriction must also be **proportionate** (Article 23(1)).
- (5) Recital 73 GDPR states that restrictions ‘should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.’
- (6) The risks to the rights and freedoms of data subjects must be considered in the development of any legislation which will restrict data subject rights. The EDPB suggests a Data Protection Impact Assessment may be an appropriate way to assess these risks, and identifies ‘erroneous profiling leading to discrimination, reduced human dignity, freedom of speech, the right to privacy and data protection, a bigger impact on vulnerable groups (such as children or persons with disability)’ as some potential risks which could be taken into account. ([EDPB Guidelines, paras 58-60](#))

- (7) Article 23(2) requires that the legislative measure ‘contain specific provisions at least, where relevant, as to:
- a. The purposes of the processing or categories of processing;
 - b. The categories of personal data;
 - c. The scope of the restrictions introduced;
 - d. The safeguards to prevent abuse or unlawful access or transfer;
 - e. The specification of the controller or categories of controllers;
 - f. The storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;
 - g. The risks to the rights and freedoms of the data subjects; and
 - h. The right of data subjects to be informed about the restriction unless that may be prejudicial to the purpose of the restriction.

Article 57.1(c) GDPR provides for the **Data Protection Commission**, as the relevant Supervisory Authority, to advise ‘the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons’ rights and freedoms with regard to processing’.

As a final point, separate to GDPR, it is worth noting that the outdated Supreme Court decision in *IO’T v B* [1998] 2 IR 321 creates no barrier to the Oireachtas legislating to provide automatic access to birth certificates. As explained in the above-mentioned [Legal Opinion](#) by O’Mahony, Logue, O’Rourke et al., the *IO’T v B* was decided in a legislative vacuum, did not address the issue of access to publicly available birth certificates, and does not affect the position expressed by the Supreme Court in *Fleming v Ireland* [2013] 2 IR 417 that legislation ‘concerned with the implementation of public policy in respect of sensitive matters of social or moral policy’ will attract a particularly strong presumption of constitutionality.

ⁱ Mother and Baby Homes Commission of Investigation, Final Report, Recommendations Chapter, para 3, <https://www.gov.ie/en/publication/38afd-recommendations-of-the-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/>.

ⁱⁱ Ibid.

ⁱⁱⁱ Ibid, para 52.

^{iv} See letter dated 1 June 2016 from Maeve Doherty, Solicitor to the Commission of Investigation, to Rod Baker, Hogan Lovells, http://clannproject.org/wp-content/uploads/Letter-from-MBHCOI_01-06-16.pdf

^v See <http://clannproject.org/wp-content/uploads/Letter-from-COI-re-Subject-Access-Request.pdf> and Conall Ó Fátharta, ‘Commission says they are prohibited from telling surviving family members about burial locations’ *Irish Examiner* (19 April 2019), <https://www.irishexaminer.com/news/arid-30918869.html>.

^{vi} RTE Radio 1, Today with Claire Byrne, ‘Mother and Baby Homes’ (with Noelle Brown), 13 January 2021, <https://www.rte.ie/radio/radioplayer/html5/#/radio1/21892875>.

^{vii} Commission of Investigation into Mother and Baby Homes and Related Matters, Information Note regarding the Confidential Committee, <http://clannproject.org/wp-content/uploads/Information-for-Witnesses-at-the-Confidential-Committee.pdf>

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^x See Maeve O’Rourke, Máiréad Enright and Sinéad Ring, Submission on the provisions of the Retention of Records Bill 2019, 13 November 2019, http://jfmresearch.com/wp-content/uploads/2019/10/ORourke_Enright_Ring-Submission.pdf.

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- ^{xii} ECtHR, *Leander v. Sweden*, No. 9248/81, 26 March 1987, para. 58.
- ^{xiii} ECtHR, *Amann v. Switzerland* [GC], No. 27798/95, 16 February 2000, para. 50; see also ECtHR, *Kopp v. Switzerland*, No. 23224/94, 25 March 1998, para. 55 and ECtHR, *Iordachi and Others v. Moldova*, No. 25198/02, 10 February 2009, para. 50.
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