

Information and Data Protection Commissioner

CDP/COMP/434/2022

[REDACTED]

vs

[REDACTED]

COMPLAINT

1. On the 17th October 2022, [REDACTED] through her legal counsel (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 four (4) CCTV cameras on the façade of his private property [REDACTED] which are capturing third-party properties and public spaces, and consequently considers that the processing relating to him by means of the CCTV cameras infringes 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 19th October 2022, the Commissioner requested the controller to put forward his submissions in order to defend himself against the allegation raised by the complainant, and was also requested to provide copies of the image grabs taken from the footage of the four (4) CCTV cameras.

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.

[REDACTED]

3. By means of an email dated the 14th November 2022, the controller submitted copies of the image grabs extracted from the recording of the four (4) CCTV cameras.
4. On the 22nd November 2022, the controller through his legal counsel, submitted the following principal arguments for the Commissioner to consider in the legal analysis of this case:
 - i. that the complainant provided three police reports outlining that during this last year the complainant suffered vandalism on his property on three separate occasions. He further added that *“dan ma kienx incident izolat anzi il-fatti juru li hemm frekwenza u intenzjoni cara li jdejjqu u jivvessaq lill-klijent b'atti gravi fosthom rimi ta zejt u prodotti ohra mal-faccata tal-klijent u kif ukoll rimi ta actu fuq il-vettura tieghu meta kienet hdejn l-istess sar tieghu. Dan kollu jirrizulta mill-annessi rapporti. Sigurament din ma hiex sitwazzjoni felici anzi hija wahda serja u ta thassib”*;
 - ii. that the complainant does not feel safe in his home and that he feels that not only his property is being threatened but also his own life and that of his family;
 - iii. that *“[d]awn il-cameras huma essenzjali ghall-protezzjoni tal-hajja u l-interessi tieghu u dik ta familtu u li tali interessi huma legittimi, speċjalment fid-dawl tal-fatt li llum il-gurnata il-pulizija hija entita ineffikaci, u ghalhekk persuni fic-cirkostanzi tal-klijent necesarjament trid tara kif tista tiprotegi ruhha. Dawn il-cameras gew installati unikament sabiex il-klijent jissalvagwardja lilu innifsu, familtu u l-propjeta tieghu. Tajjeb li jinghad ukoll illi l-cameras ma humiex qed jaqbd u faccati ta terzi imma unikament it-triq quddiemu, triq li del resto hija pubblika u li hija miftuha ghal kulhadd”*;
 - iv. that the complainant made reference to article 6(1) of Regulation and noted that the following are applicable to justify the use of the CCTV cameras:

“(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) ;

(f) processing 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, in particular where the data subject is a child”.

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 four (4) image grabs which were produced by the controller following a request in terms of article 58(1)(a) of the Regulation, the Commissioner establishes that the CCTV cameras installed by the controller are capturing third-party properties and public spaces, as well as an excessive part of the road. Furthermore, the Commissioner notes that the systematic recording of public spaces 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.
7. Having considered the judgment *František Ryněš 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].

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;”

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.’

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 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.
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 defence of legal claims.*” [emphasis has been added].
12. Within this context, the Commissioner examines the judgments⁷, 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**

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

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

freedoms of the person concerned by the data protection do not take precedence.” [emphasis has been added].

13. 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.
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 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.*”
15. 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.
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 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*”.
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 cameras which installed on the façade of the controller’s private property are capable of recording a wide area, and in fact, the image grabs produced by the controller shows that the CCTV cameras **are extensively capturing public spaces and third-party properties**. In addition, the controller through his legal counsel also stated that CCTV cameras “*ma humiex qed jaqbdu faccati ta terzi imma unikament it-triq quddiemu, triq li del resto hija pubblika u li hija miftuha ghal kulhadd*”.
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 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.

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 four (4) CCTV cameras are 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 four (4) CCTV cameras 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 four (4) CCTV cameras were 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 9th January, 2023