

Information and Data Protection Commissioner

CDP/COMP/216/2022

[REDACTED]

vs

[REDACTED]

COMPLAINT

1. On the 20th of June 2022, Mr [REDACTED] and Ms [REDACTED] (the “complainants”), through their legal counsel, lodged a complaint with the Information and Data Protection Commissioner (the “Commissioner”), alleging an infringement of their data protection rights as safeguarded under the provisions of the General Data Protection Regulation¹ (the “Regulation” or “GDPR”) when Mr [REDACTED] (the “controller”) captured and shared a video with media houses without their consent or authorisation.

INVESTIGATION

2. Pursuant to article 58(1)(a) of the Regulation, the Commissioner requested the controller to put forward his submissions on the allegations raised by the complainants for the Commissioner to consider in his legal analysis of the case. On the 27th of September 2022, the controller held that he handed over the footage to the competent authorities to investigate the aggression he suffered for the purpose of identifying the perpetrator who threw a bottle at his face whilst carrying his duties as the [REDACTED].
3. The complainants were provided with the opportunity to rebut the arguments made by the controller and, by means of an email dated the 21st of October 2022, the complainants submitted that *“although the footage might have been handed over to the competent authorities...it also results that the same has been disseminated to other persons, namely media houses. The perpetrator of the breach also gave comments to the media houses, making it thus clear that he was in contact with the same entities with a clear intention to publicise the incident”*.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

Furthermore, he held that “██████████ was not carrying out his ██████████ at that point in time”. The complainants concluded that “had the material been solely disclosed to the Police, it would not have ended up available to the worldwide public”.

4. In line with the Commissioner’s complaint-handling procedure, the Commissioner provided the controller with the opportunity to rebut the arguments made by the complainants. On the 17th of November 2022, the controller submitted that, regarding the “so called “publicizing” of the incident, ██████████ was attacked in a public area and the identification of the perpetrator was without doubt paramount to public safety, which as it so happens is one of his main duties as ██████████”. He added that “██████████ duty towards ██████████ is not a mere switch which he can switch on and off, it would be absurd to have ██████████ look away from an offence being committed simply because he is not at the time carrying out his duties”.
5. The controller concluded that “in this situation there were no normal circumstances since the identification of such person was intended to locate an aggressor and threat to public safety. Thus, the processing of such data in favour of public interest and safety was overriding to the data subject’s own personal interest”.
6. Following such submissions, the Commissioner requested the controller to confirm whether he had shared the video with the media houses. On the 22nd of December 2022, the controller held that “the video was forwarded to the police at ██████████ police station and other officers, but cannot recall re media later on when he was interviewed”.

LEGAL ANALYSIS AND DECISION

7. For the purpose of this legal analysis, the Commissioner sought to establish whether article 2 of the Regulation must be interpreted as meaning that the recording of a video of individuals in a public space, and the sharing of that video with third parties, are matters which come within the scope of the Regulation.
8. In terms of article 2(1), the Regulation applies to the “processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system”.
9. The concept of ‘personal data’ within the meaning of that provision encompasses, according to the definition in article 4(1) of that Regulation, “any information relating to an identified or

15. A case from the Court of Justice of the European Union (CJEU) assists in understanding the extent of this exemption, making it clear that this exemption must be construed narrowly. In its judgment in the case of *Rynes vs Urad* (2014), the Court considered that, to the extent that video surveillance [...] covers, even partially, a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner, it cannot be regarded as an activity which is a purely ‘personal or household’ activity for the purposes of the second indent of Article 3(2) of Directive 95/46.
16. The Commissioner considers that since the controller captured the complainants in a public space, and eventually disclosed such video to third parties, the recording does not fall under the ‘personal’ or ‘household exemption’, and consequently, ██████████ is considered as a controller for the purpose of the specific processing activity.
17. The complainants held that the video was captured without their consent. However, the Commissioner emphasises that consent is just one of the lawful grounds for processing personal data under the Regulation. Article 6(1) thereof stipulates what may constitute such a legal basis, taking also into consideration all the other core principles for processing personal data as set out in article 5 of the Regulation⁶.
18. The European Data Protection Board⁷ states that every legal ground under article 6(1) of the Regulation can provide a legal basis for the processing of video surveillance data, including disclosure as defined under article 4(2) of the Regulation. However, in practice, the provision most likely to be used is legitimate interest and in rather exceptional cases, consent.
19. The Commissioner assessed the nature and specific circumstances of this case and concluded that consent would have never constituted a valid legal ground on the strength of which the processing operation under investigation could have been legitimised by the controller. Consequently, the Commissioner proceeded to examine article 6(1)(f) of the Regulation, which provides that the processing shall be lawful if it “*is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data...*”. The Commissioner is of the view that the reference to ‘*interests or fundamental rights*’, along with the fact that the interests are not qualified by ‘*legitimate*’ means that the data subject merits extensive protection.

⁶ Judgment of 13 May 2014, *Google Spain and Google*, C-131/12, para. 71.

⁷ *Ibid.* 3, para. 16.

identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to ... one or more factors specific to his physical ... identity”.

10. According to the case-law of the European Court on Human Rights, the image of a person recorded by a camera constitutes ‘personal data’ within the meaning of article 4(1) of the Regulation since it makes it possible to identify the person concerned.
11. The Commissioner determined that a video recording of natural persons, which is stored on a device, constitutes processing of personal data pursuant to article 2(1) of the Regulation². The Court of Justice of the European Union confirmed that the *“image of a person recorded by a camera constitutes personal data within the meaning of Article 2(a) of Directive 95/46 inasmuch as it makes it possible to identify the person concerned”*.³
12. As regards the concept of the ‘processing’, this is defined in article 4(2) of the Regulation as *“any operation or set of operations which is performed on personal data ... such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”*.
13. In the context of a video-surveillance system, the European Court on Human Rights held that a video, recording of persons which is stored on a continuous recording device, namely the hard disk drive of that system, constitutes the automatic processing of personal data, pursuant to article 2(b) and article 3(1) of Directive 95/46.⁴
14. Having established that the Regulation applies to such processing, the Commissioner notes that article 2 (2)(c) and recital 18 of the Regulation provide that the Regulation does not apply to the processing of person data by a natural person during a purely personal activity. Hence the Commissioner proceeds to determine, with objectivity and certainty, whether the processing subject to this complaint is carried out for a personal activity or otherwise⁵.

² Judgment of the 11th December 2019, *TK vs Asociația de Proprietari bloc M5A-ScaraA*, C-708/18. paragraphs 33 and 34.

³ Judgment of the 11th December 2014, *František Ryneš vs Úřad pro ochranu osobních údajů*, C-212/13, para. 22.

⁴ Judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 23 and 25.

⁵ The Commissioner’s legal analysis shall be strictly limited to the capturing of the video and the disclosure of such video to third parties by the controller.

20. Furthermore, article 21 of the Regulation provides that the “*controller shall no longer process the personal data unless the controller demonstrates **compelling legitimate grounds for the processing** which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.*” [emphasis has been added].
21. Within this context, the Commissioner examined the judgments⁸, delivered by the Court of Justice of the European Union (the “**Court**”), whereby it elaborated on the concept of the three-part test needed to satisfy the legitimate interest basis and held that “[a]rticle 7(f) of Directive 95/46 lays down **three cumulative conditions** so that the processing of personal data is lawful, namely, first, the **pursuit of a legitimate interest** by the data controller or by the third party or parties to whom the data are disclosed; second, **the need to process personal data for the purposes of the legitimate interests pursued**; and third, that **the fundamental rights and freedoms of the person concerned by the data protection do not take precedence.**” [emphasis has been added].
22. In this respect, the Commissioner noted that the three (3) conditions identified by the Court need to be cumulatively present in order for the processing of personal data to be lawful: (i) the existence of a legitimate interest justifying processing; (ii) the necessity of processing for the realisation of the legitimate interest; and (iii) the prevalence of that interest over the rights and interests of the data subject, which calls for a balancing exercise.
23. First, the processing is conditional upon the existence of a legitimate interest of the controller or of a third party. The Regulation does not define legitimate interest and thus, it is for the controller to determine whether there is a legitimate aim that could justify an interference with the right to the protection of personal data. The EDPB Guidelines provide that a “*legitimate interest needs to be **of real existence and has to be a present issue** (i.e. it must not be fictional or speculative). A real-life situation of distress needs to be at hand – such as **damages or serious incidents in the past – before starting the surveillance.**”⁹ [emphasis has been added].*
24. In the present case, the condition relating to the existence of a present and effective interest is fulfilled, since the controller declared with the news media that as he was going up the stairs, there were two people urinating on the rocks and upon his intervention, the woman started

⁸ Rigas satiksme, C-13/16, paragraph 28 and TK v Asociația de Proprietari bloc M5A-ScaraA, Case C-708/18, para. 40.

⁹ Ibid. 3, para. 20.

cursing and calling him ‘perverted’ for trying to put a stop to the public urination. As declared by the controller, it was at that point in time that he decided to start taking a video of the woman, who continued to direct strings of profanity towards him.

25. In relation to the second condition concerning the need to process personal data for the purposes of the legitimate interests pursued, the Commissioner noted that derogations and limitations in relation to the protection of personal data shall only apply in so far as strictly necessary. This condition shall also be examined in conjunction with the data minimisation principle enshrined in article 5(1)(c) of the Regulation, in accordance to which personal data shall be “*adequate, relevant and not excessive in relation to the purposes for which they are processed*”.
26. Questions concerning the necessity of processing also arise regarding the way evidence is preserved. In some situations, it may not be necessary to record the video material but may be more appropriate to use real-time monitoring instead. However, in the present case, the purpose of the actual recording by the controller, [REDACTED], was indeed necessary in the context of preserving evidence of the offences committed by the complainants.
27. Lastly, as regards the third condition laid down in article 6(1)(f) of the Regulation, relating to the existence of fundamental rights and freedoms of the data subject whose data require protection, which might override the legitimate interests pursued by the controller, it should be borne in mind that the assessment of this condition necessitates a balancing of the opposing rights and interests concerned and, in this context, the Commissioner stressed the significance of the data subject’s rights, particularly that the protection of personal data is a fundamental right.

In the light of the foregoing, the Commissioner hereby decides that the processing activity undertaken by the controller does not infringe the provisions of article 6(1)(a) of the Regulation and, consequently the complainants claim is being dismissed in its entirety.

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Ian Deguara
Information and Data Protection Commissioner