

## **Public consultation on the processing of children's personal data and the rights of children as data subjects under the General Data Protection Regulation**

Submission in response to Questions 3-5 of the Consultation:-

*3. At what age or in what circumstances should a child be able to make an access request to an organisation and receive a copy of their personal data? Is age the only relevant factor and if not, what other factors should be taken into consideration?*

*4. In what circumstances should a parent be able to make an access request and receive a copy of their child's personal data? Is there an upper age limit after which a parent should not be able to make an access request for their child's personal data? Are there circumstances where both the parent and child should have to jointly make an access request for the child's personal data?*

*5. How should the balance be struck between a parent's right to protect the best interests of their child and the child's right to privacy when organisations are dealing with access requests for the child's personal data?*

There is a great Guidance document available for public sector bodies under the Freedom of Information (FOI) Act in Ireland on processing requests from a parent or guardian to access a child's records. There is also legal precedence in relation to the access rights of the parent following a Supreme Court ruling on a parental access request – McK vs Information Commissioner (Ref: 289/04 in 2006).

Under the FOI Act, the Minister for Finance has issued guidance on what are called "third party access requests" to deal with requests from parents or guardians to a child's record or an incapacitated adult's record and also records of the deceased. These are referred to as the Section 37(8) Guidance Notes and are available on [foi.gov.ie](http://foi.gov.ie) and take into account the McK ruling. In my view, these should form the basis of any guidance for Data Controllers on the processing of data access requests from parents.

These guidance notes set out the factors to be considered when a request is received from a parent or guardian and the record relates to a minor, i.e. under the age of 18 years. The general approach to the consideration of such a request, taking into account the Guidance Notes, could be:-

- The age of the child – the closer to the age of 16/18, the more weight should be placed on their view as to whether the record should be released
- Whether the records are held in the minor's own name
- The nature of the records – how sensitive and personal is the data, on what basis was it shared by the child, etc.
- The nature of the relationship between the child and parent/guardian – has the Court limited access by the parent to the child, does the child reside with or in the care of the parent, is there any information about how close their relationship is

- Whether the child would consent to the release to the parent and any views or opinions expressed by the child – did the child ever give any indication that information should not be shared with their parent, what were the circumstances, etc.
- Would the release damage the minor in any way
- How the best interests of the child are better served

### Legal Precedence

The McK Case sets an important legal precedence in the area of parental access and, in a nutshell, states that the parent enjoys the presumption that they are acting in the best interests of the child unless the Decision Maker is satisfied that there is evidence to the contrary, i.e the parent is not required to demonstrate that they are acting in the best interests of the child rather the Decision Maker must demonstrate that they are not. I have quoted below the relevant section from the Supreme Court ruling:-

*The Act of 1997 and the Regulations fall to be interpreted in accordance with the Constitution. A parent, the requester, has rights and duties in relation to a child. It is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental. The Commissioner took an incorrect approach in requiring tangible evidence of the parent rather than applying the presumption that a parent was acting in the child's interests. The 'tangible evidence' test of the Commissioner reversed the onus of proof.*

*The relationship between parent and child has a special status in Ireland. Under the Constitution the family is the primary and fundamental unit group in our society: Article 41.1°. The State has guaranteed to protect the family in its constitution and authority: Article 41.1.2°. The State encompasses the judicial branch of government which has a consequent duty to protect the family and its authority. While the family unit has its rights, so too each member of the unit has rights. Thus while the parents have duties and rights in relation to a child, and a child has rights to parental care, the child also has personal rights which the State is required to vindicate if the parent fails in his or her duty.*

*A parent's rights and duties include the care of a child who is ill. As a consequence a parent is entitled to information about the medical care a child is receiving so that he or she may make appropriate decisions for the child, as his or her guardian. The presumption is that a parent is entitled to access such information. That position is not absolute. The circumstances may be such that the presumption may be rebutted. But the primary position is that the presumption exists. Consequently, the approach of the Commissioner was in error when he required 'tangible evidence' that the release of such information would serve the best interests of the minor. The obverse is the correct approach. The presumption is that the release of such medical information would best serve the interests of the minor. However, evidence may be produced that it would not serve her interests, and, in considering the circumstances, her welfare is paramount. That issue did not arise in this case because of the erroneous approach of the Commissioner.*

*The Commissioner should have approached the request by acknowledging that a parent is presumed to be entitled to access the information. However, the Commissioner may then proceed to consider any evidence which exists addressing the issue that it would not be in the minor's best interests that the parent should be furnished with such information.*

### Conclusion



In the normal course, access by parents to their child's records should be facilitated and as far as I'm aware in the Health and Social Care context, it generally is, where possible. However, there are many scenarios where it is not in "the normal course" and therefore any guidance needs to be flexible enough to allow the Decision Maker determine whether the release is appropriate in the particular circumstances or not. I am thinking specifically of Social Work records, sensitive medical records, mental health records, Counselling notes in Schools, etc. where lots of discretion should and needs to be allowed to the Decision Maker. In such instances, it is vital that there is a framework to support them make a good and appropriate decision based on all the circumstances of each case as it presents, i.e. each case on its own merits.

It is difficult to say that one factor is more important than another however age on its own is not sufficient, nor should there be any "automatic right" of access by a parent. I believe references to this type of process should clearly set out that right is to seek access to the record, rather than an absolute right to get access to the record.

As a Data Protection practitioner of many years in the Health Services and now as a private Consultant, I would be really interested in being part of any further consultations or considerations on this matter. For example, if the ODPC is considering setting up a Consultative Group to consider the submissions, I would be delighted to be involved to bring my experience of the complexities facing lots of public bodies in this area of law.

If you require any clarification on any aspects of my submission, please don't hesitate to contact me,

Many thanks,

