

## COMPLAINT

1. On the 13<sup>th</sup> October 2022, [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 Regulation<sup>1</sup> (the “**Regulation**”), contending that [REDACTED] and [REDACTED] (the “**controller**”) installed five (5) CCTV cameras within the block of apartments, ‘[REDACTED]’ in [REDACTED], which are allegedly capturing public access areas, public spaces and common areas. The CCTV cameras, which are the subject of the complaint, are the following:
  - a. two (2) CCTV cameras installed on the façade of the block of apartments;
  - b. two (2) CCTV cameras installed in the common parts of the block of apartments; and
  - c. one (1) CCTV camera on the rooftop of the block of apartments.

Consequently, the complainant considered the processing activity conducted by means of these five (5) CCTV cameras to be an infringement of the provisions of the Regulation.

## INVESTIGATION

2. Pursuant to article 58(1)(a) of the Regulation and this Office’s internal investigation procedure, on the 19<sup>th</sup> October 2022, the Commissioner requested the controller to put forward their

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<sup>1</sup> 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.

submissions in order to defend themselves against the allegation raised by the complainant, and were also requested to provide copies of the image grabs taken from the footage of the five (5) CCTV cameras.

3. By means of three (3) emails dated the 23<sup>rd</sup> October 2022, the controller submitted the following principal arguments for the Commissioner to consider in the legal analysis of the case:
  - a. that “*an agreement was reached by Flat 4, 5 and 6 before [the complainant] recently moved in to the apartment block*” [sic] and the controller outlined that the occupants agreed to install the CCTV cameras years ago;
  - b. that the system has been installed for years and the CCTV cameras were installed as the occupants were experiencing vandalism in the block of apartments;
  - c. that the occupants “*found letters torn up, ink on the clothes, even our gas regulator was destroyed. The number of times we called the police is uncountable*”; and
  - d. that the controller’s clothesline hanger was intentionally scratched with a sharp object and therefore the controller checked every minute of the footage. The controller added that “[the complainant] *and her relatives were on the rooftop when they decided to deliberately stay in front of the camera, acting suspiciously*”.
4. On the 26<sup>th</sup> October 2022, the controller provided a copy of the written agreement dated the 26<sup>th</sup> October 2022, signed by the occupants of Flat 4 and Flat 6, for the use of the CCTV system in the block of apartments.
5. On the 28<sup>th</sup> October 2022, the Commissioner requested the controller to further substantiate their arguments mentioned in their submissions, by providing the following:
  - a. copies of the image grabs taken from the footage of the five (5) CCTV cameras;
  - b. to indicate the legal basis upon which the controller are relying to carry out the processing activity pursuant to article 6(1) of the Regulation; and
  - c. to indicate if the controller sought the consent of all owners of the apartments.



6. By means of an email dated the 31<sup>st</sup> October 2022, the controller provided a copy of the police report filed against the complainant, including a summary of the contents of the report and copies of the image grabs extracted from the recording of the video surveillance system, and additionally submitted the following:
  - a. the CCTV cameras were installed before the complainant purchased the apartment;
  - b. the CCTV camera on the rooftop is “*facing our belongings and flat 4’s*”.
7. By means of an email dated the 4<sup>th</sup> January 2023, the Commissioner requested the controller to indicate on the image grab provided, the roof area pertaining to the controller. Following a telephone conversation on the same day, with this Office, the controller clarified that the rooftop is held *pro indiviso*. On the 4<sup>th</sup> January 2023, the controller added that “[*t*]he footage of the camera in question has legitimate interest (vandalism), so we are quite confused on why you are indecisive about the rooftop camera when clearly there is compelling video evidence of the data subject covering up the camera and scratching our personal belongings” [sic].

## LEGAL ANALYSIS AND DECISION

8. 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)<sup>2</sup> 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)<sup>3</sup> of the Regulation.

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<sup>2</sup> “‘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;”

<sup>3</sup> “‘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;”

9. After carefully assessing the image grabs which were produced by the controller following a request in terms of article 58(1)(a) of the Regulation, the Commissioner examined the image grabs produced from the footage of the CCTV cameras and established the following:

Camera Reference Number	The area/s being captured
Camera A is installed on the façade of the block of apartments.	The camera is capturing the common main entrance door of the block of apartments, as well as an extensive part of the pavement and the road.
Camera B is installed on the façade of the block of apartments overlooking the controller's balcony.	The camera is capturing the controller's balcony, but it is also capturing public access areas.
Camera C is capturing the common stairs.	The camera is capturing the block of apartments' common stairs used by all the occupants of the block of apartments, and also the controller's apartment's door.
Camera D (360° camera) is capturing the common stairs, used by all the occupants of the block of apartments.	Throughout his investigation, the Commissioner collected all the necessary evidence in relation to this specific camera, and confirmed that there is no processing activity that falls within the material scope in accordance with article 2 of the Regulation.
Camera E is installed on the block of apartments' roof top.	The camera is capturing the roof top that is used by all occupants of the block of apartments.

Furthermore, the Commissioner notes that the systematic recording of public spaces, public access areas and common parts, by means of a CCTV camera, 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.

10. Having considered the judgment *František Ryněš v Úřad pro ochranu osobních údajů*<sup>4</sup>, whereby the Court of Justice of the European Union held that a video surveillance system which

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

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 95/46”*<sup>5</sup> [emphasis has been added].

11. 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.
12. The European Data Protection Board in its Guidelines on the Processing of Personal Data through Video Devices<sup>6</sup> (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.
13. Having noted that the written agreement dated the 26<sup>th</sup> October 2022, was signed after the complainant lodged the complaint with this Office. The Commissioner further noted that the agreement was only signed by the occupants of Flat 4 and Flat 6, and therefore the Commissioner concluded that the controller did not seek the consent of all the owners of the apartments.
14. In this regard, the Commissioner examines 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.

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<sup>5</sup> 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.’*

<sup>6</sup> Adopted by the EDPB Plenary Board on the 29<sup>th</sup> January 2020.

15. 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].
16. Within this context, the Commissioner examines the judgments<sup>7</sup>, 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].
17. In this respect, the Commissioner notes 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.
18. 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 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.*”
19. In the present case, the condition relating to the existence of a present and effective interest does not seem to be fulfilled, since the Commissioner did not consider the allegations made in the police report to be sufficient evidence which concretely demonstrate that a real situation of distress concretely exists.

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<sup>7</sup> Rigas satiksme, C-13/16, paragraph 28 and TK v Asociația de Proprietari bloc M5A-ScaraA, Case C-708/18, paragraph 40.



20. In relation to the second condition concerning the need to process personal data for the purpose of the legitimate interests pursued, the Commissioner notes that derogations and limitations in relation to the protection of personal data shall only apply in so far 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 with which personal data shall be “adequate, relevant and not excessive in relation to the purposes for which they are processed”.
21. 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].
22. Within this context, the Commissioner notes that Camera A which is installed on the façade of the block of apartments 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 systematically monitoring all the data subjects entering the block of apartments**. Additionally, Camera B is capturing a public access space whilst Camera C installed in the block of apartments’ common stairs and Camera E installed on the rooftop respectively are capturing common spaces in the block of apartments, and therefore are monitoring all the data subjects entering these areas.
23. 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.
24. 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 light of the foregoing, the Commissioner hereby decides that the processing activity undertaken by the controller does not fulfil 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.**

**By virtue of article 58(2)(d) of the Regulation, the Commissioner is hereby ordering the controller to bring the processing operation into compliance with the provisions of the Regulation by taking the necessary corrective action to ensure that the angle of focus of the Camera B is solely capturing the balcony of the controller. If this is not possible due to a technical restriction or any other reason, Camera B shall be removed.**

**In terms of article 58(2)(f) of the Regulation, the Commissioner is hereby ordering the controller to stop the processing of personal data by removing Camera A, Camera C and Camera E.**

**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:**

- a. photographic evidence that Camera A, Camera C and Camera E were removed; and**
- b. a copy of the image grab taken from the footage of Camera B to demonstrate that the CCTV camera is solely capturing the balcony of the controller.**

**The information about the action taken shall be submitted by email on [idpc.cctv@idpc.org.mt](mailto:idpc.cctv@idpc.org.mt). Non-compliance with the Commissioner's orders 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 6<sup>th</sup> January 2023**