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16 October 2020

By email

Dear Eddie,

Updated Data Protection Impact Assessment (DPIA) – STOPCOVID App

Thank you for sharing with us the updated version of the DPIA for the STOPCOVID App (the App) which considered its extension to children between the ages of 11 and 17 with effect from 1st October. The ICO welcome your continued and fulsome engagement with our office.

We have confirmed with you that in your view this DPIA does not engage the statutory obligation to seek advice of the Commissioner as provided by Article 36 of the GDPR (Prior Consultation). It should therefore be noted that our advice does not constitute 'Prior Consultation' with the Commissioner.

This letter will address your response to comments made during the course of our engagement over the past number of months. Please note that our views and advice given below are based on the information you have provided to date and are without prejudice to any future intervention by the Commissioner in accordance with her tasks and powers.

We would remind you that, as controller, the Department of Health ('the Department') remains responsible for ensuring compliance with DP law, and ensuring the assessment and management of risks to individuals.

Lawful basis and child consent

During our early engagement, we advised that careful consideration should be given to the lawful basis relied upon for the processing of children's data within the app. We requested that your updated DPIA reflect your position in a clear and transparent manner.

In addition to this, and closely related, we discussed the Department's determination of the app as an information society service (ISS) and the potential Article 8 implications this may have.

The Department has indicated that they seek to rely on the same lawful bases as identified for the processing of the data of adults using the app, namely, public task (Article 6(1)(e) and public health (Article 9(2)(h)), alongside consent (Article 6(1)(a)) and explicit consent (Article 9(2)(a)) in relation to processing the diagnosis keys.

As advised, in circumstances where you are offering an ISS directly to children and you wish to rely upon consent as your lawful basis for processing their personal data, Article 8 of the GDPR (as implemented in the UK) provides that only children aged 13 years and over may lawfully provide their own consent for the processing of their personal data.

The Department has since confirmed that it deems the app to be an online 'preventative' service. The Department consequently assert that, as per Chapter 2, para 9(b) of the Data Protection Act 2018 (DPA), Article 8 requirements should not apply and that parental consent is not necessary for children under the age of 13. The Department state that it is in the best interests of the child to allow them to consent for themselves without parental authority. They have now indicated that the app will be available to children from the age of 11 years old.

The Department has now clearly outlined this position within its updated DPIA.

Best Interests of the Child

As stated above, the Department has deemed the app to be an online preventative service and consequently believe that it should be made directly available to children. It is asserted that the app's exposure notification service informs app users at the earliest opportunity that they have potentially been infected, and that they should self-isolate. This in turn prevents those who may have been infected (and not yet developed symptoms) from passing the infection on to others. The Department state that excluding children from any measure designed to prevent the spread of COVID 19, may be "detrimental to their wellbeing and unfair".

As previously advised, the onus is upon the Department to demonstrate that the app constitutes an online preventative service. It is also incumbent upon the

Department to ensure that the best interests of the child are considered and reflected within the design, development and implementation of the most recent version of the proximity app.

Consultation

As discussed, the decision surrounding the accessibility of the app to particular age groups, and the appropriateness of the content therein, ultimately lies with the Department of Health. It is encouraging that in the spirit of the consultation requirement under article 35 (9) of the GDPR, the Department sought the views of potential data subjects and their representatives on the intended processing. This included the Department undertaking significant consultation with children's representative organisations within Northern Ireland where extensive discussions were held in respect to the issue of age banding as well as content and design.

In addition to this, we are aware that considerable attention was afforded to ensuring children had an opportunity to express their views and opinions regarding the proposed design and model of the updated app. We understand that the Department undertook focus group work and user testing with young people between the ages of 11 – 17. Encouragingly, these focus groups comprised of a representative cross section of locations, socioeconomic class, religion, ethnicity, and learning difficulties.

The ICO welcome the Department's engagement with Children's Advocacy groups in Northern Ireland and its consultation with such a diverse range of young people.

Transparency and Fairness

From previous engagement with the ICO, the Department is aware of its duty to comply with Article 13 and 14 of the GDPR which outline specific obligations in regards to privacy information and the right to be informed. The Department is further aware of its obligations under Article 12 of the GDPR which states that processing information must be provided "*in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child.*"

This is expanded upon in Recital 58 which stipulates the importance of providing clear and concise information in situations whereby the "technological complexity

of practice” makes it difficult for the data subject to know or understand how their personal data is being processed.

Given the technical nature of the app and the reliance on consent for some of the processing, it is imperative for the Department to ensure that appropriate provisions are in place to ensure young app users are fully informed as to how their personal data will be processed. This will allow individuals real choice and control over how they use the app.

We note that efforts have been made to ensure that additional information is provided to younger app users (11-17) during the onboarding process and during the live functionality of the app. We welcome the Department’s adoption of the layered notice approach when providing this information as this is a useful method of providing key pieces of privacy information immediately to child users, whilst also affording them the opportunity to consider more detailed information should they wish.

Furthermore, we note the Department’s decision to incorporate one easy to read privacy notice within the app. Again, we reiterate our previous comments and stress the importance of ensuring that the privacy information provided remains updated and presented in a style which can be easily understood by all age categories.

Age Appropriate Design Code (AADC)

Encouragingly, the Department has indicated that they have given cognisance to the ICO Age Appropriate Design Code (AADC), when developing the app. This is despite the Department deeming the app to be an online preventative service and therefore beyond the scope of the AADC. We welcome this consideration of the AADC as a positive step in helping to ensure the age appropriate design of the app.

Automated decision/ alerts / impact of that decision

We acknowledge that additional content around automated decision making and alerts has now been included within the “How is the app making decisions?” section of the “easy read” privacy notice. We also note that additional, and more simplified information has been included during the onboarding process.

However, the Department has indicated that an updated version of the app to include more explanation about the alert messages and their impact will be released shortly and this is to be welcomed. It is important that children understand the significance of receiving an alert notification and the potential impact that this may have.

It is therefore important to ensure this information is clear, concise and can be easily understood by all users, particularly those between the ages of 11-17.

Parental Involvement

Whilst it is acknowledged that the app has been deemed an online preventative service which does not require parental consent, it was felt that some form of parental support should be referenced within the app's functionality.

We are aware that, during focus group testing, the Department identified the potential for exposure notifications or "alerts" to cause concern for the app's youngest users. The Department has sought to mitigate this risk by incorporating age appropriate screens and information in the easy read privacy notice which direct the user to seek assistance from a trusted adult if necessary. It appears, from user testing feedback, that this has helped provide greater reassurance among younger app users who at times may not feel emotionally equipped to deal with an exposure notification on their own. It seems that references to parental/guardian discussion is a very welcomed approach among app users.

As advised, it is important that these parental/guardian support messages are not displayed in a manner that can be confused with parental/guardian consent screens.

Risks and risk assessment

We acknowledge that the risks section of the DPIA has now expanded and been furnished with additional information. It is apparent that, in light of the app being extended to younger users, additional risks have been identified and efforts to mitigate against these risks have been documented. Further to our comments above, we note that the risk that some children may be concerned when receiving notifications to self-isolate, has been mitigated by greater encouragement to gain parental/guardian support.



Information Commissioner's Office

As advised, it is the responsibility of Department to ensure the security and integrity of the personal data being processed. We therefore recommend that this section, and indeed the entire DPIA, is kept under continuous review. That being said, we refer to our previous discussions and remind the Department of the merit in treating it's DPIA as a "live" document. It is important to ensure that it is subject to regular revision and re-assessment in light of potential changes to the nature, scope, context or purpose of the processing being undertaken. This may be particularly pertinent given the evolutionary nature of the current pandemic.

In closing, we reiterate our thanks to you for your continued engagement with our office and for your transparency throughout this process.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Caroline Mooney'.

Caroline Mooney
Regional Manager
ICO (Northern Ireland)