

Opening Remarks to Oireachtas Joint Committee Meeting

Good afternoon. I am Daragh O'Brien, managing director of Castlebridge, a data privacy and data governance consultancy, and an advisor to Digital Rights Ireland. I also have advised on data privacy and data governance issues on a number of public sector projects.

Data is Neutral, what is done with it is not

The potential value from the sharing of data between organisations is not to be lightly dismissed. From improvements in efficiency of the delivery of services to better modelling of the future needs of society, there is immense value in the sharing of high quality, trusted information.

However, data is neutral. It does not care if the fact about a person represented in a system is accurate. It does not care if the linking of that inaccuracy or error with other data results in a decision being taken about a person which has significant impacts on them, or their families, or their communities. The data simply is.

We have seen recent cases where the careless handling of information resulted in a fact being created, and a process put in train, that impacted on the private life of at least one whistle-blower.

We have also seen a constant procession of cases before the Data Protection Commissioner and the courts where data has been accessed inappropriately and without authorisation. In these cases personal data of individuals has been disclosed to third parties by people in the employment of the State who already have access to significant amounts of personal, sensitive, and valuable information about you or your constituents.

I know from working with civil servants in my professional capacity as a consultant and trainer in Data Protection law and practice that those I meet with are dismayed that colleagues could undermine trust to that extent. But they are equally alert to how easy it is for the trust between the citizen and the State to be breached, whether by the conscious action of an individual or the ill-considered acts of an official body.

In that context, the presentation of data sharing as a panacea for efficiency and effectiveness needs to be considered in the context of:

- The quality of data sets that are being linked together
- The impact of the processing of data on the fundamental rights and freedoms of individuals
- The transparency of the processing to the citizen

Ultimately, the potential value of data sharing travels hand in hand with a requirement for the data to be trusted and trustworthy and for the processing of that data to be equally trusted and trustworthy.

Transparency, effective controls, clear standards, and agreed upon frameworks for governance are essential to the development and maintenance of trust between the citizen and the State.

The Data Sharing and Governance Bill

In 2014, Castlebridge were engaged by Digital Rights Ireland to conduct a review of the proposed scheme of the Data Sharing and Governance Bill. A copy of our analysis at that time, which I was invited by DPER to present to an open forum on the Bill in November 2014, has been included in the submissions today. As time is limited in today's session I will summarise the findings as follows:

- The cart has been put before the horse
- In focussing on improving efficiency through sharing the Bill, as proposed, does not do enough to ensure the robustness of governance necessary to ensure that the right data is shared in the right way, at the right time, with the right basis.
- The Bill tells the citizen to "trust us, we're the government" but provides very little in the way of standards, structures, or accountability on which that trust might be grounded.

Scope and Intent

I listened with interest to the video of last week's presentation to this committee on this bill. I found it difficult to square the view of Mr Sutherland of the DPC that this bill was simply a framework which would require additional legislation to underpin sharing, and the apparent view from others (and I will welcome corrections and clarifications on this perception) that this was an umbrella piece of legislation that would allow sharing to take place without additional legislative measures.

Either this is skeleton or it is an umbrella. It cannot be both. But the fact that, almost three years after the outline scheme of the Bill came to light there is this lack of clarity of purpose, intent, and scope between the Office of the Data Protection Commissioner and the Civil Service on what this bill is intended to do is of grave concern.

I noted also Mr Sutherland's remarks in the written submission where he pointed out that:

"In itself, this legislation will not be sufficient to validate the processing of personal data to the standard required under EU law and it cannot provide a basis for automatically sanctioning public sector authorities to share personal data"

The Need for Cross-Functional, Cross-Departmental Governance

The Data Sharing and Governance Bill, in its current form, represents a missed opportunity to learn from prior experience such as the late lamented REACH initiative.

Based on experience and insight from private sector Data Governance projects and successful models of implementation that I have studied and applied with clients over the years, the need for effective cross-functional approaches to the governance of data in organisations is essential. I have lost track of the number of organisations I have worked with where one department's definition of a "customer" is different to that of the team sitting next to them, but I remember vividly the late nights at the end of a reporting period where people tried to get the count of customers to add up between the different teams.

This simple example of cross-departmental communication is because of poor data definition. An absence of standards for codifying the meaning of a simple term or concept. However, in the public sector we see examples of this type of metadata challenge in a variety of contexts.

For example:

- The definition of “means” in the calculation of a means tested benefit or grant can differ from agency to agency, and from scheme to scheme.
- The definition of “income” can also differ, as different agencies or schemes apply different rules and different meanings.
- What is an “address”? And, in a given context, what would the correct “address” be to use or share for a given purpose?

Given the potential for sub-optimal outcomes if the wrong data is applied to the right purpose, a far better and valuable focus of the Bill would be to mandate the improvement of, standardisation of, and professionalisation of Data Governance functions in Departments. This is particularly significant given the critical role effective governance of information will play in compliance with the General Data Protection Regulation, in a little over 260 working days from today.

As my team and I wrote in 2014:

“With a mandate to define and develop common standards and work practices for Data Protection, data definition, and data-driven technology development such a function would provide the basis for sustainable, proportionate, and trustworthy sharing of data within the Public Sector”

It is said that the difference between knowledge and wisdom is knowing that a tomato is a fruit, but that doesn’t go into a fruit salad. Absent effective cross-departmental governance models for the oversight of how personal data is used, shared, and protected, we risk an infinite number of odd salad outcomes from organisations sharing data without appropriate care.

The Bara Ruling

The Bara ruling (summary note provided under separate cover) is, at its heart, quite simple. It applies to the public sector the same standard that private sector organisations processing personal data must comply with...

...The simple requirement to tell people what is happening to their data, why, and on what basis.

In Bara there was primary legislation, there was some secondary legislation, and there was an administrative protocol governing the format and mechanism for transfer of personal data. The mistake the Romanian authorities made, in my view, was not letting people find out how careful and considered they were being with the sharing of data between two Public Bodies.

But, for the want of a nail the horse was lost. For the want of communication with their citizens about what they were doing with data, the Romanian authorities lost their case in the European Court of Justice.

Many of the organisations I advise in the Public Sector have taken simple steps to make people aware of their sharing of data with other agencies, or the sharing of data with them by other agencies.

The Data Governance and Sharing Bill, as currently framed, does not resolve the conundrum posed by Bara. Indeed, it risks making it worse as public bodies share data under what the stewards of the Bill present as an umbrella for all sharing.

It is inevitable, in the absence of the effective governance structures and standards mentioned previously, that an agency will, through no ill will or intent, share data in a way that is not necessary,

or is disproportionate, or simply is of a nature that causes a citizen to be concerned about how their data is being processed.

This will result in a complaint to the Data Protection Commissioner. Who has already stated that this legislation, as proposed, is merely a framework and not a basis in and of itself for sharing.

Or perhaps, under GDPR, a complaint might be made to the Data Protection Authority of another EU Member State. I know a number of retired civil servants who reside now in other EU member states but who might find data being shared about them here in ways their local Data Protection Authority might find “odd”.

Conclusion

- This Bill represents a missed opportunity in its current form.
- Data sharing on foot of umbrella legislation is not compatible with the necessity and proportionality principles of EU law.
- Clear statutory grounds should be created, and should be open to scrutiny. This is particularly true of large scale, bulk sharing of data.
- The Bill requires more detail on an effective framework for Data Governance and standards.
- Data Sharing arrangements in the Public Sector should provide protections equal to or greater than those which already arise since the Bara ruling.