



Date 16th day of April 2014

To Mr Saviour Cachia
The Information & Data Protection Commissioner,
Airways House, Second Floor,
High Street, Sliema
Malta

Dear Mr Cachia,

Re: Data concerning Persons in Educational Institutions Regulations 2014

Whilst congratulating on your much needed appointment, the Nationalist Party hereby presents this formal complaint for your attention and immediate action regarding Legal Notice 76/2014 concerning 'Data concerning Persons in Educational Institutions Regulations 2014'.

You will appreciate that this Legal Notice was published by Government in a time when no person held the office of Information and Data Protection Commissioner in Malta, thus not allowing any interested person the possibility to raise a formal complaint or concern on this issue with the appropriate authorities.

Legal Notice 76/2014, is in our opinion:

- (i) extremely disproportionate;
- (ii) insufficiently specific in its definitions, scope and purpose;
- (iii) completely void of any safeguards, checks and balances which can counteract the broadness of the wording utilised; and
- (iv) presents numerous unanswered questions relating to its overall validity and respect to the principles contained in the Data Protection Act (Chapter 440 of the Laws of Malta), related EU Directives (including Directive 95/46 EC), Chapter IV of the Constitution of Malta, the European Convention on Human Rights as well as the EU Charter of Fundamental Rights.

This complaint and our present concerns regarding the said Legal Notice can be briefly summarised as follows:

- A. Legal Notice 76/2014, by means of Regulation 4(1) thereof, is granting directly in the hands of the Minister for Education and Employment (the "Minister") as data controller, broad powers to enable him to obtain, without any differentiation, limitation or exception, any data from educational institutions without specifying the exact purpose for such wide and all-encompassing powers.
- B. The information collected directly by the Minister without the consent of data subjects pursuant to Legal Notice 76/2014 also requires such personal data to be accompanied by a

valid identification number or ID Card Number which means that each individually shall be easily directly identifiable.

- C. Legal Notice 76/2014 does not provide any definitions of the terms 'data' or 'research' which can only mean that the powers granted by the said Legal Notice relate to all data (including personal data and sensitive personal data). The lack of a definition of the term 'research' renders the Legal Notice extremely vague and subject to potential abuse.

Legal Notice 76/2014 does not provide any guarantees whatsoever, including in particular relating to the following:

- (i) That the data collected by means of LN 76/2014 will be processed fairly and lawfully by the Minister in accordance with Article 7(a) of Chapter 440;
- (ii) That the data collected directly by the Minister by means of LN 76/2014 will always be processed in accordance with good practice as per Article 7(b) of Chapter 440 – particularly when one looks at the mechanisms introduced in other jurisdictions for the processing of personal data relating to educational research activities;
- (iii) That the justifications for the collection of personal data as per Legal Notice 76 are not sufficiently specific and explicitly stated and this in accordance with Article 7(c) of Chapter 440; and one therefore seriously questions whether the purposes for such processing (or lack thereof) as contained in LN 76/2014 are sufficiently legitimate in light of the provisions of Chapter 440, EU related Directives, the Maltese Constitution, the European Convention on Human Rights, the European Charter of Fundamental Rights and Freedoms, as well as jurisprudence of the Courts of the European Union (ECJ);
- (iv) That the processing of the data that shall be carried out directly by the Minister in light of the provisions of LN 76/2014 is indeed compatible with the purposes for which the data was originally collected as required by Article 7(d) of Chapter 440;
- (v) That all personal data that the Minister may obtain directly pursuant to the said legal notice, is relevant in relation to the unclear purposes to which the said Legal Notice makes reference; this as required by Article 7(e) of Chapter 440 and is covered by sufficient legislative safeguards;
- (vi) That no unnecessary personal data will be processed directly by the Minister for the purposes (or lack thereof) contained in LN 76/2014 as per Article 7(f) of the Chapter 440; and
- (vii) That personal data shall not be kept for a period longer than that which is necessary in terms of Article 7(i) of Chapter 440.

Clearly, LN 76/2014, does not in our opinion fulfil the conditions contained in Article 9 of Chapter 440 especially when one considers that data subjects have not unambiguously given their consent for such processing.

Furthermore, we further contend that one cannot justify such Legal Notice under Articles 9(c), (d) and (e) of Chapter 440 since one can never equate the broad powers given directly to the Minister under LN 76/2014 as 'necessary' to protect the vital interests of the data subject and/or necessary

for an activity that is carried out in the public interest, or the exercise of authority vested in the data controller.

If one takes into consideration the statement made by the Minister for Education and Employment, when he stated that this information is required for him to “knock at the door” of data subjects and, without their consent, instruct them as to whether they are not keeping up with their educational or employment inspirations, this surely should not be considered to be in the public interest since such processing is directed specifically to these individuals and not as part of any general strategy or public policy measure – a clear invasion of the right to private family life and privacy of such individuals.

Furthermore, whilst Article 9(f) of Article 440 provides that processing without the consent of the data subject can be carried out for a purpose which concerns a legitimate interest of the controller, the present wording of LN 76/2014 does not provide sufficient guarantees nor does it clearly establish how such powers can override the interest to protect the fundamental rights and freedoms and the data subject and in particular the right to privacy.

We further highlight the restrictions contained in Article 8 of Chapter 440 especially the restriction that the processing of personal data for statistical purposes cannot be used for any specific and targeted decision concerning the data subjects. This somewhat contrasts with the present wording of Legal Notice 76/2014.

One has also to question the very wide definition of “educational institution” as provided for in Legal Notice 76/2014 and whether the alleged purposes (or lack thereof) for the processing of personal data warrant such broad definition.

As you are fully aware, the scope of Chapter 440 is to introduce general principles regarding the processing of personal data. As has happened in other substantive areas, the legislator wisely introduced specific subsidiary legislation under Chapter 440 in order to provide further detailed rules as to how the general principles found under Chapter 440 should be implemented within specific sectors such as the processing of personal data by the police, the processing for personal data within the electronic communications industry as well as the processing of personal data relating to minors. Unfortunately, with respect to the processing of personal data regarding students in educational institutions, the legislator (irrespective of our reservations) decided to opt for very broad regulations issued under the Employment and Training Services Act, without any visible attempt to reflect these new powers within the existing legal frameworks regulating the processing of personal data. Such course of legislative action is very dangerous and can lead to serious abuses and potential erosion of the fundamental rights to privacy and data protection enjoyed by all citizens.

Whilst the powers and functions of our institutions established by law, including the Education Directorates, the National Commission for Higher Education and the Employment and Training Corporation are clearly laid down in their respective laws, the powers of the Minister, a politician are not clearly defined at law. This, married with the new powers introduced by virtue of Legal Notice 76/2014, raises serious doubts as to the reason why the legislator in this specific instance decided to grant such powers directly in the hands of the politician and not in the hands of such institutions.

The wide powers granted directly to the Minister by means of Legal Notice 76/2014 do not in any way limit or prohibit the same Minister from processing vast and unnecessary amounts of personal data, including sensitive data and ID Card numbers, which could also lead to the creation of a Student Profile Database available directly to the Minister without specifying precisely the purpose and limitations for such processing.

Whilst we sincerely believe that the intentions of the present Minister may indeed be genuine, the present text of Legal Notice 76/2014 does not contain sufficient safeguards which can guarantee that the powers contained in the same legal notice will not be abused or will not lead to abuse.

Similarly, the above concerns do apply to the provisions of Regulation 5 of Legal Notice 76/2014 regarding direct access by the Minister to data regarding persons registering for works as well as all and any data relating to anyone held by the Employment and Training Corporation. One has also to consider the effect that this Legal Notice will have in relation to Article 19 of Chapter 440 regarding information obligations to data subjects.

The scope of any law regarding the processing of personal data should be to create a balance between the interests and duties of the State and the fundamental rights and freedoms of the data subjects. Sadly, the present version of Legal Notice 76/2014 fails to strike this balance through its ambiguity, broad scope and absolute lack of proportionality and which therefore leads to justified Orwellian fears.

Since Opposition's reservations to this Legal Notice fell on deaf ears in the debate held in Parliament on Monday 14th April, and since the post of Commissioner of Information and Data Protection was vacant for the past months, we are therefore, and in light of the above, formally now requesting your immediate and urgent attention in order that the concerns raised in this letter and fully addressed.

Finally, let us reiterate that:

- (i) We believe that research in education is paramount for our future but such activities should never prejudice our fundamental rights;
- (ii) Legal Notice 76/2014 is not the correct way in which the challenges regarding education and employment, in full respect of our fundamental right to privacy, should be addressed;
- (iii) It should not be the Minister who should be empowered with such data processing powers but the institutions established by law;
- (iv) Our laws should in principle reflect informational self-determination where the consent of the data subject is key, as further highlighted in the proposed EU General Data Protection Regulations

We shall naturally remain at your complete disposal for any further information and clarification you may require. We would also like to invite you to set up a meeting where we can further discuss this matter in more detail.

Wishing you once again congratulations for your appointment and thanking for your service to our country. We are fully confident of your commitment in the best interests of our citizens and children as well as champion of the fundamental right to privacy.

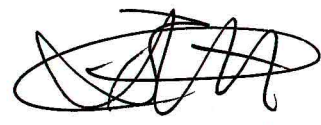
Yours sincerely,



Hon. Joseph Cassar



Hon. Paula Mifsud Bonnici



Hon. Claudette Buttigieg