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# Submission to the Department of Justice & Equality Regarding Data Protection Safeguards for Children ("The Digital Age of Consent")

This submission is made by Millett & Matthews Solicitors in response to the Department's consultation on the Digital Age of Consent. While we appreciate that the consultation related to a child's consent in relation to information society services pursuant to Article 8[1] of the General Data Protection Regulations ("**GDPRs**"), this submission relates to wider issues regarding data protection safeguards for children more generally. We act for a number of schools and educational charities. The points raised in this Submission set out some of the data protection compliance issues which affect them in relation to the processing of data relating to children. In our experience, there are two areas affecting data protection safeguards for children which should be considered:

(a) Consent to processing, and

(b) Parents making access requests.

We have dealt with each of these points in turn. We are available to discuss these issues and would welcome the opportunity to engage further on this matter.

## 1. Consent to Processing

1.1. The Data Protection Acts 1988 and 2003 currently recognise that in some circumstances it is necessary for another person (such as a parent) to give consent to processing relating to the personal data of a data subject. Section 2A provides: "(1) *Personal data shall not be processed by a data controller unless […] (d) the data subject has given his or her consent to the processing or, if the data subject, by reason of his or her physical or mental incapacity or age, is or is likely to be unable to appreciate the nature and effect of such consent, it is given by a parent or guardian or a grandparent, uncle, aunt, brother or sister of the data subject and the giving of such consent is not prohibited by law"*.

1.2. Special Schools delivering education to children with special educational needs routinely engage with a student's parents to obtain consent to processing in circumstances where due to his/her special educational needs the student may be unable to appreciate the nature and effect of giving such consent. It is submitted that this is an appropriate model

[1] Article 8 Conditions applicable to child's consent in relation to information society services 1.Where point (a) of Article 6(1) applies, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years. 4.5.2016 L 119/37 Official Journal of the European Union EN

to be followed in situations where for any reason a child may be unable to appreciate the nature and effect of giving such consent. We would ask that consideration be given to facilitating a similar approach within the Data Protection Bill[2] where possible legislative "space" is given within the GDPRs.

1.3. Resource materials available on the website of the Data Protection Commissioner state[3]: "*The Irish Data Protection Acts (1988 and 2003) are not specific on what age a person needs to be to consent on their own behalf, for their personal data to be processed for a particular purpose. Data Protection law allows for a degree of flexibility in terms of accessing whether a person is mature enough to give consent themselves depending on the matter in question. A person aged eighteen or older can give consent to their data being processed themselves. Judging the maturity of 12-18 year olds will vary from case to case and depending on the circumstances. Generally, in the case of children under the age of twelve, the explicit consent of a parent or guardian is necessary*".

1.4. It is submitted that this is a sensible and pragmatic approach having regard to the evolving maturity and understanding of child. Having regard to the considerations outlined later in this document, we would ask that consideration be given to facilitating a similar approach within the Data Protection Bill, where possible, in matters beyond the scope of Article 8 GDPRs (ie the processing of children's data in circumstances unrelated to information society services).

**2. Parents Making Access Requests**

2.1. At present, there is no express, explicit provision in the Data Protection Acts 1988 and 2003 which permits one person (such as a parent) to make an access request on behalf of another person (such as their child) and to require that the data controller issues the documentation to the requesting person (ie the parent, not the child). We note that the GDPRs are also silent in relation to the entitlement of a parent to make an access request on behalf of their child. That being the case, we wish to highlight the issues which arise for Schools when they receive "access requests" from a parent requesting information about their child and ascertain whether there is legislative space for this to be addressed in the Data Protection Bill having regard to the fact that the issue is not dealt with in the GDPRs. It is submitted that it would be helpful to both data controllers and to parents if the Data Protection Bill could make legislative provision in relation to whether and in what circumstances a parent has a right to obtain personal data relating to his/her child, or in the alternative for a sector-specific Code of Practice to be developed to offer guidance on the matter.

[2] Page 19 of "Legislation Programme Current Session": published by Office of the Government Chief Whip 8th June 2016, "*Data Protection Bill: to give effect in Irish law to the new EU Regulation recently adopted. Heads expected end 2016".*

[3] https://www.dataprotection.ie/documents/teens/cspe%20resource%20booklet/Section_3_-_Rights_and_Responsibilities.pdf

2.2. It is not unusual for a School to receive a data access request made under section 4 Data Protection Acts 1988 and 2003 from a parent requesting the information the data controller holds about his/her child and requiring the data to be issued to the parent (not the child). In general, in reliance on section 2A(1)(a)[4] a data controller will generally interpret an access request from a parent as being the parent vindicating their child's rights where the child is too young to do so themselves and/or is unable to appreciate the nature and effect of giving consent to making an access request themselves. See further Denis Kelleher: *"…this does not mean that a parent cannot make such a request, as a child may be presumed to have consented to the processing of their data by a parent*[5]".

2.3. While in general any data controller would have no issue whatsoever with facilitating the parent's request where the child is of an age as that they could not (without the assistance/intervention of their parent) vindicate their own rights under section 4, a significant challenge does arise in the following increasingly common scenarios:

(a) Where the parents are separated or estranged and one parent objects to the other parent obtaining data relating to the child.

(b) Where the child is a mature teenager and does not agree to a parent (often a parent with whom they may have limited contact) obtaining copies of their information.

(c) Where the data held relating to the child contains sensitive information and the data controller has a concern that the release of the child's data directly to the parent may put the child at risk of reprisals or punishment or could otherwise be harmful to the safety, health, welfare, or wellbeing of the child.

2.4. Due to the challenges raised in these scenarios, Schools often try to facilitate a parent in obtaining information relating to the educational progress of their child pursuant to section 9(g) Education Act 1998:

Functions of a school. 9.— "*A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to — […] (g) ensure that parents of a students, or in the case of a student who has reached the age of 18 years, the student, have access in the prescribed manner to records kept by that school relating to the progress of that student in his or her education*".

[4] 2A.—(1) Personal data shall not be processed by a data controller unless section 2 of this Act (as amended by the Act of 2003) is complied with by the data controller and at least one of the following conditions is met: (d) the data subject has given his or her consent to the processing or, if the data subject, by reason of his or her physical or mental incapacity or age, is or is likely to be unable to appreciate the nature and effect of such consent, it is given by a parent or guardian or a grandparent, uncle, aunt, brother or sister of the data subject and the giving of such consent is not prohibited by law.

[5] Kelleher: "Privacy and Data Protection in Ireland", 2nd Edition, 2015 at page 305.

It must be understood that releasing educational progress documentation to a parent pursuant to section 9(g) Education Act 1998, or releasing test results to a parent pursuant to section 22(2) Education Act 1998[6] is separate from an access request pursuant to section 4 Data Protection Acts 1988 and 2003.

2.5. This is challenging because no regulations have been introduced pursuant to section 9 Education Act 1998 to set out the "*prescribed manner*" in which a School is required to make available educational records to a parent (to use the wording set out in section 9(g)). Therefore the definition of what records would fall within the scope of "*relating to the progress of that student in his or her education*" has not been fully clarified. By contrast, in England[7] there is a definition prescribed by statutory regulations which provides that educational record means *"any record of information which- (a) is processed by or on behalf of the governing body of, or a teacher at, any school specified in paragraph (2); (b) relates to any person who is or has been a pupil at any such school; and (c) originated from or was supplied by or on behalf of any of the persons specified in paragraph (3), other than information which is processed by a teacher solely for the teacher's own use*". The regulations also add: *"(4) In addition to the information referred to in paragraph (1), an educational record includes – (a) any statement of special educational needs; and (b) any personal education plan, relating to the pupil concerned*".

2.6. In the absence of such a statutory definition in Ireland, a School may not be clear as to whether the entire of the data held by the School relating to the child falls within the definition of records relating to the student's educational progress. It might not be clear in every scenario that the records relate to educational progress. For example:

(a) Child protection documentation furnished to the School by the Child and Family Agency or by social services/child protection authorities from other jurisdictions.

(b) A school guidance counsellor's notes. These could include data relating to sensitive issues such as gender/sexual identity issues, crisis pregnancy, family breakdown, substance abuse, self-harm, etc.

2.7. In some instances a School may be reluctant to release certain data directly to a parent due to *bona fides* concerns for the well-being of the student. For example, where there are child safeguarding issues relating to that parent or where barring or safety orders are in place in respect of that parent. These factors may be evidential in suggesting that the release of materials to such a parent may not be in the child's best interests.

[6] Section 22(2) states that the Principal and teachers shall "(b) regularly evaluate students and periodically report the results of the evaluation to the students and their parents".
[7] The Education (Pupil Information) (England) Regulations 2005

2.8. Having regard to the sensitive and difficult issues considered above, we have engaged with the Office of the Data Protection Commissioner on specific issues where they arise. The advices issued by the Commissioner's Office confirmed that the Data Protection Acts apply to a person's own personal data only and that there was no express provision for the exercising of that right by one person on behalf of another person (eg a parent requesting the data relating to their minor child child). This is consistent with the advices of the Information Commissioner's Office: "*Even if a child is too young to understand the implications of subject access rights, data about them is still their personal data and does not belong to anyone else, such as a parent or guardian*[8]". The Data Protection Commissioner's Office has previously kindly offered their general advices on such a scenario in email correspondence with our offices: "*At the discretion of the data controller (in this case the school), the right may be exercised by a parent or guardian on behalf of a child. As the Data Protection Act makes no specific provision for a parent or guardian to make an access request on behalf of a child, the school in this case has entire discretion in the matter. The key issue is that the personal data is made available to the child as the child is the person who is entitled to it under the Act. Neither a father, mother or guardian (if applicable) has any entitlement to the personal data of another person. In the circumstances where a parent makes an access request on behalf of a minor under 18 years of age, this Office would have no objection to the data being forwarded to the child directly at the address which is registered with the school as being his/her home address*".

2.9. The advices set out above are sensible and are greatly appreciated. Notwithstanding this helpful advice, Schools sometimes feel they remain in a difficult situation: the child's best interests are of paramount consideration[9] and they consider their principal duty to be to their student. Where the school follows the advices set out at 2.8 above and posts/couriers the data access request materials to the registered address that the School holds for the student, this approach can often antagonise some parents who do not also reside at the same address to which the student is registered. So in cases where a parent has no guardianship of, or custody of, or access to their child, this *ad hoc* arrangement is perceived by them to be a hostile action by the School. Some parents initiate (or threaten to initiate) equality litigation against the School[10]. There have been a number of such cases which have been decided before the Equality Tribunal[11] (and many more which presumably were settled prior to them coming before that forum or its successor the Workplace Relations Commission). These cases demonstrate the perceived difficulties Schools have in dealing with parental requests for records.

[8] ICO Subject Access Request Code of Practice, available at: www.ico.org.uk/media/1065/subject-access-code-of-practice.pdf
[9] Children First Act 2015
[10] The parent often claims that the School has discriminated against them in the delivery of a service.
[11] For example, see A Separated Father v. A Community School (DEC-S2010-049)

2.10. The challenge faced by the School is considerable: endeavouring to balance all the conflicting and competing interests and rights of each party can be difficult. Schools accept that their Constitutional role in providing education is to work in partnership with parents[12]. However, the School will generally view its principal duty as being to its own students. Schools clearly view their role as ensuring that in all matters relating to the child that the child's best interests shall be of paramount consideration.

2.11. Ireland is a signatory to the UN Convention on the Rights of the Child[13], article 16(1) of which provides that "*no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour*". The UN Convention on the Rights of the Child also states at Article 5 that state parties shall respect the "*rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention*". It is therefore submitted that it would be appropriate to ensure that the voice of the child is heard in matters relating to his/her personal affairs where it is age-appropriate to do so. Where the child's age and maturity has reached a point where he/she would have a reasonable expectation of having an input into what happens to their data and would reasonably expect to be consulted about to whom their data are released, it would appear to be reasonable to require data controllers to consider whether it is appropriate to consult with the child in an age-appropriate way (if it is appropriate in the circumstances) and to take the child's views into consideration. This would be helpful to data controllers as it would provide them with clear guidelines on the considerations they would be entitled to take into account when considering a parental access request. It would also provide certainty to affected parents and give them a clear framework in the event of their making an access request.

2.12. Having regard to the decision of the Supreme Court in *McK.v Information Commissioner*[14] (which considers the Freedom of Information regime, **not** the data protection legislation) the Supreme Court held that the parent did not have to proffer tangible evidence that the release of information to him would be in the child's best interests. It was held that the decision of a parent of a minor was to be presumed to be in the best interests of that minor in the absence of evidence to the contrary. In that judgment, the Supreme Court set out its views on the Constitutional interpretation of any Act or Regulations: "*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*

[12] Article 42.1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
[13] Available at www.ohchr.org/Documents/ProfessionalInterest/crc/pdf
[14] [2006] 1 I.R. 260

*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 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*[15].

2.13. It is important to note three issues in relation to the foregoing:

(a) Firstly, that these comments arose in the context of Freedom of Information legislation, **not** Data Protection legislation, and the two regimes are different.

(b) Secondly, Freedom of Information legislation, at present, applies only to Schools/educational centres operating under the auspices of an Education and Training Board but not to other schools[16], therefore the statutory regulations of S.I. 216/2016[17] only apply to ETB schools. ETB schools are therefore in a position to deal with parental requests for information about their children pursuant to FOI and to take into account whether the parent's access to the child's records would "*having regard to all the circumstances be in the [child's] best interests*[18]".

(c) Thirdly, the Supreme Court's decision in *McK v Information Commissioner* was decided prior to the 31st Amendment to the Constitution which introduced Article 42A.

2.14. Having regard to Article 42A, Article 42A.1 states: "*The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights*". It would appear to be logical that children

[15] See paragraph 15.3 of the judgment.
[16] See Part 2 Schedule 1 Freedom of Information Act 2014.
[17] S.I.No.218/2016 – Freedom of Information Act 2014 (Section 37(8)) Regulations 2016.
[18] S.I.218/2016 at regulation 6 thereof.

(particularly mature teenagers) have a right to privacy as an unenumerated right. It is accepted that this right is not absolute, and should be appropriately qualified having due regard to the child's capacity and maturity and other considerations as may apply in a democratic society. Article 42A.4.2° provides: "*Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child*". Article 42A.4.1° refers to proceedings brought by the State for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or concerning the adoption, guardianship or custody of, or access to, any child. Article 42A.4.1° makes no explicit reference to other legislative provisions affecting a child. However, it appears to recognise that it is important for the voice of the child to be heard during an age-appropriate consultation process on matters which are important in the life of the child. The implications of the 31st Constitutional Amendment upon data protection and the privacy rights of a mature teenager are as yet, insofar as we are aware, untested before the Courts.

2.15. It is submitted that the GDPRs identifies at least one scenario relating to the processing of children's data where parental consent should **not** be necessary. At Recital 38 it states "*The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child*". This indicates an acceptance that parental consent and/or parental involvement is not required in every single processing operation relating to a child's data: it infers that there will be some special circumstances where a child is entitled to their privacy in order to avail of services to which they are entitled (in this scenario preventative or counselling services). This would indicate that the GDPRs accept there may be some situations where the best interests of the child may not be served if the processing is contingent upon their parent knowing about and consenting to the processing of their data.

2.16. If it is considered that there is no legislative "space" for this issue to be dealt with within the Data Protection Bill, perhaps consideration could be given to developing a sector-specific Code of Conduct on the matter.

2.17. The GDPRs provide a mechanism for the development of sector-specific Codes of Conduct. Article 40 of the GDPR ("Codes of conduct and certification") provides that "*(1) The Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises. (2) Associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation, such as with regard to: […] (f) the exercise of the rights of data subjects; (g) the information provided to, and the protection of,*

*children, and the manner in which the consent of the holders of parental responsibility over children is to be obtained*". It is respectfully submitted that if a legislative framework cannot be established for the processing of access requests made by parents requesting the data of their children, that relevant stakeholders within the education sector (such as the education management bodies, parent representative bodies etc) should be supported and encouraged to develop a Code of Conduct in relation to that issue.

2.18. Having regard to the complexities outlined above, and the high administrative fines under the GDPRs, it is submitted that on any reasonable analysis a sector-specific Code of Practice/Code of Conduct would be highly beneficial in terms of facilitating the effective application of the GDPRs and safeguarding the data protection rights of children. Furthermore, having regard to Recital 148 GDPRs which provides that "*adherence to a code of conduct*" could be taken into account as a mitigating factor in ascertaining the appropriate penalties (including administrative fines) to be imposed due to any infringement of the GDPRs, the presence of such a Code of Conduct and a School's reliance on it could reduce (but clearly not eliminate) the risk of the modest capitation grant given to Schools by the Department of Education and Skills being consumed by administrative fines, compensation (for material or non-material damage[19]), and legal costs.

2.19. It is therefore respectfully submitted that it would helpful if a Code of Conduct could be prepared to assist data controllers working within the education sector (and other data controllers within the wider not-for-profit sector whose service-users are wholly or mainly children) dealing with parental requests for records. It is furthermore submitted that ensuring the codification of a generally accepted practice would provide assistance to parents in understanding the considerations that a school/not-for-profit data controller will take into account when they request a copy of their child's data. This Code of Practice could be modelled on the excellent document prepared by the Information Commissioner's Office: "Subject Access Code of Practice – Dealing with requests from individuals for personal information"[20].

2.20. That Code of Practice advises a data controller to take into account, *inter alia*, the following:

(a) "*Where possible, the child's level of maturity and their ability to make decisions like this.*

(b) *The nature of the personal data.*

(c) *Any court orders relating to parental access or responsibility that may apply.*

[19] Article 82(1) GDPRs.
[20] https://ico.org.uk/media/1065/subject-access-code-of-practice.pdf

*(d) Any duty of confidence owed to the child or young person.*

*(e) Any consequences of allowing those with parental responsibility access to the child's or young person's information. This is particularly important if there have been allegations of abuse or ill treatment.*

*(f) Any detriment to the child or young person if individuals with parental responsibility cannot access this information.*

(g) *Any views the child or young person has on whether their parents should have access to information about them*[21]."

2.21. Having regard to this considered and useful list, it is submitted that (g) could be rephrased as follows: "*Any child who is capable of forming his or her own views on whether their parent(s) should have access to information about them shall have their views ascertained and the data controller shall give due weight to those views having regard to all the circumstances including the age and maturity of the child and any other relevant considerations such as the child's safety, health, welfare, and wellbeing*."

2.22. In having regard to these considerations, the data controller's decision should be informed by the principle that the best interests of the child shall be the paramount consideration.

2.23. It is respectfully submitted that if the above-mentioned considerations were codified into a Code of Practice, that would provide a welcome clarity to data controllers and a welcome measure of "quality assurance" to parents.

We are available to discuss these issues and would welcome the opportunity to engage further on this matter.

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[21] Ibid cit. at page 12.