

# Police Surveillance During Protests May be Unlawful

Wednesday 4<sup>th</sup> December 2019

## Context

The Malta IT Law Association (MITLA) has taken note of reports from various media organisations about the fact that several plain clothes policemen were seen in strategic positions taking pictures and video footage of people during the civil protests occurring in Malta.

## Concern

MITLA expresses its concern about these developments and calls on the Office of the Information and Data Protection Commissioner (IDPC) of Malta to look into the matter with urgency. The IDPC is to initiate all necessary investigations and verifications in accordance with its powers in order to ensure that any and all processing of sensitive personal data carried out by the Police during these delicate times is carried out in accordance with applicable laws and in full respect of the fundamental rights and freedoms of the protestors.

## Unwarranted interference

Protest is an important political resource which is a fundamental right in any liberal western democracy. The state can't interfere with peaceful protest with no good reason and the organised collection and processing of photographic data without a strong justifiable legal basis can be perceived as an act of intimidation.

## Privacy Legislation

The taking of pictures and footage of protestors is tantamount to the processing of personal data and is subject to data protection legislation amongst which the *Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, Subsidiary Legislation 586.06* of the Laws of Malta (S.L. 586.06), which transposes EU Directive 2016/680.

Whilst Regulation 3(1) of S.L. 586.06 empowers the police to process personal data for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, MITLA has to underline the fact that in the context of last Sunday's protest, as well as the nature of the data itself including faces of protestors, such data would be considered at law as a special category of personal data.

In light of the provisions of Regulation 10 of S.L. 586.06, the processing of personal data by the Police, or any other competent authority as defined at law, which reveals amongst others political opinions or includes biometric data (such as facial images and details) should only be allowed “where strictly necessary, subject to appropriate safeguards for the rights and freedoms of the data subject”.

## **Safeguards need to be in place**

Malta is presently in a fragile state with many fundamentals of the rule of law being put to question. In this context, MITLA is preoccupied that the appropriate safeguards required for processing of personal data are not fully in place with the dire consequence that the rights and freedoms of the protestors could be under threat.

Even though Article 8(3) of S.L. 586.06 empowers the Police authorities to collect personal data by technical surveillance or other automated means for any of the purposes set out in regulation 3(1) such surveillance must be based on law. The competent authorities therefore cannot simply justify their actions through the provisions of S.L. 586.06 as these have to be laid down through another specific law or regulation. The Maltese legal system currently **does not have any specific law regulating such technical surveillance.**

## **Proportionality and Data Minimisation**

Regulation 4(1)(e) of S.L. 586.06 provides that Personal data should be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they are processed. Furthermore, Regulation 5(1) obliges the Police to “erase without undue delay” any personal data which is no longer required for the purposes set out in regulation 3(1).

MITLA questions how, in light of the current national situation, these data minimisation principles are being observed with respect to any personal data covertly collected by the Police, especially in relation to any time limits being set for the storing or erasing of such sensitive data and which should be pre-established in an applicable data retention policy.

Such data retention policy should include data categories and time-limits for processing and which need to be reviewed and approved by the Information and Data Protection Commissioner. S.L. 586.06 also empowers the Information and Data Protection Commissioner to refuse a data retention policy if it does not comply with these regulations.

## **Categorisation of data by the Police**

The processing of photographic images of the protestors on Sunday also introduces a conundrum as to how these factors in the provisions of S.L. 586.06. Regulation 6 in fact provides that the Police shall make a clear distinction between personal data of different categories of data subjects, including: (a) persons with regard to whom there are serious grounds for believing that they have committed or are about to commit a criminal offence; (b) persons convicted of a criminal offence; (c) victims of a criminal offence or persons with regard to whom certain facts give rise to reasons for believing that they could be the victim of a criminal offence; and (d) other parties to a criminal offence, such as persons who might be called on to testify in investigations.

MITLA has serious reservations as to how peaceful protestors have been tagged and categorised in light of the four category types listed above.

In light of this evolving situation, MITLA cannot but recall what is currently occurring in Hong Kong whereby, due to constant police surveillance in a time of great political unrest, protestors in Hong Kong opted to wear face masks. A few weeks ago, the Hong Kong government hurriedly passed an emergency law banning face masks during protests but which law was

quickly shot down by the highest court in Hong Kong on the basis of the fact that such was unconstitutional and went against the fundamental rights of the protestors.

## **Protecting freedom of expression**

MITLA has already stated its concern about the present surveillance techniques being utilised by the state and has published its legal opinion on the matter on 7/12/2017.

MITLA will continue to document how this situation will evolve in Malta and will share its legal review with Amnesty International and its European counterparts within professional and academic circles including the European Data Protection Board (EDPB).

The Malta IT Law Association (MITLA) is active in the research, discussion and circulation of information on legal developments taking place on the international plane and within the European Union with respect to ICT Law and the knowledge economy.

MITLA is registered as a Voluntary Organisation (VO/1166) in terms of Article 3 of the Voluntary Organisations Act 2007 (Act No, XXII of 2007), Malta.