

Our Reference: RMC/LOB/RT007/334/

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By Email: Eimear.cusack@rte.ie

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Re: **Joint Oireachtas Committee and Public Accounts Committee
Requests for detailed personnel information from RTÉ**

Dear Eimear

We refer to your letter of 27 September.

RTÉ has asked us to advise as to whether the voluntary disclosure of personnel data on an individualised basis to the Public Accounts Committee (“**PAC**”) and/or Joint Committee on Tourism, Culture, Arts, Sport and Media (“**JOC**”) would be compliant with RTÉ’s obligations under applicable employment, contractual, confidentiality, privacy and data protection laws. While we understand that RTÉ wants to be as transparent as possible, RTÉ is in receipt of a number of objections and complaints expressing concerns about the potential disclosure of personal data without the consent of the employees concerned.

1. Statutory Basis for the Request

- 1.1 Both the PAC and JOC are governed by the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 (the “**2013 Act**”). While Section 67(1) of the 2013 Act provides for the PAC or JOC to compel the provision of a document, we understand that the procedure in Section 67 does not apply in the current context and instead the PAC and JOC have requested voluntary disclosure of the relevant personal data from RTÉ.
- 1.2 We further note that Section 92(2) of the Broadcasting Act 2009 (the “**2009 Act**”) as amended requires the Director General of RTÉ to attend before a Committee appointed by either House of the Oireachtas at the request of the relevant Committee. The scope of such attendance is “*to give account for the general administration of his or her corporation*” while under Section 92(3) of the Act the Chair of RTÉ may be

requested to attend a Committee to “*represent the views of the board of [RTÉ]*”¹. Section 92(4) excludes from the scope of any request “*any matter which is or has been or may at a future time be the subject of proceedings before a court or tribunal in the State*”.

2. Employment and Contractual Considerations

- 2.1 Employees have a legitimate expectation that their personal data (and particularly sensitive personal data) arising from their employment is not made publicly available. We are not aware of any contractual provision that contemplates the general publication of such information.
- 2.2 If such information is published in a manner where employees could be identified then we are of the view that this would create significant employee and industrial relations issues for RTÉ, as well as potentially resulting in legal exposure depending on the nature of the publication. The potential for such issues is borne out by correspondence RTÉ has received to date from concerned current and former employees.
- 2.3 We are of the view that the public disclosure of employee sensitive personal data would serve to undermine the trust and confidence that is required in every employer/employee relationship. The consequences of this could include a disenfranchised workforce, internal complaints, stress related claims and referrals to the WRC and elsewhere. Specifically, in circumstances where RTÉ has received correspondence outlining employees’ concerns about any such disclosure, in our view, it is entirely legitimate for RTÉ to anticipate that any such disclosure may result in employees claiming that their ongoing employment relationship with RTÉ has been hampered to such an extent that it is no longer sustainable for them to remain in employment, i.e. a constructive dismissal complaint on the basis of such a significant breach of trust and confidence. Naturally, the likelihood of success of such a complaint will be impacted by the nature of the disclosure and the sensitivity of the information involved. The maximum financial exposure for RTÉ in respect of such a complaint is two years’ remuneration as compensation per employee.
- 2.4 In this context, it is also worth considering the potential impact of media coverage. In our view, if any individual’s personal data was disclosed and subsequently picked up by a media outlet, this is likely to amplify the potential negative ramifications for the individual employee. It is noteworthy that one of the former RTÉ executives specifically alluded to the impact that the media coverage had on her mental health during one of the Oireachtas Committee meetings. In the event that media coverage in any way resembled the intense scrutiny of the summer months, individual employees may allege that they have suffered a psychiatric injury as a result of such disclosure. Again, the likelihood of success of such proceedings will significantly depend on (a) the nature of the disclosure and (b) the nature and extent of any media coverage. RTÉ will have a limited degree of control in respect of (b). The maximum financial exposure in relation to personal injury litigation on the basis of psychiatric injury is difficult to quantify in the abstract, and will depend on the nature of the alleged injury. In order for RTÉ to be found liable, a Court must find that there has been a breach of duty, negligence or other material contribution to the harm caused. Causation will be a significant obstacle for any individual employee to overcome, but if a Court is satisfied that RTÉ materially contributed to any harm by virtue of an unlawful disclosure, the employee is likely to be successful.

¹ Emphasis added in each case.

- 2.5 A separate consideration for RTÉ is related to potential reputational damage in relation to its status as an employer. In the event that the workforce in general becomes significantly disenfranchised for the reasons outlined above, RTÉ can expect that relationships with employees will at a minimum become strained, which will likely have a knock-on impact for retention and potentially recruitment.

3. Lawful Basis under the GDPR

- 3.1 The General Data Protection Regulation (“GDPR”) governs the processing (which includes a disclosure) of personal data by controllers. In the current context, RTÉ is a controller of the personal data that is the subject of the PAC and JOC requests. Personal data means any information relating to an identified or identifiable natural person. The GDPR has no application to purely corporate data which is not referable to a living individual.
- 3.2 All disclosures of personal data by RTÉ require a supporting lawful basis under Article 6 GDPR². Without a lawful basis, the disclosure of the data will violate the GDPR, thus exposing RTÉ to regulatory sanctions (which may include fines from the Data Protection Commission) and/or civil actions taken by aggrieved data subjects pursuant to the right of action under Article 82 GDPR.
- 3.3 There are up to six potential lawful bases available in the context of the specific disclosures to PAC/JOC. However, for the reasons set out in the Appendix, none of them apply to the proposed disclosures to the PAC/JOC.

4. Lawful Bases in Context – the Data Protection Principles

- 4.1 While the legal basis analysis in the Appendix is unhelpful in the context of RTÉ’s preference to cooperate with the PAC and the JOC, it is best understood when considered in the broader GDPR context.
- 4.2 The core principles of data protection are set out in Article 5 and they include that personal data shall:
- (a) be processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);
 - (b) be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’); and
 - (c) be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (‘storage limitation’).
- 4.3 In addition, Article 25 GDPR sets out the “*data protection by design and default*” principle which requires controllers such as RTÉ to “*implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects*”.
- 4.4 In light of the above, if the information requirements of the PAC and/or the JOC can be met through the provision of aggregated or anonymised data such that linking the

² A secondary lawful basis is required under Article 9 GDPR if the data is “special category data” but that does not appear relevant here.

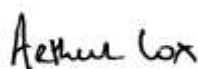
information to an identifiable employee is not possible, there is nothing in the GDPR that would prevent RTÉ making the information available in that format. Notably, the DPC's guidance on Anonymisation and Pseudonymisation³ provides that *“Organisations don't have to be able to prove that it is impossible for any data subject to be identified in order for an anonymisation technique to be considered successful. Rather, if it can be shown that it is unlikely that a data subject will be identified given the circumstances of the individual case and the state of technology, the data can be considered anonymous.”*

- 4.5 The DPC's Lawful Bases Guidance⁴ summarises the position as follows: *“[f]or processing to be necessary to carry out a task in the public interest or exercise official authority, it must be a targeted, reasonable, and proportionate way of doing so.”* The DPC cautions that *“[i]f a controller can reasonably achieve these purposes in another, less intrusive way, it is unlikely that they should process personal data under this legal basis”*. The DPC note that it is *“imperative”* that public authorities ensure that both the type and amount of personal data processed *“are adequate, relevant and limited to what is necessary to achieve the stated purpose.”*

5. Conclusion

- 5.1 For the reasons outlined above and as set out in the Appendix, the proposed voluntary disclosure of detailed, individualised, personnel data to the PAC and/or the JOC is unlikely to be compliant with RTÉ's obligations as a controller under applicable privacy and data protection laws. The disclosure would lack a clear lawful basis and would be incompatible with the data minimisation and fair processing principles in the GDPR. The disclosure would also give rise to industrial and employee relations issues.
- 5.2 Accordingly, RTÉ should continue to consider alternative ways of cooperating, such as by the provision of aggregated or anonymised data.

Yours faithfully



ARTHUR COX

³ <https://www.dataprotection.ie/sites/default/files/uploads/2022-04/Anonymisation%20and%20Pseudonymisation%20-%20latest%20April%202022.pdf>

⁴ Data Protection Commission, Guidance on Legal Bases for Processing Personal Data, available at: <https://www.dataprotection.ie/en/dpc-guidance/guidance-legal-bases-processing-personal-data>

Appendix

Lawful Basis under Art 6 GDPR	Summary	Can RTÉ rely on it?	Comment
Consent (Art 6(1)(a))	Consent is defined in Article 4(11) GDPR as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”. Because of the importance of the consent being “freely given”, it is notoriously difficult to rely on in an employment context. The relevant European Data Protection Board (“EDPB”) Guidance ⁵ states that “the EDPB deems it problematic for employers to process personal data of current or future employees on the basis of consent as it is unlikely to be freely given. For the majority of such data processing at work, the lawful basis cannot and should not be the consent of the employees (Article 6(1)(a)) due to the nature of the relationship between employer and employee.”	No.	RTÉ is already on notice of the concerns of some employees about the disclosure of their personal data without their consent. However, even without this notice, it is clear that consent cannot be safely relied upon. Further, if RTÉ was to seek the consent of relevant staff members, the EDPB Guidance clarifies that “as a general rule, the GDPR prescribes that if the data subject has no real choice, feels compelled to consent or will endure negative consequences if they do not consent, then consent will not be valid. If consent is bundled up as a non-negotiable part of terms and conditions it is presumed not to have been freely given. Accordingly, consent will not be considered to be free if the data subject is unable to refuse or withdraw his or her consent without detriment.”
Performance of a contract (Art 6(1)(b))	RTÉ is permitted to disclose personal data where it is necessary for the performance of a contract to which the data subject is party or in order to	No.	While the terms of the relevant employment contracts may be of interest to the PAC and/or the JOC, the contracts themselves are a confidential contract between RTÉ and the employee concerned.

⁵ https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf

	take steps at the request of the data subject prior to entering into a contract.		
Legal obligation (Art 6(1)(c))	This lawful basis does not apply where the request is a voluntary one.	No.	See paragraph 1 in our letter of advice above.
Vital interests (Art 6(1)(d))	Disclosures that are necessary in order to protect the vital interests of the data subject or of another natural person.	No.	The data subjects in this case (RTÉ staff) have in some cases expressed objections to the disclosure of their data so it cannot be in their vital interests to disclose, notwithstanding the PAC and JOC's public interest in fulfilling their tasks.
Public interest (Art 6(1)(e))	Disclosures that are necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. Section 38 of the Data Protection Act 2018 also permits processing <i>“to the extent that it is necessary and proportionate for the performance of a function of a controller conferred by or under an enactment or by the Constitution”</i> .	No	Art 6(3) GDPR makes it clear that any public interest must be supported by Member State law to which the controller is subject. In this case, while there is Member State law in the 2013 Act, it has not been invoked by the PAC or JOC. Section 92 of the 2009 Act refers to <i>“general administration”</i> and the <i>“views of the board”</i> which lacks the required specificity required under Art 6(3) GDPR which suggests that any Member State law relied upon to support a disclosure should be specific, including, inter alia, as to <i>“which the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures”</i> . Further the relevant law Member State must <i>“meet an objective of public interest and be proportionate to the legitimate aim pursued”</i> . Recital 41 GDPR states that a <i>“legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it”</i> . As regards Section 38 of the Data Protection Act 2018, in circumstances where there is a specific statutory mechanism in the 2013 Act to compel the production of specific personal data, Section 38 cannot be used as a generalised alternative basis to support the proposed disclosures as this fails the requirement that the disclosure be a necessary and proportionate measure.
Legitimate	Disclosures that are necessary for the purposes of	No	Art 6(1)(f) does <i>“not apply to processing carried out by public authorities in</i>

<p>interests (Art 6(1)(f))</p>	<p>the legitimate interests pursued by RTÉ or by a third party are permitted, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.</p>		<p><i>the performance of their tasks</i>". While RTÉ has a dual public and private mandate, the disclosures arise on foot of its public sector mandate and accordingly Art 6(1)(f) is not available. Further, even if it could be argued that Art 6(1)(f) did apply, RTÉ is required to undertake a balancing test between the interests of RTÉ, the PAC and the JOC and the fundamental rights and freedoms of the staff members concerned, some of whom have already expressed concerns that their personal data and private contractual information could be disclosed without their agreement. In those circumstances, the balance falls in favour of the individual employees.</p>
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