

Information and Data Protection Commissioner

CDP/COMP/656/2023

[REDACTED]

vs

[REDACTED]

COMPLAINT

1. On the 20th of June 2023 [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] [REDACTED] (the “**controller**” or the “**supermarket**”) unlawfully shared a video recording containing her personal data to her employer and considered that the processing of her personal data infringes the provisions of the Regulation.
2. The complainant explained that while she was performing her job tasks at the supermarket on behalf of her employer, which is a separate company, she placed some items in her bag and inadvertently forgot to pay on her way out. The incident was captured by the CCTV camera and the controller sent the video recording to her employer.

INVESTIGATION

3. On the 4th of July 2023, pursuant to article 58(1)(a) of the Regulation and the internal investigation procedure of this Office, the Commissioner requested the controller to provide its submissions on this complaint, including any other information, which it deemed relevant to submit in connection with the allegation raised by the complainant.

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.

4. On the 4th of August 2023, the controller submitted that it has “*CCTV cameras in their establishments which are placed precisely for security reasons and to ensure that shoplifting does not take place*”. The controller stressed that by means of such CCTV cameras, it was able to collect evidence that the complainant had left the supermarket with some objects without paying. The controller held that, in order not to aggravate the matter, it informed the complainant’s employer to refrain from sending her to perform employment duties at the supermarket. However, the controller held that the complainant’s employer kept on insisting, and “*he had no other choice but to pass on a copy of the video*” and justified this processing activity pursuant to regulation 4(b) of the Restriction of the Data Protection (Obligations and Rights) Regulations. The controller concluded by stating that this is “*without prejudice to the right to pass the same video to the police officers so that the case can be investigated*”.

LEGAL ANALYSIS AND DECISION

5. As a preliminary step of the investigation, the Commissioner examined the complaint wherein the complainant alleged that the controller had unlawfully disclosed a video recording containing her personal data to her employer. As part of determining the admissibility of this complaint, the Commissioner viewed the video recording and noted that the complainant is identified based on her looks, and thus, this constitutes processing of her personal data within the meaning of article 4(1) of the Regulation.
6. The controller did not contest the fact that the video recording was disclosed to the employer of the complainant, and therefore, for the purpose of this complaint, the Commissioner sought to establish whether the controller had a legal basis to disclose the video recording to the employer of the complainant in accordance with article 6(1) of the Regulation.
7. The Commissioner highlights that every processing operation which falls within the meaning of article 4(2) of the Regulation must have a legal basis in terms of article 6(1) of the Regulation. Pursuant to the principle of accountability as set forth in article 5(2) of the Regulation, the controller shall be responsible for, and be able to demonstrate that the disclosure of the video recording to a third party is indeed lawful.
8. The Court of Justice of the European Union (the “CJEU”) held that “*Article 7 of Directive 95/46 sets out an exhaustive and restrictive list of cases in which the processing of personal data can be regarded as being lawful and that the Member States cannot add new principles relating to the lawfulness of the processing of personal data or impose additional requirements that have the effect*”.

*of amending the scope of one of the six principles provided for in that article (see, to that effect, judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, paragraphs 30 and 32)”². In a recent judgment, the CJEU reaffirmed that “it must be pointed out that any processing of personal data ... must satisfy **the conditions of lawfulness set by Article 6 of the GDPR**”³ [emphasis has been added].*

9. It therefore follows that the processing of personal data is deemed lawful if it comes within one of the six grounds as mentioned in article 6(1) of the Regulation, which are as follows: (a) consent; (b) contract; (c) compliance with a legal obligation; (d) vital interest; (e) performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; and (f) legitimate interest. In the present case, the controller needed to demonstrate that the disclosure of the video recording containing the complainant’s personal data was based on at least one of these legal grounds. However, during the course of the investigation, the controller did not cite any of these legal grounds to justify the lawfulness of the processing of the personal data pertaining to the complainant.
10. In the submissions dated the 4th of August 2023, the controller justified the disclosure of the video recording to the employer of the complainant pursuant to regulation 4(b) of the Restriction of the Data Protection (Obligations and Rights) Regulations (the “**Subsidiary Legislation 586.09**”), which provides that “[a]ny restriction to the rights of the data subject referred to in Article 23 of the Regulation shall only apply where such restrictions are a necessary measure required: - (b) for the prevention, detection, investigation and prosecution of criminal offences, including measures to combat any money laundering activity, and the execution of criminal penalties”.
11. Recital 4 of the Regulation provides that the right to the protection of personal data is not an absolute right, and thus, article 52(1) of the Charter allows the limitation of this fundamental right subject to the appropriate safeguards. Accordingly, article 23 of the Regulation states that national law may be introduced to restrict the application of certain provisions relating to the rights of the data subjects and the obligations of the controller, which concern the right to transparent information (article 12), the right to information (article 13 and article 14), the right of access (article 15), the right to rectification (article 16), the right to erasure (article 17), the right to restriction of processing (article 18), the notification obligation regarding rectification or erasure of personal data or restriction of processing (article 19), the right to data portability (article 20), the right to object (article 21), the

² Case C-582/14, Patrick Breyer vs Bundesrepublik Deutschland, decided on the 19th October 2016, para. 57.

³ Case C-268/21, Norra Stockholm Bygg AV v Per Nycander AB, decided on the 2nd March 2023, para. 29.

right not to be subject to an automated individual decision making (article 22), the communication of a personal data breach to the data subject (article 34) and article 5 as far as its provisions correspond to the rights and obligations provided for in article 12 to 22.

12. Subsidiary Legislation 586.09 was introduced “*to apply restrictions to certain obligations and rights provided for in Article 23 of the Regulation*”⁴. The Regulation and Subsidiary Legislation 586.09 do not define the term ‘restrictions’, however, the ‘Guidelines 10/2020 on Restrictions under Article 23 GDPR’ adopted by the European Data Protection Board define ‘restrictions’ as follows:

“[t]he term restrictions will be defined as any limitation of scope of the obligations and rights provided for in Articles 12 to 22 and 34 GDPR as well as corresponding provisions of Article 5 in accordance with Article 23 GDPR. A restriction to an individual right has to safeguard important objectives, for instance, the protection of rights and freedoms of others or important objectives of general public interest of the Union or of a Member State which are listed in Article 23(1) GDPR. Therefore, restrictions of data subjects’ rights can only occur when the listed interests are at stake and these restrictions aim at safeguarding such interests.” [emphasis has been added].

13. The controller invoked regulation 4(b) of Subsidiary Legislation 586.09, which is intended to restrict the rights of the data subjects only when such a restriction is necessary “*for the prevention, detection, investigation and prosecution of criminal offences*”. The Commissioner emphasises that this restriction may be invoked by a body that processes personal data for the purposes of the prevention, investigation, detection and prosecution of criminal offences that fall with the scope of the Regulation. Recital 19 of the Regulation provides that “[w]hen the processing of personal data by private bodies falls within the scope of this Regulation, this Regulation should provide for the possibility for Member States under specific conditions to restrict by law certain obligations and rights when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard specific important interests including public security and 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. This is relevant for instance in the framework of anti-money laundering or the activities of forensic laboratories”.

⁴ Regulation 3 of Subsidiary Legislation 586.09.

14. This leads the Commissioner to conclude that the controller is wrongly interpreting regulation 4(b) of Subsidiary Legislation 586.09 for the following reasons: (a) the complainant did not request the controller to exercise any of her data protection rights pursuant to the Regulation; and (b) the controller is a supermarket conducting a commercial activity, which clearly is not competent or authorised to process personal data within the scope of the Regulation for the purposes of the prevention, investigation, detection or prosecution of criminal offences.
15. The Commissioner clarifies that the restrictions held in Subsidiary Legislation 586.09 do not constitute grounds to legitimise processing operations and it is indeed article 6(1) of the Regulation which is the appropriate provision that sets forth the lawful bases of the processing.

Based on the foregoing considerations, the Commissioner hereby decides that the controller failed to demonstrate that the disclosure of the complainant's personal data to her employer is based on any of the lawful bases held in article 6(1) of the Regulation. Therefore, the Commissioner concludes that the controller infringed article 6(1) of the Regulation.

In terms of article 58(2)(b) of the Regulation, the Commissioner is hereby serving the controller with a reprimand and warned that in the event of a similar infringement, the Commissioner shall take the appropriate corrective action.

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**Ian Deguara
Information and Data Protection Commissioner**

Right of Appeal

In terms of article 26(1) of the Data Protection Act (Chapter 586 of the Laws of Malta), “*any person to whom a legally binding decision of the Commissioner is addressed, shall have the right to appeal in writing to the Tribunal within twenty days from the service of the said decision as provided in article 23*”.

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing and addressed to:

The Secretary
Information and Data Protection Appeals Tribunal
158, Merchants Street
Valletta.