

**Submission to the Department of Justice  
and Equality on the European  
Commission's proposal for a new Data  
Protection Regulation**

**May 2012**

**IHRC**

AN COIMISIÚN UM CHEARTA AN DUINE  
IRISH HUMAN RIGHTS COMMISSION

## 1. Introduction

The Irish Human Rights Commission (IHRC) has a statutory remit under the Human Rights Commission Act 2000 to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State. The IHRC seeks to ensure that Irish law and practice reflects best international practice in the area of human rights. To this end its functions include keeping under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights, and making such recommendations to the Government as it deems appropriate in relation to the measures the IHRC considers should be taken to strengthen, protect and uphold human rights in the State. The IHRC also has the function of engaging with international organisations in support of its human rights mandate. While the IHRC has engaged with the European Commission on certain draft legislation, it did not engage in the 2009 consultation on this proposal.

The IHRC considers that the proposed Data Protection Regulation and Directive by the European Commission highlights a number of human rights issues surrounding the right to privacy within the context of data protection, most notably in light of emerging technological developments. In its most recent Strategic Plan, the IHRC identified this as a developing area of human rights concern insofar as “[s]eparate developments in the fields of communications, technology, science and engineering, all have the potential to raise important considerations for individual security and privacy. Conditions surrounding storage and access to personal data and related information must reflect key human rights principles and respect for individual privacy.”

The IHRC thus welcomes the opportunity to contribute to the consultation process in respect of negotiations for the proposed new Data Protection Regulation and Directive. Issues of collection, retention, storage, access to, use and/ or deletion of personal data are increasingly significant insofar as technological advances pose new challenges to human rights which include the challenge to ensure that the right to respect for private life and particularly the protection of personal data is safeguarded under a regulatory regime which is fit for purpose. The rapid and diverse expansion of the manner in which people share and disseminate information - including personal biometric information - means that the control individuals retain over their most personal data has gained greater importance.

The current definition regarding the exact remit of personal data is found in Irish law within amended Section 1 of the Data Protection Act 1988, which provides that personal data is “*data relating to a living individual who can be identified either from*

*the data or from the data in conjunction with other information in the possession of the data controller”<sup>1</sup>.*

The Data Protection Commissioner has observed that this definition has been drawn broadly to ensure that any information which relates to a living identifiable person can be considered applicable and that the definition is deliberately technology neutral to ensure that regardless of how private information is stored the legislation will still be applicable.<sup>2</sup> A broad definition is a condition precedent for proper regulation in light of modern conditions and accordingly the definition proposed in the Regulation and Directive should be no less extensive than that now existing under Irish law. Thus the definition of “data subject” and “biometric data” must be synonymous with human rights standards which apply to those terms as commonly understood.

Increasingly in light of the rise of social networking and social media, the public require an enhanced ability to control the usage of their personal data as well as clear and transparent information regarding how it is processed. Definitions are thus key.

## **2. Relevant Human Rights Standards**

### **2.1 EU Charter of Fundamental Rights**

The Explanatory Memorandum for the Proposed Directive (COM/2012/010 - 2012/0010) (COD) *Proposal on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data* records the relevant human rights standards thus:

The right to protection of personal data is established by Article 8 of the Charter on Fundamental Rights of the EU and Article 16 TFEU as well in Article 8 of the ECHR. As underlined by the Court of Justice of the EU[20], the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society[21]. Data protection is closely linked to respect for private and family life protected by Article 7 of the Charter. This is reflected in Article 1(1) of Directive 95/46/EC, which

---

<sup>1</sup> Article 2(a) of Directive 95/46/EC defines personal data as “any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”- available at <http://eur-lex.europa.eu>. This has been transposed into Irish law by the Data Protection Act 1988 and the Data Protection (Amendment) Act 2003.

<sup>2</sup> Office of the Data Protection Commissioner - Guidance Note on Personal Data available at <http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/guidance/310604.htm>

provides that Member States shall protect fundamental rights and freedoms of natural persons and in particular their right to privacy with respect of the processing of personal data.

Other potentially affected fundamental rights enshrined in the Charter are the prohibition of any discrimination amongst others on grounds such as race, ethnic origin, genetic features, religion or belief, political opinion or any other opinion, disability or sexual orientation (Article 21); the rights of the child (Article 24) and the right to an effective remedy before a tribunal and a fair trial (Article 47).

The fundamental right of all people to have their personal and private information protected is explicitly recognised at the European level under Article 8 of the EU Charter of Fundamental Rights (hereinafter “the Charter”). Article 8 of the EU Charter provides that:

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to the control of an independent authority.<sup>3</sup>*

Article 7 of the Charter provides for the right of every person to have their private, family life, home and communications respected.<sup>4</sup> Article 53.3 of the Charter stipulates that where rights under the Charter correspond with those protected by the European Convention on Human Rights the meaning and scope of those rights shall be the same as in the Convention, unless EU law provides an enhanced level of protection. In this regard the case law of the European Court of Human Rights is relevant to any legislation the EU adopts in the area of data protection.

## 2.2 Treaty on the Functioning of the European Union

Article 16(1) of the TEU provides that “Everyone has the right to the protection of personal data concerning them.” Article 16(2) provides that the Parliament and Council may legislate for “rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies,

---

<sup>3</sup> Article 8 of the Charter of Fundamental Rights of the European Union.

<sup>4</sup> Article 7 of the Charter of Fundamental Rights of the European Union.

and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data.”<sup>5</sup> Under Article 16(2) there is a requirement that “[c]ompliance with these rules shall be subject to the control of independent authorities.” In this State, the Data Protection Commissioner is the relevant authority for these purposes (see below).

### 2.3 European Convention on Human Rights (ECHR)

Notably, article 7 of the Charter mirrors largely the wording of Article 8 of the ECHR, which provides for the right to respect for private and family life. In particular, Article 8 provides that any interference by a public authority must be in accordance with the law, for a specified legitimate aim and “necessary in a democratic society”.<sup>6</sup>

### 2.4 European Court of Human Rights

Thus, consensus exists in recognising the fundamental importance of respect and protection for the personal and private information of all persons. The imminent accession of the European Union to the European Convention on Human Rights, solidified under the Lisbon Treaty, recognises the vital place of the ECHR in protecting the fundamental rights of European citizens.<sup>7</sup> The European Court of Human Rights has examined the issue of the right to respect for private and family life on a number of occasions.

In *S and Marper v the United Kingdom*<sup>8</sup> concerning the automatic retention of DNA samples, profiles and fingerprints of those not convicted of crimes, the Court found that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8.<sup>9</sup> Further, it found that domestic law must provide appropriate safeguards to prevent the use of personal data in any manner which may be inconsistent with the guarantees provided under Article 8.<sup>10</sup> The question to be addressed was whether the retention of personal data in circumstances where there was no conviction was proportionate and struck a fair balance between competing interests of crime detection and personal privacy. The Court in this instance concluded that the State had failed to do so and had “overstepped any acceptable margin of appreciation in this regard”.<sup>11</sup> In relation to the margin of appreciation afforded to the State by the European Court this will tend to be narrower the more sensitive and personal the information that is concerned.

---

<sup>5</sup> Article 16 of the Treaty on the Functioning of the European Union.

<sup>6</sup> Article 8 of the European Convention on Human Rights.

<sup>7</sup> See Council of Europe information note at <http://www.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>

<sup>8</sup> *S and Marper v the United Kingdom* [2008] ECHR 1581.

<sup>9</sup> *Ibid* at para 67. See also *Leander v Sweden* [1987] 9 EHRR 433

<sup>10</sup> *Ibid* at para 103.

<sup>11</sup> *Ibid* at para 125.

Similarly in *P.G. and J.H v the United Kingdom*<sup>12</sup> the Court found that the recording of data and the permanent nature of the record could fall within the scope of protection provided under Article 8 even where the data may be available in the public domain. In this context the Court was examining the claim that the recording of the applicants' voices when being charged and in their police cell amounted to an interference with their right to respect for private life.<sup>13</sup>

The protections afforded to the individual under Article 8, must however be balanced against the right to freedom of expression protected under Article 10 of the Convention, which includes the right to receive and impart information.<sup>14</sup> In this regard any data protection regulations adopted at EU level should not have a chilling effect on the rights enshrined in Article 10.<sup>15</sup>

## 2.5 Other International Human Rights Standards

Article 17 of the International Covenant on Civil and Political Rights contains a right to privacy and states as follows

*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*2. Everyone has the right to the protection of the law against such interference or attacks.*

Clearly this provision not only recognises the right to privacy, but requires the State to legislate for that right and make available a remedy for any interference with the right. The Human Rights Committee has issued guidance in relation to the obligations of the State under Article 17, and states the following in relation to automated data:

*The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or*

---

<sup>12</sup> *P.G. and J.H. v the United Kingdom* [2001] ECHR 550.

<sup>13</sup> *Ibid* at para 59-60.

<sup>14</sup> See *Leander v Sweden*, 26 March 1987 and *Gaskin v the United Kingdom*, 7 July 1989.

<sup>15</sup> See for instance *Axel Springer AG v Germany*, Grand Chamber Judgment, 7 February 2012, and *Von Hannover v Germany (No.2)*, Grand Chamber judgment 7 February 2012.

*private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination*<sup>16</sup>.

### **3. The Article 29 Data Protection Working Party report**

Opinion 01/2012 on the data protection reform proposals by the Working Party established under Article 29 of Directive 95/46EC<sup>17</sup> in general terms welcomes the Regulation insofar as it “fulfils the ambition to produce a text that reflects the increased importance of data protection in the EU legal order (Article 16 of Treaty, Article 8 of Charter)... retains and strengthens the core principles of data protection, imposes clear and uniform obligations on data controllers and processors, facilitates free movement of personal data and provides a strengthened legal framework for a uniform application of the law by Data Protection Authorities (DPAs) whose powers have been strengthened.”<sup>18</sup>

However, noting that the Commission chose “to present a separate proposal for a Directive applicable to the area of police and criminal justice due to political constraints”, the Working Party report raises serious concerns about the lack of consistency between Regulation and Directive, particularly in the field of criminal justice, while not addressing “the issue of the collection and transfer of data by private parties or non-law enforcement public authorities that are in fact intended for law enforcement purposes, as well as the subsequent use of these data by law enforcement authorities”.<sup>19</sup>

The IHRC agrees with the Working Party that there must be consistency between the Regulation and Directive if the fundamental rights identified above are to be protected. If not, Ireland could be challenged before the European Court of Human Rights as co-respondent with the EU following the imminent EU ratification of that convention were the regime in Ireland not to meet the minimum rights required under Article 8 of the ECHR.

Thus the statement by the Working Party that “the current proposal would result in lowering the data protection standards in several Member States” is worrying.<sup>20</sup> The IHRC agrees that “the ‘core’ aspects of the provisions should be consistent, in

---

<sup>16</sup> *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*. 08/04/1988. CCPR General Comment No. 16. (General Comments), at para 10.

<sup>17</sup> Opinion 01/2012 on the data protection reform proposals by the Working Party established under Article 29 of Directive 95/46EC 23 March 2012, 00530/12/EN WP 191.

<sup>18</sup> *Ibid*, at p.4.

<sup>19</sup> *Ibid*, at p.5.

<sup>20</sup> *Ibid*, at p 26.

particular as regards the principles, obligations and responsibilities, individual rights and powers and tools available to supervisory authorities.”<sup>21</sup>

The Directive should apply to all stages of criminal justice procedure, from investigation through to prosecution or non-prosecution, to use and deletion of soft data including for vetting and other purposes. Thus the recommendations of the Working Party (pp 26-31) should be adhered to insofar as there should be universal coverage, consistency and oversight for each aforementioned stage.

#### 4. Conclusions and Recommendations

The case law of the European Court of Human Rights is instructive in highlighting the narrow instances in which an interference with the right to respect for private life by the State may be permitted. Further, it outlines some of the key principles that should be followed in determining whether the State has interfered with the right to privacy in accordance with law and only where it is necessary in narrowly drawn circumstances.

The increasing complexity of privacy protection requires a comprehensive and measured response. In this regard the proposal for a new Data Protection Regulation is welcome in that a unified set of rules governing data protection with greater emphasis on, *inter alia*, the accountability and responsibility of data processors<sup>22</sup> as well as the requirement of explicit consent is more likely to meet the applicable human rights standards.<sup>23</sup>

However, concerns still remain over the practical implications for the general public in ensuring the protection of their fundamental right to privacy. The IHRC is concerned that the effectiveness of the proposed Regulation would be undermined if the Directive introduces lower standards. For the reasons outlined above this should be avoided.

The IHRC is also concerned that the ability of the Office of the Data Protection Commissioner to meet the increased challenges brought about through the introduction of the new Regulation and Directive should be ensured. It should be noted in this context that in its Annual Report of 2011, the Office of the Data Protection Commissioner observed that the expansion of the responsibilities of the office with the implementation of the proposed Regulation will require additional resources to ensure that its commitment is maintained and to uphold Ireland's

---

<sup>21</sup> *Ibid*, at p.26.

<sup>22</sup> Chapter II and III of the *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*.

<sup>23</sup> Article 6 (1)(a) of the *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*.



reputation within the global economy.<sup>24</sup> Thus the comments of the Working Party are salutary: “The Working Party does however have serious doubts as to whether the significant budgetary implications of these enhanced duties are sufficiently recognised. To empower DPAs and the EDPB to effectively carry out their duties, including mutual assistance and cooperation within the consistency mechanism, Member States must be committed to provide the necessary financial, human and technical resources.”<sup>25</sup>

Insofar as Ireland's position as a hub for multinational headquarters brings with it significant economic benefits, it must also be recognised that if the Data Protection Commissioner is to be charged with regulating transnational corporation compliance with the Regulation and Directive under a “one stop shop”, the Office must be adequately resourced to efficiently process complaints. Insufficient resources will in effect reduce the power and authority of the Data Protection Commissioner to tackle violations of the right to protection of personal data. This is not only a risk to the protection of human rights in the State and throughout the EU, it would also bring with it reputational risks to the State if it were not seen as adequately addressing potential data privacy violations, not least as this issue has deep resonance on social networking and internet media sites.

14 May 2012

---

<sup>24</sup> Office of the Data Protection Commissioner – Twenty Third Annual Report of the Data Protection Commissioner 2011- p4-5.

<sup>25</sup> *Ibid*, at p.8.