

Information and Data Protection Commissioner

CDP/COMP/453/2022

██████████
vs
██████████

COMPLAINT

1. On the 28th October 2022, ██████████ through his 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 ██████████ (the “**controller**”) failed to comply with his request to access his personal data.

2. As supporting documentation, the complainant provided a copy of the subject access request² dated the 30th September 2022, which request contained a copy of the power of attorney. The complainant requested the controller to provide the following:
 - *“transaction lists of all accounts of our client, which contain all actually executed deposits and withdrawals (incl. date of execution) as well as the respective games played (casino, sports betting, poker, etc.) including a comprehensible explanation of the list(s);*
 - *the information how much money our client has won or lost in total;*
 - *the information whether our client’s winnings or losses include winnings or losses due to sports betting and if so, how much of the winnings or losses are due to sports betting;*
and

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.

² The documentation was submitted in German and translated to English by the complainant.

- *the information with which legal entity or legal entities the contractual relationship has been established”.*
3. In addition, the complainant submitted a copy of the reply provided by the controller on the 28th October 2022, wherein the controller informed the complainant that “[w]e have carefully considered all specific circumstances and aspects relevant to your request and have weighed the legitimate interests of your client and ourselves with respect to your request. We believe that your request is predominantly aimed to facilitate litigation. In this light we believe it is necessary for the pursuit of our legitimate interests to restrict access to the data requested by denying your request”.

INVESTIGATION

4. In terms of this Office’s investigation procedure and article 58(1)(a) of the Regulation, the controller was provided with a copy of the complaint, including the supporting documentation, and requested to put forward any information which is deemed relevant and necessary to demonstrate that the restriction invoked by the controller is necessary and proportionate. In particular, the Commissioner requested the controller to indicate whether there were ongoing judicial proceedings filed by the complainant against the controller at the time of receipt of the subject access request, and if in the affirmative, to provide the necessary evidence. Furthermore, the Commissioner requested the controller to submit a copy of the necessity and proportionality test applied in relation to the restriction imposed by the controller in terms of regulation 4(e) of the Restriction of the Data Protection (Obligations and Rights) Regulations, Subsidiary Legislation 586.09 (the “**Subsidiary Legislation 586.09**”).
5. In its reply dated the 29th November 2022, the controller provided that the “*complainant has not filed judicial proceedings against ██████████ in Austria as of yet, but the Law Firm filing the complaint with the IDPC in this case, has already initiated two separate legal proceedings against ██████████ in Austria, and has also filed European Payment Orders (EUIPOs) against ██████████ s. Given that the legal basis for the Law Firm’s Argument is identical in each and every case, we expect judicial proceedings to be initiated against ██████████ in Austria shortly*”.
6. The controller submitted a copy of the necessity and proportionality test dated the 24th October 2022, which was conducted by the controller prior to deciding on invoking the restriction. The

Commissioner noted that the necessity and proportionality test is an internal document of the controller and therefore, the document was solely used by the Commissioner for the purpose of investigating this complaint.

LEGAL ANALYSIS AND DECISION

7. During the course of the investigation, the Commissioner established that the complainant had exercised his right to access his personal data in terms of article 15 of the Regulation, by means of a request dated the 30th September 2022. In the reply dated the 28th October 2022, the controller restricted the right of the complainant to access his personal data in the belief that the request is predominantly aimed to facilitate litigation. In this regard, the Commissioner sought to establish whether the restriction invoked by the controller pursuant to regulation 4(e) of Subsidiary Legislation 586.09 applies to the present case, particularly, by considering the assessment conducted by the controller to restrict the right of the complainant.

Subject Access Request: Article 15 of the Regulation

8. Article 15 of the Regulation grants data subjects far-reaching rights of access in relation to the processing of their personal data. Its predominance is derived from article 8(2) of the Charter of Fundamental Rights of the European Union (the “**Charter**”), which explicitly refers to the right of access, by stating that “[e]veryone has the right of access to data which has been collected concerning him or her ...”. This corresponds to the objective of the Regulation which is clearly outlined in recital 10 of the Regulation, that is, to ensure a consistent and high level of protection of natural persons within the European Union.
9. It has been repeatedly stated by the Court of Justice of the European Union (the “**CJEU**”) that this right is instrumental to the exercise of the other data subjects’ rights as set forth in the Regulation³, mainly articles 16 to 19, 21, 22 and 82. Notwithstanding this, the exercise of the

³ Case C-487/21, ‘*FF vs Österreichische Datenschutz-behörde*’, decided on the 4th May 2023: “*In particular, that right of access is necessary to enable the data subject to exercise, depending on the circumstances, his or her right to rectification, right to erasure (‘right to be forgotten’) or right to restriction of processing, conferred, respectively, by Articles 16, 17 and 18 of the GDPR, as well as the data subject’s right to object to his or her personal data being processed, laid down in Article 21 of the GDPR, and right of action where he or she suffers damage, laid down in Articles 79 and 82 of the GDPR.*” (para. 35).

right of access is an individual's right and is certainly not conditional upon the exercise of other rights⁴.

10. Article 15 of the Regulation provides the data subject with the right to request, whilst the controller has the obligation to provide information and personal data. Article 15(1) and (3) of the Regulation empowers the data subject to obtain from the controller: (i) confirmation as to whether or not personal data concerning him are being processed and, if so, to receive information about the processing activity, and (ii) to receive a copy of the personal data being processed.
11. The CJEU's Advocate General Pitruzzella in his Opinion explained that article 15(1) of the Regulation "*gives specific expression to the right of access to personal data and related information, defining the precise subject matter of the right of access and the scope of application*", whereas article 15(3) of the Regulation "*provides more details as to how that right is to be exercised, specifying in particular the form in which the controller must provide the data subject with personal data, that is to say, in the form of a copy and, therefore, a faithful reproduction of the data*"⁵.
12. Given that the right of access is an expression of article 8(2) of the Charter, it is formulated in very broad terms and, as a result, the CJEU adopted a wide interpretation of this article, with specific reference to the recent judgments delivered in 2023⁶. This is naturally due to the fact that the right of access is the crux of guaranteeing the protection of the data subjects' right to data protection. To this end, the controller should seek to handle the request in such a manner to give the broadest effect to the right of access.
13. It is evident from the wording of article 15 of the Regulation, that the law does not require the data subject to justify or give any reasons for a request under the Regulation, and any beliefs of the controller as to what the data subject's reasons are, should not affect that request as otherwise this would render the right of access futile and ineffective.

⁴ European Data Protection Board, '*Guidelines 01/2022 on data subject rights - Right of access*' (Version 2.0), adopted on the 28th March 2023 (para. 12).

⁵ Case C-487/21, Opinion of Advocate General Pitruzzella, delivered on the 15th December 2022, (para. 48 and 49).

⁶ Case C-487/21, '*FF vs Österreichische Datenschutzbehörde*', decided on the 4th May 2023, & and Case C-154/21, '*RW v Österreichische Post AG*', decided on the 12th January 2023.

14. This is further supported by the interpretation provided by the European Data Protection Board (the “EDPB”) in its Guidelines 01/2022 published in March 2023, which reads as follows: “[c]ontrollers should not assess “why” the data subject is requesting access, but only “what” the data subject is requesting ... and whether they hold personal data relating to that individual [F]or example, **the controller should not deny access on the grounds or the suspicion that the requested data could be used by the data subject to defend themselves in court in the event of a dismissal or a commercial dispute with the controller**”⁷ [emphasis has been added].

Restriction in terms of Subsidiary Legislation 586.09

15. Recital 4 of the Regulation provides that the right to the protection of personal data is not an absolute right, and it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This has been reaffirmed by the CJEU in the judgment of Facebook Ireland and Schrems⁸.
16. The fundamental right to the protection of personal data may be subject to some limitations pursuant to article 52(1)⁹ of the Charter. This therefore means that the limitations should be provided by law, respect the essence of the rights and freedoms, and be necessary and proportionate to genuinely meet objectives of general interest or the need to protect the rights and freedoms of others. Therefore, a restriction should not be extensive and intrusive in such a manner that it would void a fundamental right of its basic content.
17. Whereas the Regulation does not define the term ‘restrictions’, the EDPB defines it “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”. The EDPB further provides that 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**

⁷ Ibid 4 (para. 13).

⁸ Case C-311/18, ‘Data Protection Commissioner vs Facebook Ireland and Maximillian Schrems’, decided on the 16th July 2020 (para. 172).

⁹ Article 52(1) of the Charter provides that: “1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

are at stake and these restrictions aim at safeguarding such interests”¹⁰ [emphasis has been added].

18. The scope of the obligation and right provided for in article 15 of the Regulation may be restricted by national legislation. To this effect, regulation 4(e) of Subsidiary Legislation 586.09 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: (e) **for the establishment, exercise or defence of a legal claim and for legal proceedings which may be instituted under any law**” [emphasis has been added].
19. Regulation 7 of Subsidiary Legislation 586.09 makes it abundantly clear that any restriction must be a “*necessary and proportionate measure*”, which effectively means that an assessment needs to be undertaken by the controller on a case-by-case basis to determine whether such measure is indeed “*a necessary and proportionate measure*”, rather than merely refusing to comply with a request.
20. Pursuant to article 5(2) of the Regulation, the controller must be able to concretely demonstrate how the restriction is indeed necessary and if this part of the test is passed, the controller must proceed to show the element of proportionality. The case law of the CJEU emphasises that any limitation to the rights of the data subjects must pass a strict necessity test. In C-73/07, the CJEU held that “*derogations and limitations in relation to the protection of personal data ... must apply only insofar as is strictly necessary*”¹¹ [emphasis has been added].
21. Thus, in his assessment, the Commissioner analysed the replies provided by the controller to the complainant, including the necessity and proportionality test conducted by the controller, wherein the right of the data subject was restricted in full pursuant to regulation 4(e) of Subsidiary Legislation 586.09.
22. The context within which the controller invoked the restriction could only be justified if the controller concretely demonstrates that the restriction is indeed necessary to defend a legal claim **and** legal proceedings which may be instituted by the complainant under any law. During the course of the investigation, the controller reiterated that the right of the data subject was being

¹⁰ European Data Protection Board, ‘*Guidelines 10/2020 on restrictions under Article 23 GDPR*’ (Version 2.0), adopted on the 13th October 2021 (para. 8).

¹¹ Case C-73/07, ‘*Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*’, decided on the 16th December 2008, (para. 56).

restricted on the basis that the “*request is predominantly aimed to facilitate litigation*”. The Commissioner does not consider this reason to be compliant with the objective of the restriction as set forth in regulation 4(e) of Subsidiary Legislation 586.09. The said regulation provides that the right of the data subject may only be restricted “*for ... defence of a legal claim **and** for legal proceedings*” [emphasis has been added]. Thus, the restriction shall only apply if it is necessary for the controller to defend an actual legal claim **and** legal proceedings instituted under any law. Hence, the controller cannot invoke the restriction merely on the assumption that the data subject **may**, following the provision of the information, institute legal proceedings against the controller. This led the Commissioner to conclude that the controller has failed to provide evidence that there is a legal claim and legal proceedings between the parties [emphasis has been added].

23. Without prejudice to the above, it must be emphasised that even in the eventuality that there is an actual legal claim and legal proceedings, for the restriction to apply, the controller shall demonstrate that the application of the restriction is indeed a necessary and a proportionate measure.

On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller has failed to demonstrate how restricting the right of the complainant, at the time of receipt of the request, was indeed a necessary measure in terms of regulation 4(e) of Subsidiary Legislation 586.09. This therefore led to an infringement of article 15 of the Regulation.

In terms of article 58(2)(c) of the Regulation, the controller is hereby being ordered to comply with the request and provide the complainant with the information prescribed under article 15(1)(a) to (h) of the Regulation, and also with a “*copy of the personal data undergoing processing*” at the time of receipt of the request.

The controller shall comply with this order without undue delay and by no later than twenty (20) days from the date of receipt of this legally binding decision and inform the Commissioner immediately thereafter of the action taken.

Non-compliance with this order shall lead to an administrative fine in terms of article 83(6) of the Regulation.

After considering the nature of the infringement, the controller is hereby being served with a reprimand pursuant to article 58(2)(b) of the Regulation and warned that, in the event of a further similar infringement, the appropriate corrective action shall be taken accordingly.

Ian
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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 (Cap 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.