

# Digital Rights Ireland

Helen McEntee TD,  
Minister for Justice,  
Department of Justice,  
51 St. Stephen's Green,  
Dublin 2, D02 HK52

BY EMAIL

June 23, 2023

## High Court application to oblige service providers to retain Schedule 2 data

Dear Minister,

1. We understand that you intend to apply next Monday, 26 June 2023, to a High Court judge for an order requiring service providers to retain Schedule 2 data under section 3A(1) of the Communications (Retention of Data) Act 2011.<sup>1</sup>
2. Could you confirm by return if this is the case?
3. If so, could you please confirm if your office has carried out a Data Protection Impact Assessment (DPIA) in respect of this measure, as required by Article 35 GDPR?<sup>2</sup>
4. If you have completed a DPIA, will you bring this to the attention of the court?
5. If you have not completed a DPIA, will you bring this fact to the attention of the court?
6. Have you engaged in prior consultation with the Data Protection Commission in relation to this measure, as required by Article 36 GDPR?<sup>3</sup>

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<sup>1</sup> As amended by section 4 of the Communications (Retention of Data) (Amendment) Act 2022.

<sup>2</sup> Article 35, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

<sup>3</sup> Article 36, GDPR, <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

7. If so, will you bring the views of the Data Protection Commission to the court's attention?
8. If not, will you bring the lack of prior consultation to the attention of the court?
9. Will you bring to the court's attention the State's correspondence with the European Commission over notification of the Communications (Retention of Data) (Amendment) Act 2022 as required by Directive (EU) 2015/1535 (SMTD/TRIS)? The 2022 Act was notified only after it was signed into law, and in correspondence of 11 January, 2023, regarding the Act, the European Commission has stated that failure to notify a measure at a draft stage will have the effect of making the 'technical regulation at issue inapplicable and unenforceable against individuals'?<sup>4</sup>
10. Under section 3A(4) of the Communications (Retention of Data) (Amendment) Act 2022: 'A relevant judge, as respects an application under subsection (1), may make an order under subsection (5) only if satisfied that the making of such an order is necessary for, and proportionate to, the purposes for which the application was made.'<sup>5</sup>
11. The information we have mentioned in this letter is necessary for the relevant judge to make a fully informed assessment of necessity and proportionality.
12. This information is also necessary for the relevant judge to determine whether to make a reference to the Court of Justice of the European Union for a preliminary ruling regarding the validity of the Communications (Retention of Data) (Amendment) Act 2022 having regard to the failure to notify the Act at a draft stage as required by Directive (EU) 2015/1535.
13. However, section 3A(3) of the Communications (Retention of Data) (Amendment) Act 2022 provides that such applications must be made *ex parte*. In these circumstances it is not open to any other party to bring these matters to the attention of the court as part of this hearing.

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<sup>4</sup> See correspondence at:

[https://www.asktheeu.org/en/request/12506/response/43279/attach/3/2022%20872%20IRL%20communication%20COM.pdf?cookie\\_passthrough=1](https://www.asktheeu.org/en/request/12506/response/43279/attach/3/2022%20872%20IRL%20communication%20COM.pdf?cookie_passthrough=1) See also Brennan, C., European Commission says Ireland's new data law may be 'inapplicable', The Irish Examiner, 5 March, 2023, <https://www.irishexaminer.com/news/arid-41085928.html>

<sup>5</sup> 3A(4) of the Communications (Retention of Data) (Amendment) Act 2022, <https://www.irishstatutebook.ie/eli/2022/act/25/enacted/en/print#sec4>

14. In accordance with your duty of candour to the court and the commitment in the State Litigation Principles to 'assist the court by providing full and accurate explanations of all relevant matters of which the court requires to be aware'<sup>6</sup> we ask that you bring this correspondence and the matters mentioned herein to the attention of the court.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'TJ McIntyre', with a long horizontal line extending to the right.

Dr TJ McIntyre,  
Chairperson of Digital Rights Ireland

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<sup>6</sup> Principle 7: 'The State will act honestly and will seek to assist the court by providing full and accurate explanations of all relevant matters of which the court requires to be aware, on affidavit, in witness statements, and in oral evidence as appropriate, depending on the nature of the proceedings.'