

The Public Services Card:

Mandatory, without a mandate

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Legal Basis

On the 18th September 2013 the Cabinet met and agreed a formal Government Decision. Amongst other matters it ordered that;

- (i) a research and consultation exercise to be undertaken by the Department of Social Protection on the suitability of the current legal basis for the PPSN and the making of recommendations,

On the 27th October 2017, the Department of Employment Affairs and Social Welfare confirmed, in a reply to an FOI request, that this review has never begun and that therefore no records relating to it have ever existed.

I contend that this may prove to be a significant oversight. The Public Service Card project has spread- and sprawled- in the intervening years. It has become a national ID card, backed by a significant national biometric ID database, the Single Customer View.

Driving Licences have been withheld unless the citizen accedes to being carded. Pensions have been stopped. Social Welfare payments have been threatened. Even Citizenship has been made conditional on willingness to be carded, for new citizens.

This has happened without ID card legislation ever being debated by the Oireachtas.

Significantly, while the Irish State has yet to start their examination of the laws around data sharing and the PPSN the EU courts have been much busier.

EU Caselaw: Smaranda Bara

In October 2016, the CJEU, the top court in the EU ruled that a national legal framework for broadly sharing personal data between state agencies, was not permissible unless the nature of the each transfer was made clear to

the data subjects before it happened. In this Bara¹ Case the court found that having national legislation permitting such transfers, the details of which were then worked out in a protocol between the agencies did not meet the needs of EU law for citizen's data protection and privacy.

Their summing up was exceptionally clear and pithy:

“Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing.”²

- Judgment of the Court of Justice of the European Union in Case C-201/14 Smaranda Bara and Others v Președintele Casei Naționale de Asigurări de Sănătate and Others

The Irish Data Protection Commissioner subsequently issued a detailed briefing note to public bodies highlighting the consequences of this new statement of the supreme law in the EU.

“The consequences of this judgment are significant and potentially very far reaching. The Office of the Data Commissioner recommends that all public sector bodies complete a full review of their obligations and arrangements on the basis of the findings in this judgment”³

¹ Case C-201/14 Smaranda Bara and Others v Președintele Casei Naționale de Asigurări de Sănătate and Others <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130deba1d062186774d0ba51286e71a6b3df5.e34KaxiLc3eQc40LaxqMbN4PaNyPe0?text=&docid=168943&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=662066>

² <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130deba1d062186774d0ba51286e71a6b3df5.e34KaxiLc3eQc40LaxqMbN4PaNyPe0?text=&docid=168943&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=662066>

³ <https://www.dataprotection.ie/docs/Bara-Others/1528.htm>

- Irish Data Protection Commissioner

It is regrettable that the administrative urge to carry on collecting and sharing sensitive personal data has proved stronger than the wish to enquire into the solidity of the legal basis of the PSC project.

The Public Services Card: Mandatory but not compulsory?

The Department of Employment Affairs and Social Protection cites as the legal basis for cutting off the pensions of old ladies who refuse to comply with the demand they get an ID card:

The Social Welfare Consolidation Act 2005, as amended, viz.

- Section 247C(1) of the Act provides that the Minister may require any person receiving a benefit to satisfy the Minister as to his or her identity;
- Section 247C(2) of the Act specifies the consequences of failure to satisfy the Minister in relation to identity as required, specifically that a person shall be disqualified from receiving a benefit;
- Section 247C(3) of the Act specifies the manner in which the Minister may be so satisfied; in effect, this Section describes the process for registering a person's identity

The first two of those provisions simply say that a person who refuses to satisfy the Minister as to his or her identity may have their payments stopped until their identity has been confirmed. This is a completely reasonable and laudable requirement, necessary to make sure money is going to the right person.

But here, the Department never said that the lady in the public gallery today whose pension the Department stopped isn't who she says she is. They didn't deny her identity at all- they knew who she is. An official even visited her at her house and was shown her marriage cert. The lady happily produced her passport- the document which Ireland expects every other country in the world to be find an acceptable proof of identity at their borders.

Again, they knew who she is. That wasn't why they cut her off. They stopped her pension because she refused to comply with the biometric carding process.

And for that, they're relying on Section 247C(3) of the Social Welfare Consolidation Act 2005. The actual provision was only brought in in 2013 in the [Social Welfare and](#)

[Pensions \(Miscellaneous Provisions\) Act 2013](#)⁴

The problem for the Department is that, though Section 247C(3) describes a visit to a Social Welfare office, showing some documents and having your picture taken and giving a copy of your signature as being the Minister's preferred method of you proving who you are, it doesn't say that the purpose of doing so is to have your data entered onto the national Public Services Card register or the Single Customer View database, with all the subsequent data sharing and processing that involves.

The Act sets out, in a clause *not typically* cited by the Department, that this attendance and these records can only be lawfully used for one purpose. Section 247C(1):

“to satisfy the Minister as to his or her identity”

Once that's done, there is no lawful basis for any further use of that data. No legislative requirement to be placed on an ID register. No basis for sharing the data collected with other government agencies (as envisioned by [Section 8 of the Health Identifiers Act](#)⁵, for example).

Joan Burton, when she was Minister for Social Protection, acknowledged that building an ID database was something which couldn't simply be treated as an administrative act. It has serious and permanent consequences for the relationship between the citizen and the state.

The question of the introduction or otherwise of a national identity card was not part of SAFE's remit. The matter of establishing a national identity index and producing a national identity card is a wider issue. It would require due consideration by the appropriate agencies before any policy decisions could be formulated by Government and would require the development and implementation of legislation to support any such policy. ([source](#))⁶

The state can issue a person with an ID card without a legal basis, if they consent to it. The problem is, in order for that consent to be valid under EU law, it can't have been compelled. It can't have been extracted on pain of penury at the loss of your pension, of the child benefit you rely on or your unemployment benefit.

And a person can't give consent if they haven't been clearly told to what purposes

⁴ <https://www.kildarestreet.com/wrans/?id=2015-07-08a.138>

⁵ www.irishstatutebook.ie/eli/2014/act/15/section/8/enacted/en/html

⁶ <https://www.kildarestreet.com/wrans/?id=2015-07-08a.138>

the data they are agreeing to hand over will be put.

Until we have a full and open debate on the merits of a national ID card (and the identity index database those cards extend from) we cannot decide if we are happy with the consequences of such a plan or ([as happened in the UK](#)⁷) whether we decide it is a dangerous and illiberal step and reject the proposal.

If any Government wants to legislate for an ID card, it should first propose the plan and then see it through the Oireachtas.

Personal data is legitimately gathered and used by the state on the basis that it is a safe guardian of citizens' fundamental data and privacy rights. Without trust that the state will do the right thing, the legitimacy of that collection breaks down.

The Single Customer View: The Database behind the PSC Card

It's a legislative requirement⁸ that public bodies sharing personal data, and relying on the provisions of the Social Welfare Consolidation Act 2005 to do so, have an agreement in place first.

In 2014 this requirement had [fatal consequences for Irish Water's](#)⁹ attempts to rely on the 2005 Act in the absence of that Ministerial agreement. (It was illegal, and the hundreds of thousands of PPSN records Irish Water collected were subsequently scrapped.)

The Department of Social Protection claim that they are the Data Controller for the National biometric ID Database which the Card is linked to. It's called the Single Customer View.

However, they have passed the storage and management of that database to the Department of Public Expenditure and Reform.

⁷ www.eff.org/pages/success-story-dismantling-uk's-biometric-id-database

⁸ <https://www.mcgarrsolicitors.ie/2014/10/22/irish-water-ppsns-and-the-missing-ministers-agreement/>

⁹ <https://www.irishtimes.com/news/social-affairs/welfare-staff-opposed-giving-pps-numbers-to-irish-water-1.2034894?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fsocial-affairs%2Fwelfare-staff-opposed-giving-pps-numbers-to-irish-water-1.2034894>

This data sharing must be legally underpinned by a data sharing agreement. There have been a sequence of these Agreements, in various formats. They are in force for a set period of time and then lapse. The most recent was signed on 5th December 2017.

It is notable that the Dept of Employment Affairs and Social Protection have repeatedly allowed those Agreements lapse, for months at a time, without any suspension of transfers. Transfers during those gaps, even if we ignore the questionable nature of the agreements themselves, were, on their face, unlawful.

It is notable that no mention of these periods of transfer without an operative Data Sharing Agreement was made in the Department's responses to the Data Protection Commissioner's queries on the legal basis of data transfers.

Side Issues: Is this a biometric database?

The shared Single Customer View database, and the PSC cards themselves, include facial images. These images can and have been used to run biometric matching processes. The department argues that the facial images are not biometric data, only the output of those matching processes and so the PSC database contains no biometric data.

This argument is unsustainable.

The General Data Protection Regulation has a helpfully short definition of what is 'biometric data'.

Article 4(14) says:

'biometric data' means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as **facial images** or dactyloscopic data;

(Emphasis added).

Dactyloscopic data is a reference to fingerprints. If the department's definition of biometric data were to be the relevant one then a database of the whole population's fingerprints or iris scans would contain no biometric data. This would make a nonsense of the protections for biometric data in the

GDPR.

There are two issues which arise from the disconnect between the what the law says and the Department's position.

Either the Department knows it is in error, but does not wish to admit it and address the legal consequences of that admission or

The Department's grasp of the law underpinning its stewardship of the largest and most intrusive citizen database in the history of the state is of a standard that it can sincerely believe it is not in error.

Neither option is comforting for the citizen to contemplate.

Conclusion

The Public Service Card project requires an urgent review of its legality. It is not necessary. It is not proportionate. It was commenced without any business case being made as to its purpose.

In his report on the Public Services Card project rollout,¹⁰ the Comptroller and Auditor General stated:

There is no single business case document for the PSC, setting out at a high level all of the information needed to get the project started (scope, justification, funding, roles and responsibilities)

Amongst the issues¹¹ the C&AG identified in planning and implementing this project were

- A comprehensive estimate of the total projected project costs including the allocation of existing DSP staff was not prepared.
- There was no initial assessment of DSP's capacity to deliver the project or a formal assessment of the project risks.

¹⁰ <http://www.audgen.gov.ie/documents/annualreports/2015/report/en/Chapter10.pdf>

¹¹ <http://www.audgen.gov.ie/documents/annualreports/2015/report/en/Chapter10.pdf>

- There was no plan setting out how and when the project's benefits would be measured, and who was responsible/accountable for their delivery.

In the UK, the governments of Tony Blair and Gordon Brown brought forward plans for a national ID card- initially presented as an 'entitlements card' to assist in accessing Public Services. They brought forward legislation and whether such a measure was proportionate and necessary in a liberal society was hotly debated. In the end, the legislation was scrapped and the database was erased, after billions had been spent building it.

I am hopeful that the Oireachtas will take this opportunity to assess our own project before it runs up similar wasted costs and needless breach of citizens' human rights.