

Our Ref: POD2/SMcG

Your Ref: 3/15/895

13th April 2016

██████████
Office of the Data Protection Commissioner
Canal House
Station Road
Portarlinton
Co. Laois

Re: 2nd Complaint re Primary Online Database

Dear ██████████,

I write further to your email of 13th April 2016 and the above matter.

I have just recently received a copy of the Department of Education's full response letter, dated 29th February 2016 from the Department via a Freedom of Information request, a copy of which I attach for your ease of reference.

I am surprised that your office did not notify me of this reply before your email of the 13th April 2016, given the time sensitivity of my complaint.

I note that the Department's letter is structured as a response to three paraphrases of some of my points of complaint. I wish to initially respond to same adopting the numbering scheme therein.

1. I complained of the threat to defund the education of any child whose parent did not consent to their offspring's data being transferred to the POD. The Department does not address my complaint in their response, except to implicitly accept it by stating they have as of the 29th February 2016 abandoned the policy of coercion complained of. Extraordinarily, they further confirm that, despite this critical policy change, they have not yet communicated with schools, who continue to believe that funding for children whose details will not be in POD will be withdrawn at the commencement of the 2016/17 academic term. The inevitable result will be further pressure being brought on parents of children to comply, under threat of (perceived) imminent defunding of their offspring's education.

The threat to withhold funding for children's education either now or starting 2016/17 has ensured that all of the data collected from parents has been obtained

unfairly. [REDACTED]

However, as the Department now acknowledges, and as argued by me for over a year, anonymous, minimised data is an acceptable alternative to the demands for data in the POD scheme. That being the case, all the personally identifiable data collected to date in the POD database is excessive processing, being unnecessary and therefore disproportionate data collection.

2. The Department denies the applicability of the Court of Justice of the European Union's decision in the Bara case (Case C 201/2014). In the Bara case, the CJEU found that the transfer of personal data from one emanation of the state to another emanation of the state could not rely upon the exemption of a legislative basis for that transfer (which would otherwise constitute a breach of the Data subject's Fundamental Rights as expressed in the Charter of Fundamental Rights and the Data Protection Directive) where that legislation itself represented a breach of citizen's Fundamental Rights.

The Department cites no authority for their bald denial of the applicability of EU caselaw other than to claim that the data in the Bara case was made between two government departments and that the POD does not solely involve such a transfer. As is clear from the judgment, this distinction was immaterial to the court's decision, which is based on the fundamental rights of the individual not the administrative form of the Romanian state entities.

(Though the Department's assertion is baseless on its own merits, it is worth pointing out that it is also factually incorrect the Romanian data transfer which was the subject of challenge in the Bara case was between a tax authority and a state Fund.)

3. The Department of Education's response does not address the issue complained of and misdirects itself on the principles of statutory interpretation.

The Department selectively quotes Section 266 of the Social Welfare Consolidation Act 2005, saying

"The 2005 Act authorises a "specified body" to share "prescribed" information with the Minister for Education and skills."

This is an inadequate description of the effect of Section 266 of the 2005 Act. Section 266 (a) permits the sharing of specified and prescribed information with the Minister for Education solely and exclusively

"where that Minister requires the information for the purpose of enabling him or her to provide education in accordance with Section 6(b) of the Education Act 1998"

If the information is not required solely for the purpose of enabling the Minister to provide education to children, there is no power granted by this section to share information.

SI 317/2015 seeks to amend SI 142/2007 by adding POD data to the schedule of prescribed data under Section 266 (a) of the 2005 Act. However, S266 of the 2005 Act does not permit arbitrary data to be scheduled. Only data which meets the test of being “required for the propose of enabling [the Minister] to provide education” may be lawfully scheduled.

POD data is not required to enable the Minister to provide education. The Minister has been able to provide education to children without the POD to date and it is now acknowledged by the Department of Education in numbered paragraph 1 of their letter of the 29th February 2016 that she can continue to do so for children whose parents do not agree to transfer of data to POD.

As the purported legal basis of SI 315/2015 is invalid on its face, there remains no legal basis for the POD data processing by way of transfer which has occurred to date and which the Department continues to seek, without lawful authority.

The requirement by the Department of Education to force collection by schools of POD data and transfer of same to the Department of Education has been neither fair nor lawful data processing.

I trust the above stands as a full response to the Department’s letter of the 29th February 2016.

Please note that not all of my grounds of complaint appear to have been conveyed by you to the Department of Education specifically, my earlier complaint that the Department of Education is collecting data regarding children’s psychological assessments, but not acknowledging that this constitutes sensitive personal data remains open and is unaddressed in either your Notice of Investigation or the Department’s letter of the 29th February 2016.

I will write under separate cover regarding some of other matters arising from the documents attached.

Yours faithfully

Simon McGarr