

Joint Committee on Education and Skills

Submission on the Retention of Records Bill 2019 by Fred Logue

13.11.2019

I would like to thank the committee for the opportunity to make this brief submission in relation to the Retention of Records Bill 2019 (the “Bill”).

By way of background, I am the Principal solicitor in FP Logue Solicitors¹ where I specialise in information law including data protection law. I act for both individuals and public and private-sector organisations in relation to information rights and access to information.

I make this submission in relation to the information law aspects of the Bill and in particular its relationship with the General Data Protection Regulation (Regulation (EU) No 2016/679) (the “GDPR”). Although the GDPR, as an EU Regulation, is directly applicable, the Oireachtas has given effect to certain provisions via the Data Protection Act 2018 so these two pieces of legislation need to be read together.

As the committee knows, data protection is a fundamental right recognised by and governed by EU law. The doctrine of primacy requires EU law to have primacy over conflicting national law. When read with the doctrine of effectiveness and the duty of sincere cooperation, national courts and public authorities are required as a matter of EU law to disapply national law that conflicts with EU law without having to wait for a court to set that conflicting legislation aside. Therefore any aspects of the Bill which conflicts with EU law will have no binding effect. That being said, in the interest of legal certainty, it is imperative that conflicting national legislation shouldn't be knowingly enacted.

With all that in mind, I have reviewed the Bill and wish to make some observations particularly in relation to how any personal data contained in the transferred records should be handled.

In short, despite the provisions in the Bill, any personal data in the archives must still be processed subject to the GDPR. Therefore, the provisions of the bill should be understood to be without prejudice to data subject rights, including the right of access. I would recommend that this position, which is the EU law position, should be expressly provided for in the act.

¹ <http://www.fplogue.com>

I also have concerns that the bill does not make adequate provision for access to records transferred under the Bill. The Bill seems to contemplate that the records will be (a) sealed and (b) withheld from public access under section 3(3)(b). I am not sure that the concept of “sealing” of records is well understood under Irish law. The word gives the impression that the transferred records will be physically sealed but it is not clear from the draft if this is the case. It does seem however that that restrictions on access over and above public access will be imposed because the “sealing” is distinct from the restriction on public access. Crucially the bill is silent on whether the transferred records will be accessible to the National Archives internally.

As a matter of law, I don’t believe records held by the National Archives can be physically sealed in the manner that seems to be contemplated by the bill. In other words I don’t believe it is possible to pass legislation which provides for no access whatsoever to information for anyone, for any reason until regulations under section 6 are made.

First and importantly, the personal data in the transferred records must be accessible as of right to data subjects; this should be expressly recognised in the bill. Any access by the National Archives, its staff and service providers that is necessary to give effect to data subject access rights must also be possible and should be expressly provided for in the legislation.

Second, the High Court under the Constitution has full and original jurisdiction and has the power to order access by way of discovery or otherwise. Equally the Data Protection Commission, High Court and Circuit Court have jurisdiction to grant access following a data protection investigation or data protection litigation. These powers should be expressly reflected in the bill.

There should therefore be an express provision allowing the National Archives, its staff and contractors to access the records for the purpose of giving effect to data subject rights. Similarly there needs to be express provisions allowing the Data Protection Commission and the applicable courts access the records for the purpose of a data protection investigation, data protection litigation, discovery etc. and to order disclosure to third parties following such procedures.

If these provisions (which exist independently of the Bill under EU law and the Constitution) are not clarified there is a high likelihood that the National Archives will be unsure of its legal obligations giving rise to unnecessary delay for data subjects wishing to access their personal data. It will also lead to more disputes, more complaints and eventually litigation.

Once again, I thank the committee for the invitation to make this submission. I am available to give oral evidence to the committee should that be requested.