An Roinn Caiteachais Phoiblí
agus Athchóirithe
Department of Public
Expenditure and Reform

Ms. Helen Dixon,
Data Protection Commissioner,
Data Protection Commission,
21 Fitzwilliam Square,
Dublin 2.

5th April 2019

Dear Ms. Dixon,

The Department of Public Expenditure and Reform welcomes the opportunity to contribute its views with respect to the Commission's important work in implementing the General Data Protection Regulation. This Department has gained particular relevant insights with respect to implementation of the Freedom of Information regime over the course of the past two decades, which may be seen as closely analogous in many respects to the matters at issue in the public consultation. In addition, the Office of the Chief Government Information Officer forms part of the Department.

Accordingly, this submission is concerned with procedures around the exercise of subject rights in response to questions 3-7, as well as a brief comment with respect to data protection by design and default at questions 14-15.

Right of access (Article 15 GDPR)

The Freedom of Information Act 2014 provides under section 11(1) for a "right of access" to records held by FOI bodies, as defined in the Act. Section 6 sets out the general criteria by which it may be determined whether a body is subject to FOI, while further organisations may be designated by way of secondary legislation, or excluded in whole or in part in Schedule 1 of the legislation. The Act covers the vast majority of organisations in the civil and public sector, some 600 bodies. Its purpose is to promote openness, transparency and accountability in public administration (see s.11(3) as well as the long title to the Act).

In respect of personal data, the 2014 Act contains a similar and closely related concept of "personal information", defined at section 2. Section 37(1) of the Act sets out the general principle that personal information cannot be released on foot of an FOI request, subject to a number of exceptions. These include most importantly where the requester is the person to whom the personal information relates (s.37(2)(a)), but exceptions also arise for example to permit the release for accountability purposes of limited categories of personal information relating to public servants, such as their names where contained in routine workplace correspondence in the ordinary course of business.

For present purposes, section 37(8) of the 2014 Act should be noted, which provides that the Minister for Public Expenditure and Reform may make regulations governing the exercise of a right of access by the parents or guardians of a person to whom personal

Tithe an Rialtais,
Sráid Mhuirfean Uachtr.
Baile Átha Cliath 2,
Éire.

Government Buildings,
Upper Merrion Street,
Dublin 2,
Ireland.

T: +353 1 676 7571
F: +353 1 678 9936
www.per.gov.ie

information relates, as well as with respect to personal information of deceased persons. The applicable regulations are contained is S.I. 218 of 2016, which states insofar as relevant:-

> *4. Notwithstanding section 37(1), an FOI request may be made for records which involves the disclosure of personal information ... and shall, subject to the other provisions of the Freedom of Information Act 2014, be granted if the case falls—*
>
> *(a) within a case to which Regulation 5 applies and, in addition, the condition specified in Regulation 6 is satisfied ...*
>
> *5. This Regulation applies to a case in which the requester is a parent or guardian of the individual to whom the record concerned relates and that individual belongs to one of the following classes of individual:*
>
> *(a) individuals who, on the date of the request, have not attained full age ...*
>
> *6. The condition referred to in Regulation 4(a) is that the individual specified in Regulation 5 is an individual access to whose records would, in the opinion of the head having regard to all the circumstances, be in the individual's best interests.*

Therefore, the approach taken in FOI requires that a best interests test must be carried out records before may be released to the parent or guardian of a child, defined as an individual who has not attained majority. Further guidance has been provided by the Central Policy Unit for Freedom of Information at this Department, under section 48 of the 2014 Act, to assist decision-makers in effectively applying the regulations.

It should be noted that one of the leading Irish cases concerning parental rights and the best interests of the child, *McK v. Information Commissioner* [2006] 1 IR 260, arose out of an FOI appeal. As reflected in the judgment, the system for access by parents to personal information of their children proceeds from the presumption that a parent is acting in the child's best interests, although the decision maker may have regard to the surrounding circumstances, including by way of consultation if appropriate with the minor, in forming a view on whether this presumption has been rebutted. Generally, as may be seen from the enclosed material, in line with the position taken by the Supreme Court, the FOI regime provides for a structured case by case assessment, with a recognition that there may be cases in which it is not in a child's best interests for records to be released to a particular parent or guardian.

Under FOI, only parents or guardians are entitled under section 37(8) to make a request for their child's information. While the legislation provides for a separate public interest test whereby personal information might be released where the interest in release outweighs the constitutional right to privacy, in practice such cases are exceedingly rare and will usually relate to, for example, transparency around state expenditure, etc. Even where the individual has had a close relationship with the minor akin to a parental role, but does not have legal standing as parent or guardian, it is highly unlikely that information would be released in the public interest (see for example the recent judgment of the Court of Appeal in *FP v. Information Commissioner* [2019] IECA 19)

However, where the minor is in a position to provide a valid consent to the satisfaction of the FOI body, section 37(2)(b) allows for the possibility that another person might exercise a right of access to their personal information. Thus, FOI requests are routinely made on behalf of individuals by solicitors or other professionals, as well as family members or close friends.

Turning to the Commission's specific questions:-

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?

At present, the FOI system does not exclude the possibility that a minor might make a request on their own account for any information, although it should be noted that in practice such requests are rarely received. Where medical, psychiatric or social work records are concerned, section 37(3) provides that where release might be detrimental to an individual's physical or emotional wellbeing, access may be granted by providing records to a suitable medical or social work professional who will facilitate an inspection of same by the requester, an arrangement that is known as "mediated access". Although it is not clear that this specific issue has ever arisen in practice, in principle this provision may be relevant where a minor requests particularly sensitive records.

The Department would suggest that a minor's ability to assert informational self-determination rights will vary widely from case to case, such that age in itself will not be reliable yardstick. If a minor is capable of making a coherent request for data and providing the necessary proof of identity, it might be supposed that they should be entitled to receive that data. It may perhaps be considered whether it would be appropriate for there to be an assumption that data may be released to a minor at any age as a default position, subject to exceptions, for example where the contents of the data or capacity of the minor are such that released data would be either harmful or incomprehensible to them. Depending on the circumstances, mediated access may be appropriate through parents, guardians or other professionals.

As a general observation, the Department would note that the question of whether access to a child's personal information is appropriate will depend in large part on a combination of the maturity of the child and the nature of the data concerned. A particularly careful approach must be taken in respect of medical, social work, education or other classes of sensitive personal data of a kind that are routinely held by public bodies. This may include, but should not be taken as being limited to, special category personal data. At a minimum it should be considered where data falls in such categories whether a best interests test must be applied, i.e. that such records would not be released, either directly or through mediated access, where release would be against the child's best interests.

Such considerations are less likely to arise with respect, for example, to personal data held by a social networking site where access to personal data is available directly for download from the site or an API, or when dealing with a business. Moreover, specific considerations

may arise out of Article 8 of the GDPR that are not relevant to the public sector, which might potentially justify a different approach.

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?

The Department's view is that the "best interests" approach as outlined above strikes an appropriate balance in assessing whether a parent or guardian may access a child's personal data, is compatible with data protection principles, has been tested by the Courts and shown to comply with relevant provisions of national law.

Under FOI, as outlined, a case by case assessment must be carried out. The age and capacity of the child concerned to understand what is at issue and to give their views will be a relevant factor, as detailed in the CPU Guidelines. It does not seem appropriate for an arbitrary age limit to be included, but preferable instead to allow for a similar assessment of factors such as those set out in the Guidelines, including the nature of the data, the child's age and capacity or views, as well as evidence of the requester's relationship to them. Consultation with the minor may not be mandatory and the weight to be afforded to the minor's views will vary from case to case. However the closer the individual is to attaining majority the more likely it becomes that their "age, intelligence and maturity" will be such as to mandate both consultation and giving significant weight to their views. Moreover, in some circumstances requests by parents for access to a child's records may be refused on the basis that a child is competent to access the records on their own account if they wish.

It does not seem that any great benefit would arise out of providing for joint access requests. Where a child is competent to make a request, it may be more appropriate for the process to be undertaken directly by them. If it has been assessed as being in a child's best interests that a parent may receive personal data of a child, then it is unclear what practical advantage would arise out of requiring that a child must also co-sign an access request.

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?

As previously outlined, the Department believes that the established FOI regime for access by parents to records of children that has been developed and tested by the Courts provides a suitable template for regulation of access requests made by a parent on behalf of their child. It is recommended that, insofar as the public sector is concerned, significant divergence from the established framework should be avoided if possible.

Right to erasure ("Right to be forgotten" – Article 17 GDPR)

6. At what age or in what circumstances should a child be able to make an erasure request to an organisation and have their personal data erased? Is age the only relevant factor and if not, what other factors should be taken into consideration?

7. In what circumstances should a parent be able to make an erasure request on behalf of their child and have their child's personal data erased? Is there an upper age limit after which a parent should not be able to make an erasure request for their child's personal data? Are there circumstances where both the parent and child should have to jointly make an erasure request?

Section 9 of the 2014 Act provides that information held by an FOI body in relation to an individual may be amended, deleted or otherwise noted on file where it is found to be "incorrect, incomplete or misleading". Similarly to section 37(8), section 9(6) gives the Minister a power to make regulations. In this case, the relevant secondary legislation is S.I. 53 of 2017, which insofar as relevant is almost identical in its terms to S.I. 218 of 2016. Thus in the view of this Department identical considerations will apply to those set out above in considering whether a minor may exercise their rights to seek an amendment or erasure, or whether a parent or guardian might exercise these rights on their behalf.

While the basis for seeking erasure is somewhat different under Article 17 to that arising under FOI, in terms of practical implementation the position set out above would appear to apply *mutatis mutandis* in this context. In particular it does not appear to this Department, based on its experience in implementing the FOI system that age alone is a sufficient determinant whether in relation to requests by a minor or a parent or guardian, and that a broader approach based on the best interests of the child should instead be adopted.

IV. Data protection by design and by default (Article 25 GDPR)

14. What measures should organisations take to incorporate the principles of data protection by design and by default into the services and products that they offer to children?

15. Do you think products/services that are used by or offered to children should have built-in default privacy settings that vary according to the age and evolving capacities of a child? For example, should there be stricter privacy settings for younger children? How should these variations in the privacy settings be given effect?

The principle of privacy by default entails that the most robust privacy protections feasible in a given system should be taken as the default baseline from which users will be free to depart if they so choose. As such, it is questionable whether it is consistent with any robust privacy by design approach that young children, for example, should automatically be moved to default settings that reduce the degree of privacy or data protection protections year by year as they age. Moreover, generally accepted data protection by design principles requires that functionality should not be dependent on reduced privacy protections.

Therefore, while the most stringent possible data protection measures should be "designed in" to systems to be used by young children, it would follow that all users should be placed on these settings. Any departure from same must be based on freely given consent and should not involve a trade-off in terms of the available functionality. As such, it would seem that an acceptable approach may be to allow children based on age and developmental milestones, with their parent's consent where required, to change their settings away from the default to a greater or lesser extent. In practice, this might entail that privacy settings will simply not be available to minors under the age of 14, while at the age of 16 they might be entitled to access the settings and alter same within limited bounds, before being granted full control of privacy / data protection settings at age 18.

The Public Service Data Strategy 2019-2023 recognises that privacy must be treated as a design concern, rather than a regulatory or compliance burden and accordingly, Government is committed to ensuring that privacy is considered up-front and built into all public service systems at design stage. It does not appear that there is necessarily a case for departing from general data protection by design methodologies, other than to be cognisant of the particular vulnerabilities of young children.

V. General

16. Are there any other particular issues you would like to raise with the DPC in connection with the subject matter of this consultation?

It will be apparent from the above that the subject rights of access and erasure in data protection law are largely closely related to what is provided for in the 2014 Act, and that there is scope for a transfer of learnings between the two systems. In the interests of the most efficient possible use of public resources, the Department recommends that, with respect to the civil and public service, it is highly desirable that consistencies in the methods for vindicating the rights of children, their parents, guardians or other concerned parties arising under each regime should be emphasised, while duplication or significant divergence should where possible be avoided.

Many thanks for your consideration of the Department's submission. Please do not hesitate to make contact if you have any queries regarding the foregoing or otherwise wish to discuss any of the issues arising.

Yours Sincerely,

[redacted]

Government Reform Unit

For information purposes, the following supplemental material is enclosed:

1. Section 37 of the Freedom of Information Act, 2014
2. Section 9 of the Freedom of Information Act, 2014
3. S.I. 218 of 2016
4. S.I. 53 of 2017
5. FOI Central Policy Unit Guidance Note 25
6. Judgment of the Supreme Court in *McK v. Information Commissioner* [2006] 1 IR 260
7. Judgment of the Court of Appeal in *FP v. Information Commissioner* [2019] IECA 19
8. Office of the Information Commissioner Guidance Note on Section 37
9. Office of the Information Commissioner Guidance Note on Section 9
10. Illustrative Information Commissioner decisions relating to access under section 37(8):
    a. OIC Case 170236 - Ms X and The Child and Family Agency (TUSLA)
    b. OIC Case 170431 - Mr X and the Health Service Executive (FOI Act 2014)
    c. OIC Case 180221 - Mr & Mrs X & The Health Service Executive (the HSE)
    d. OIC Case 180448 - Mr X and the Health Service Executive (FOI Act 2014)