

Information and Data Protection Commissioner

CDP/COMP/425/2022

vs

COMPLAINT

1. On the 13th October 2022, Ms [REDACTED] (the “**complainant**”) lodged a complaint with the Information and Data Protection Commissioner (the “**Commissioner**”) pursuant to article 77(1) of the General Data Protection Regulation¹ (the “**Regulation**”), alleging that [REDACTED] (the “**controller**”) installed a CCTV camera on the façade of the property [REDACTED], which is capturing third-party properties and public spaces, and consequently considers this processing activity to be an infringement of the provisions of the Regulation.

INVESTIGATION

2. Pursuant to article 58(1)(a) of the Regulation and in line with this Office’s internal investigation procedure, by means of a letter dated the 19th October 2022, the Commissioner requested the controller to put forward her submissions in order to defend herself against the allegation raised by the complainant, including by providing a copy of the image grab taken from the footage of the CCTV camera.

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.

3. By means of an email dated 22nd October 2022, the controller submitted that she installed the CCTV camera for security reasons, especially since she is a [REDACTED] and has suffered damage to her property, including *“ħsara fuq il-karozza fosthom side mirror miksura b’daqqa kif ukoll diversi drabi sibt it-tyre imqatta’ filgħodu. Kemm ilha mwahħla din il-kamera, li sservi bhala deterrant, is-sitwazzjoni tġiebet”*.
4. By means of an email dated 27th October 2022, the controller was requested to provide the Commissioner with an image grab taken from the recordings of the CCTV camera system which effectively shows the area being captured by the camera’s angle of vision. A copy of the image grab extracted from the recording of the CCTV camera was submitted on the 7th December 2022.

LEGAL ANALYSIS AND DECISION

5. The systematic automated monitoring of a specific space by means of a CCTV camera brings about the collection and retention of information on all persons entering the monitored space that are identifiable on the basis of their looks. The Commissioner notes that the image of a person recorded by a camera constitutes personal data within the meaning of article 4(1)² of the Regulation. Consequently, surveillance in the form of a video recording of persons, which is stored on a continuous recording device, constitutes the automatic processing of personal data pursuant to article 4(2)³ of the Regulation.
6. After carefully assessing the image grab which was produced by the controller following a request in terms of article 58(1)(a) of the Regulation, the Commissioner establishes that the CCTV camera installed by the controller is capturing third-party properties and public spaces, including an excessive part of the road. Furthermore, the Commissioner notes that the systematic recording of third-party properties and public spaces, by means of a CCTV camera,

² “‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;”

³ “‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, 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;”

- cannot be considered as processing of personal data by a natural person during a purely personal or household activity, and therefore the provisions of the Regulation apply in their entirety.
7. In this regard, the Commissioner considered the judgment *František Ryneš v Úřad pro ochranu osobních údajů*⁴, whereby the Court of Justice of the European Union held that a video surveillance system which systematically records ***“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 the Article 3(2) of Directive 95/4”***⁵ [emphasis has been added].
 8. Having also noted that the principle of lawful processing, which is one of the data protection principles, requires that every data processing operation has a lawful ground for processing. In this regard, article 6(1) of the Regulation 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 Regulation.
 9. The European Data Protection Board, in its Guidelines on the Processing of Personal Data through Video Devices⁶ (the **“EDPB Guidelines”**), states that every legal ground under article 6(1) of the Regulation can provide a legal basis for the processing of video surveillance data. However, in practice, the provision most likely to be used is legitimate interest and in rather exceptional cases, consent.
 10. In this regard, the Commissioner analysed 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.

⁴ Judgment of the Court (Fourth Chamber), decided on the 11th December 2014.

⁵ Now it reads article 2(2)(c) of the Regulation: *‘This Regulation does not apply to the processing of personal data: by a natural person in the course of a purely personal or household activity.’*

⁶ Adopted by the EDPB Plenary Board on the 29th January 2020.

11. 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 defense of legal claims*” [emphasis has been added].
12. Within this context, the Commissioner examined the judgements⁷, 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].
13. 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 realization 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.
14. 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 provides that a “*legitimate interest needs to be of **real existence and has to be a present issue** (i.e. it must 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.**”⁸ [emphasis has been added].*
15. In the present case, the condition relating to the existence of a present and effective interest was not fulfilled, as the controller did not submit any form of evidence or police reports, indicative of the alleged incidents.

⁷ Rigas satiksme, C-13/16, paragraph 28 and *TK vs Asociatja de Proprietari bloc M5A-ScaraA*, C-708/18, paragraph 40.

⁸ Ibid. 3, page 20.

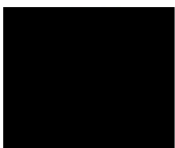
16. In relation to the second condition concerning the need to process personal data for the purposes of the legitimate interests pursued, the Commissioner notes that derogations and limitations in relation to the protection of personal data shall only apply insofar as it is strictly necessary. This 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”*.
17. The EDPB Guidelines provide that *“[i]n general, the necessity to use video surveillance to protect the controllers’ premises ends at the property boundaries. However, there are cases where the surveillance of the property is not sufficient for an effective protection. In some individual cases it might be necessary to exceed the video surveillance **to the immediate surroundings of the premises**”* [emphasis has been added].
18. In this context, the Commissioner notes that the CCTV camera which installed on the façade of the controller’s private property is capable of recording a wide area, and in fact, the image grab produced by the controller shows that the CCTV camera **is extensively capturing public space and third-party properties**.
19. 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 must be borne in mind, that the assessment of that condition necessitates a balancing of the opposing rights and interests concerned, and in this context, the Commissioner stresses the significance of the data subject’s rights, particularly that the protection of personal data is a fundamental right recognised by article 8 of the Charter of the Fundamental Rights of the European Union.
20. For this purpose, the Commissioner examines to what extent the systematic monitoring affects the fundamental right of the data subjects being monitored, particularly the Commissioner balances this exercise, by considering the number of the affected data subjects, the size of the area being monitored and the nature of the invasive processing which leads to the systematic and continuous monitoring of the data subjects’ movements.

In the light of the foregoing, the Commissioner hereby decides that the processing activity undertaken by the controller does not fulfil all the conditions laid down in article 6(1)(f) of the Regulation, particularly, the processing activity is deemed to be excessive, and does not comply with the data minimisation principle as enshrined in article 5(1)(c) of the Regulation.

Pursuant to article 58(2)(d) of the Regulation, the controller is hereby being ordered to bring the processing operation into compliance with the provisions of the Regulation by taking the necessary corrective action to ensure that the CCTV camera is adjusted in such a manner to point towards the private residence of the controller. If this is not possible due to a technical restriction or any other reason, the CCTV camera shall be removed.

The controller shall comply with these orders within twenty (20) days from the date of receipt of this legally binding decision and inform the Commissioner of the action taken immediately thereafter, by providing photographic evidence that the CCTV camera was adjusted or removed. The information about the action taken shall be submitted by email on idpc.cctv@idpc.org.mt

Non-compliance with the Commissioner's order shall be subject to an administrative fine in terms of article 83(6) of the Regulation.



Ian Deguara
Information and Data Protection Commissioner

Decided today, the 20th day of January, 2023