

Children, Parents and Data Protection: Can I make a complaint on behalf of my child?

Introduction

In December 2021, the Data Protection Commission (DPC) published an extensive document entitled [Children Front and Centre, Fundamentals For A Child-Oriented Approach to Data Processing \(Fundamentals\)](#). This document is aimed primarily at entities or organisations which determine the purposes and means of the processing of personal data (data controller) of children (data subjects) across a range of sectors, including the online sector.

There tends to be a general misconception that children do not have the same data protection rights as adults, but this is not the case. The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (the 2018 Act) apply equally to children and adults. Under Section 29 of the 2018 Act, a child is an individual under the age of 18 years. Although the same data protection principles apply regardless of the age of the child, 0 to 18 years is a broad age range developmentally, and therefore other factors need to be considered. Regardless of the age of the child, it is important for adults to realise that any personal data which relates to their child, is and remains, the personal data of their child. It does not belong to anyone else, such as a parent/guardian and parents/guardians do not have an automatic entitlement to that personal data.

Within the specific context of the online environment (“information society services”), there is even greater protection for children’s data. For example, the digital age of consent is 16 years and any processing of children’s personal data below the age of 16 years is only lawful with the consent of a parent/guardian.

However, this guidance note is not aimed at the online environment, but rather is aimed at assisting parents/legal guardians more generally in understanding the exercise of their children’s data protection rights with entities and organisations in a variety of settings, such as schools, medical facilities or even play centres. For the purposes of this document, the DPC uses the phrase “parent/ guardian” to refer to any person with legal guardianship over a child, which is discussed later.

Background

Although data protection law applies to children, there is little guidance contained within the GDPR as to how the data protection rights of children are exercised. For example, Article 15 of the GDPR enables individuals to exercise their right to access certain information and to request a copy of their own personal data from a data controller. Technically, children can make such an access request themselves under data protection law. In reality, it is most unlikely that a 7-year-old child will be concerned about their data protection rights, whereas the same may not necessarily be said of a 17-year-old child. Certainly, the GDPR envisages that data controllers will interact with children, as Recital 58 of the GDPR states:

“Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand.”

The main difficulties in the exercise of children’s data protection rights, which are not addressed under the GDPR or the 2018 Act, relate to the following questions: Who can exercise the data protection rights of children on their behalf? Up to what point can such individuals exercise those data protection rights on behalf of children? These issues are determined by reference to the national laws of each Member State.

Legal framework

1. Legal rights of children

The expansive background to the legal rights of children are considered and documented in Chapter 2 of the DPC’s [Fundamentals](#). Broadly speaking, children’s rights are sourced domestically (through various Articles within the [Constitution of Ireland, 1937](#) and different statutory provisions) and internationally, (through the [UN Convention on the Rights of the Child](#) and other legal instruments). This legal framework shapes how regulators, such as the DPC, interpret the legal rights and obligations to the processing of children’s personal data under the GDPR.

The core message is that children have their own legal rights, separate and distinct from their parents/guardians and these include data protection rights. Children also have a right to be heard in all matters that affect them in line with their developing capacities. In addition, all decisions made which relate to the processing of children’s personal data must be underpinned by what is in the child’s best interests (“the best interest principle”).

2. Legal authority of parents/guardians

Although most parents are legal guardians, not all are. The opposite also applies, which is that not all legal guardians are in fact parents. It is the legal guardianship status that provides adults with the right to make decisions in relation to the child, but these rights also come with duties to maintain and protect the child. Legal guardianship is the legal status required to permit an adult to exercise a child's rights on their behalf so long as it is in their best interests to do so, this extends to the exercise of a child's data protection rights.

It is important to note that the DPC does not and will not make a determination as to an individual's entitlement to guardianship. Individuals must address this separately themselves in the first instance, prior to any data protection concern being raised with the DPC. The net point is that if an individual wishes to exercise the data protection rights of a child with a data controller, or submit a complaint to the DPC on behalf of a child, they must be that child's legal guardian.

3. Legal bases for processing children's personal data

Under the GDPR, organisations which process personal data (i.e. data controllers) have an obligation to do so lawfully (amongst other obligations). This means controllers must have a legal justification under the GDPR for the processing of personal data. This applies also to the processing of children's personal data.

Article 6 of the GDPR sets out six possible legal bases for processing personal data and consent is only one such basis.

Even if a parent/guardian has not provided the data controller with consent on their child's behalf to process the child's personal data, the processing can still be lawful if it is based on one of the other permitted provisions. (Note that this is separate to the consent that is required in an online environment under Article 8 of the GDPR).

4. Exercise of rights by children

There is no law in Ireland setting out the age at which children can exercise their own legal rights. A child may exercise their own data protection rights at any time, as long as they have the capacity to do so and it is in their best interests.

Given the complexity and opaque nature of many transactions and interactions which children may have with a variety of organisations, children should be able to be jointly represented with an adult if they wish when exercising their rights or when making a complaint to the DPC.

In all events, the DPC's position is that a child should be able to exercise their data protection rights, directly or with assistance, and should not be prevented from doing so as a result of their age, maturity or capacity.

5. Exercise of rights by a legal guardian on behalf of a child

The DPC notes that as a matter of Irish law, there is a rebuttable presumption that a parent/ guardian is acting in the best interests of their child unless there is evidence to the contrary.

In addition to this rebuttable presumption, the DPC set out in its Fundamentals document, a (non-exhaustive) range of factors organisations should consider in deciding whether it is in the best interests of the child that their parents/guardians exercise their rights on their behalf. Similarly, parents/guardians also ought to reflect on the list of factors, when considering whether their child ought to be guided in terms of addressing their own data protection concerns or, if they are best placed, in all the circumstances, to exercise those rights on behalf of their child. The non-exhaustive list of factors considers the following:

- The age of the child – The closer the child is to the age of 18 years, the more likely it is that the child will exercise those data protection rights themselves;
- The nature of the personal data and the processing being carried out – This should include consideration of the sensitivity/confidentiality of the personal data and the basis upon which it has been provided by, or shared by, the child with the organisation which holds it – for example, is there a duty of confidence owed to the child? This might arise if a child is attending therapeutic counselling services;
- The nature of the relationship between the child and the parent/guardian – For example, are there any court orders relating to parental access/responsibility/custody/domestic violence/child protection etc. in existence?;
- The purpose for which the parent(s)/guardian(s) seek(s) to exercise the child's data protection rights – For example, is this purpose wholly in the best interests of the child or is there another purpose or interest (i.e. that of the parent/guardian or a third party, as opposed to the child) pursued in seeking to exercise these rights?;
- Whether the child would, or does in fact, consent to the parent(s)/guardian(s) exercising their data protection rights and any views or opinions expressed by the child;
- Whether allowing the parent(s)/guardian(s) to exercise the child's data protection rights would cause harm/distress to the child in any way.

In addition, parents/guardians ought to be aware that data controllers often have to abide by various statutory provisions or sectoral rules. If this arises, the DPC would expect the data controller to inform the parent(s)/guardian(s) accordingly when they are seeking to exercise the data protection rights of their child.

Conclusion

In summary, children have a set of data protection rights, similar to adults. If a child does not have the capacity to exercise their own data protection rights either alone or jointly with a representative, then their legal guardian can exercise those data protection rights on behalf of the child. The exercise of this right must be undertaken in the child's best interests and for the benefit of the child alone. The data belongs only to the child and does not belong to their legal guardian. Legal guardians may be required to provide evidence of guardianship to a data controller and to the DPC if pursuing a complaint on behalf of a child.

Finally, the DPC expects that those who exercise the data protection rights of children on their behalf do so only for bona fide reasons and not in the furtherance of their own personal objectives.

Frequently Asked Questions

Subject Access Requests

One common query raised with the DPC regarding the data rights of children concerns the right to access their personal data under Article 15 of the GDPR.

In the normal course of events, when an individual makes a subject access request for a copy of their personal data, the only personal data to which that individual is entitled, is a copy of the personal data that relates to them as an individual ("natural person"). Data that relates to another person ("third party"), or non-personal data, do not form part of a subject access request. This means this is information you are not entitled to receive under an Article 15 request. Individuals can expect a response from a data controller within one month from the date the data controller receives the subject access request; however, in certain limited circumstances, this time can be extended for two further months with the individual being informed of this extension before the expiry of the initial one-month timeframe.

If a data controller has a request on behalf of a child for access to a child's personal data, the data controller must satisfy themselves that the person making the request

has the appropriate legal authority to make the request in the first instance. This may include asking a parent/guardian for evidence of their guardianship status. It is a matter for data controllers to set their own security measures to ensure that they do not contravene any of the provisions of data protection law.

Data controllers must then consider the subject access request and consider the non-exhaustive list of factors as set out above. Data controllers will also be obliged to redact any information which relates to third parties and this will include any personal data relating to the other legal guardian or any other third party.

Example 1

Q: I want to access my child's medical notes. How do I do that?

A: If you are the legal guardian of a child, you can make a subject access request to the data controller under Article 15 of the GDPR for a copy of the child's personal data. You may be asked for proof of guardianship where the data controller has any reasonable doubts as to your identity. There is no automatic entitlement to this personal data, as it is not your personal data. The release of the personal data will be underpinned by a range of factors including the child's best interests. Depending on the age of the child, their views and wishes may be ascertained in advance of the release of any information to you.

Example 2

Q: My child attended a play centre last week and I have made a subject access request for all information they hold on my child. In particular, I want to know the name of the person who brought my child there and signed the sign-in sheet.

A: The name of the adult who signed the sign-in sheet constitutes the personal data of that person and is therefore 'third party data.' This is because it is neither the personal data of the child nor the person making the request. Consequently, under data protection law, this information is unlikely to be released by the data controller to the person who made the request for the information. It is important to note that under Article 15(4) of the GDPR, data controllers have to assess, as a matter of course, the impact on third parties, when considering third-party data in a subject access request.

Example 3

Q: My child attends counselling and therapeutic services and my former partner wants access to the counselling notes. Can he access them?

A: As stated earlier, there is no automatic entitlement of a legal guardian to the personal data of their child. The data controller will have to consider a range of factors

upon receipt of a data request in circumstances such as these before any data is released. This includes considering the best interests of the child and the right of the child to be heard regarding their parent/guardian having access to their counselling and therapeutic notes. Children also have a general right to privacy.

Alleged Unlawful Processing of Personal Data

Example 1

Q: My child's mother keeps posting photographs of our child on her private Facebook page. I have asked her to take them down and she refuses.

A: Posting photos online or on social media constitutes the processing of personal data. However, in this example, the parent is posting the photographs on her own private Facebook page. Article 2 (2)(c) of the GDPR provides for what is known as the domestic exemption. It applies in circumstances where an individual is concerned solely with the management of his/her personal or household affairs. Recital 18 of the GDPR states:

“This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities.”

As the posting of the photographs in this example is within a private and personal context, data protection law is not engaged.

Example 2

Q: My child's father keeps posting photographs of our child on his public social media business account. I have asked him to take them down and he refuses.

A: There is nothing in data protection law that requires the consent of both parents/guardians regarding the data protection rights of children. Depending on the age of the children, they may have a view regarding their photograph being shared on their father's public social media business account. As this is a public business account, it is likely that the domestic exemption under Article 2 (2)(c) of the GDPR will not apply.

The difficulty with this scenario, is that the data controller is a legal guardian. The person raising the objection is the other legal guardian. Both legal guardians simply disagree with each other in relation to the data protection rights of their child and have different views as to what is in the child's best interests. Regard should be had by both

guardians to the interests and wishes of the child involved. The assessment as to what is in the child's best interests is within the competence of parents/guardians and that must be resolved before the DPC can deal with any possible complaint.