

DIGITAL RIGHTS IRELAND CLG

Regina Doherty TD
Minister for Employment Affairs and Social Protection
Áras Mhic Dhiarmada, Store St
North Dock, Dublin 1

By email: minister@welfare.ie and cc regina.doherty@oir.ie

16 August 2018

Re: Interference with the Position of Data Protection Officer

Dear Minister

We write in relation to serious interference with the position of the Data Protection Officer (DPO) in your Department (DEASP).

As you will be aware from recent media coverage¹, the requirements of the General Data Protection Regulation (GDPR) have not been met regarding the role of the DPO in relation to the DEASP Privacy Statement.

In short, the DPO was first excluded from a decision to make changes to the Privacy Statement and was then given instructions regarding the exercise of his functions in relation to the Privacy Statement. Both these actions constitute violations of Article 38 GDPR.

The purpose of this letter is to give you an opportunity to explain (a) what steps have been taken to remedy this breach and (b) what safeguards have been put in place to prevent a recurrence, in order that we do not have to take this matter further.

¹ Elaine Edwards, 'Department Ordered Changes to "Biometric" Privacy on Website', The Irish Times, accessed 14 August 2018, <https://www.irishtimes.com/news/ireland/irish-news/departments-ordered-changes-to-biometric-privacy-on-website-1.3563006>.

Factual and legal background

The Privacy Statement was drafted by the Data Protection Officer and his staff, in a process which included a consultation period and eventual agreement on its terms by the Data Programme Management Board on 22 May 2018.

The Privacy Statement originally confirmed, in section 3.3, that biometric data is amongst the data categories which is processed by the DEASP. This was an accurate statement of the legal situation. The Department processes biometric data in a number of ways, both in relation to the Public Services Card and for other purposes, as has been acknowledged in public documents. The DPO and his staff were correct in this assessment and the Privacy Statement reflected his professional opinion as DPO.

On 5 July, however, the Secretary-General of the DEASP, following a media query received by him earlier that day, proceeded to substitute his opinion for that of the Data Protection Officer, and instructed Ms. O’Callaghan (an official in the DEASP) to alter the Privacy Statement, and to state to the media that “the existing privacy statement referred to biometric data in error”.

In a subsequent media statement the DEASP has attempted to defend this action by claiming that:

“[T]he DPO was out of the office on annual leave, so the secretary general, in conjunction with the head of communications, made the appropriate changes to the privacy statement.”²

We note that this statement fails to explain the urgency of this change, which was made the same day the media query was received, and fails to explain why it could not have waited until the DPO had returned from leave. In any event, despite being on leave the DPO was

² Elaine Edwards, ‘Department Ordered Changes to “Biometric” Privacy on Website’, The Irish Times, accessed 14 August 2018, <https://www.irishtimes.com/news/ireland/irish-news/departments-ordered-changes-to-biometric-privacy-on-website-1.3563006>.

contacted by another member of his team and confirmed that the original Privacy Statement was correct. This view was disregarded by the Secretary-General in ordering the change.

It is not clear from the correspondence released to us under FOI whether the Secretary-General was aware of the DPO's view regarding the media query and ignored it, or simply did not care to look for it. In either case, however, the failure to involve the DPO was a grave breach of Article 38(1) GDPR which provides that:

“The controller and the processor shall ensure that the data protection officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data.”

On the same day, 5 July, the Secretary-General also instructed the Data Protection Officer to “check the rest of the GDPR info and privacy statement to make sure we don't refer to collection of biometric data”.

This was a further interference with the role of the DPO, directing an outcome contrary to his professional judgment and undermining his independence in breach of Article 38(3) GDPR which provides that:

“The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks.”

Next steps

We have been contacted by a number of individuals who are concerned that this incident, in addition to itself constituting a number of breaches of the GDPR, forms part of a wider pattern of behaviour on the part of the DEASP. We hope that we do not need to underline the seriousness of this issue and the implications of this failure, at the highest level, in one of the largest data controllers in the state.

It is our preference to engage with you on this issue, but failing this the GDPR provides a number of potential remedies and sanctions and in the absence of a satisfactory response it is

our intention to fully pursue these on our own behalf and on behalf of the affected data subjects.

We look forward to hearing from you within 14 days outlining the steps you will take in response to these breaches of the GDPR and describing how you will provide appropriate guarantees in future for the independence of the DPO.

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

Chair, Digital Rights Ireland