Information and Data Protection Commissioner

CDP/COMP/485/2023

[redacted]

vs

[redacted]

[redacted]

COMPLAINT

1. On the 6th April 2023, [redacted] through his legal counsel (the **"complainant"** or the **"data subject"**) lodged a complaint with the Information and Data Protection Commissioner (the **"Commissioner"**) pursuant to article 77(1) of the General Data Protection Regulation[1] (the **"Regulation"**), against [redacted] (the **"controller"**) *"concerning the illegal, unnecessary, and unjustified processing of* [the complainant's] *personal data consisting of hundreds of pages of illegally obtained private WhatsApp messages"*.

FACTS OF THE CASE

2. For the purpose of this complaint, the Commissioner assessed the relevant points set out in the complaint:

    a. that the case pertains to a blog post[2] titled [redacted]', published on the controller's website on the 21st March 2023. Through this post, more than two hundred (200) pages of a WhatsApp chat conversation, containing the data subject's personal data, were made publicly available to an indefinite number of individuals without his permission;

[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]

b. that the WhatsApp chat dating back to 2019, is a conversation between the complainant and [redacted] **("third party")**. It includes intimate references to the data subject's personal and private life, as well as the personal and private lives of the data subject's family, third parties, and their respective families. The complainant noted that the consequences on these individuals have been severe;

c. that the chat transcripts, processed by the controller, are found exclusively on the complainant's mobile phone. This data and the mobile phone were deposited in court proceedings against the data subject, on the 30th November 2020. On that day, the complainant objected to the production of the entire dataset, asserting that most of the data were irrelevant to the court proceedings. Subsequently, the Court of Magistrates imposed a ban on the publication of the contents of the phone. This ban was reaffirmed by the Criminal Court on the 29th November 2021, wherein it was stipulated that:

> *"ma jsir ebda pubblikazzjoni kemm fil-midja lokali, fuq il-midja soċjali, fil-mezzi tax-xandir, f'kwalunkwe kitba stampata kemm dattilografikament kif ukoll elettronikament tal-kontenut tal-atti u d-dokumenti li jinsabu fl-atti proċesswali fl-isem "Ir-Repubblika ta' Malta vs* [redacted] *" li għalihom għandhom aċċess unikament il-partijiet"* **(marked and annexed Doc IDPC 1);**

d. that based on investigations conducted by the Malta Police Force, it was established that the controller clandestinely acquired the complainant's data from within the court proceedings. Subsequently, the Criminal Court ordered the police to prosecute the controller for publishing the private and prohibited material **(marked and annexed Doc IDPC 2)**. The Criminal Court stated as follows:

> *"Wara li rat l-artikolu 517(4) tal-Kodiċi Kriminali, tordna lil Kummissarju tal-Pulizija sabiex jiehu passi kriminali kontra l-imsemmi* [redacted] *quddiem il-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali, ghal disprezz lejn l-awtorita taghha u allura bir-reat imfassal fl-artikoli 517 u 686 tal-Kodici Kriminali, kif ukoll l-artikolu 996 tal-Kodici ta' l-Organizzazzjoni u Procedura Civili u dan meta fil-21 ta' Marzu 2023 fuq is-sit* [redacted] *huwa kiser l-ordni ta' din il-Qorti datata 29 ta'*

Novembru 2021 u ppubblika fuq l-imsemmi sit parti mill-kontenut tad-Dokumenti XYZ1 et seq. misjuba fl-atti tal-kawza surriferita";

e. that the processing of the complainant's personal data by the controller was not only illegal, but also entirely unjustified, unnecessary, and serves no legitimate purpose. It has caused the data subject and his family immeasurable distress and anguish. The harm caused by the illegitimate processing is amplified by the controller's efforts to achieve notoriety and disseminate the WhatsApp conversations as widely as possible. In fact, in October 2021, the controller pledged his intention to cause as much harm as possible to the third party. To fulfil this intention, the controller published the WhatsApp messages, thereby inflicting immeasurable misery upon the data subject and his family;

f. that by no stretch of anyone's imagination can it be said that there is substantial public interest in the dissemination of private conversations with a third party (which topics of conversation have absolutely nothing to do with the criminal proceedings against the data subject). The post only serves to create sensationalism and places the data subject in a perpetual negative light in the public eye;

g. that the controller failed to adhere to the principles as outlined in article 5(1)(a), article 5(1)(b), and article 5(1)(c) of the Regulation. The complainant argued that the processing of his personal data cannot, in any way, be said to be *"proportionate, necessary and justified for reasons of substantial public interest"*;

h. that a WhatsApp conversation is private between two (2) individuals. By its nature, it is not intended for public dissemination. The contents of any conversation, especially a private one, should be treated with higher levels of care and sensitivity; and

i. that *"in the circumstances the data subject respectfully requests the Data Protection Commissioner that, after finding that the controller's data constitutes a breach of the Data Protection Act and Regulation (EU) 2016/679, orders the controller to immediately and permanently delete the post in its entirety and takes steps necessary, including but not limited to, the removal the data from any publicly accessible domain; this apart from any other measure or decision which the Commissioner for Data Protection deems fit to take"* [emphasis has been added by the complainant].

INVESTIGATION

Request for submissions

3. Pursuant to article 58(1)(a) of the Regulation, the Commissioner provided the controller with a copy of the complaint, including the documentation attached thereto, and requested the controller to put forward his submissions in order to defend himself against the allegations raised by the complainant.

4. By means of an email dated the 9th May 2023, through his legal counsel, the controller submitted the following principal arguments for the Commissioner to consider in the legal analysis of the case:

    a. that the controller, acting in the capacity of an author, writer and journalist, asserted that the contents of the WhatsApp chats that were disclosed were of significant public interest. It was on this basis that he chose to publish them. The controller argues that upon reviewing the conversations in question, it becomes immediately evident that they pertain to a matter of public interest involving an individual accused of the murder of a journalist, Daphne Caruana Galizia, and also a prominent businessman in our country, involved in numerous government dealings, and a Member of Parliament affiliated with the same government;

    b. that, therefore, as an author, writer and journalist, the controller falls within the ambit of article 9 of the Data Protection Act (Chapter 586 of the Laws of Malta) (the **"Act"**), which stipulates that data can be processed in the public interest and in accordance with the right to freedom of expression;

    c. that the controller, while processing the data in question, ensured in an objective manner that the data were proportionate, necessary and justified for reasons of substantial public interest;

    d. that in order to remove any doubts regarding the public interest or relevance of the conversations in question, the following are just a few of the disclosed facts from these chats:

" a. Il-fatt illi [the third party] *irciviet ammont sostanzjali fi flus kontanti bhala rigal minghand* [the complainant], *fir-rigward tal-hlas tas-senserija, xi haga li dejjem cahdet pubblikament;*

b. Dak li stqarret [the third party] *meta b'messagg mibghut lil-*[the complainant] *qalet illi "ma jimpurtax kulhadd jithanzer' b'referenza ghall-membri tal-Gvern.*

c. llli l-fatt li saret konsulent ma' [redacted] *tal-lTS u ddahhal paga ohra fil-but, kif wara l-publikazzjoni ta' dawn ic-chats irrizulta li kienet inghaqdet mat-thanzir ta' shaba u hadet lt-tieni paga minghand* [redacted] *tal-lTS u lanqas iddikjarat dan fid-dikjarazzjoni tal-assi tal-membri parlamentari.*

d. ll-bosta rigali li [the complainant] *ta' lil* [the third party] *fosthom basktijiet u hwejjeg tad-ditta li jiswew l-eluf"*;

e. that the controller *"jaghmel referenza wkoll ghal dak li qalet l-Qorti Ewropeja ghad-drittijiet tal-bniedem li diga kella instanzi fejn pronuncat ruhha rigward sitwazzjoni simili ghal din odjerna. Di fatti fis-sentenza moghtija mill-Qorti Ewropea ghad-drittijiet tal-bniedem fid-29 ta' April tas-sena 1979 fl-ismijiet 'The Sunday Times vs the United Kingdom' ingħad illi kundanna fuq gurnalist għal disprezz tal-qorti għall-pubblikazzjoni bi ksur ta' projbizzjoni imposta mill-qorti tikser id-dritt fundamentali tal-bniedem protett mill-artikolu 10. Fi ftit kliem f'din il-kawza l-Onorabbli Qorti Ewropeja ghad-drittijiet tal-bniedem sostniet li l-liberta tal-espressjoni fl-ambitu tal-interess pubbliku jisboq kull restrizzjoni li seghta kien hemm u allura sabet li kien hemm ksur tal-Artikolu 10 (2) u allura r-restrizzjoni li kienet imposta mil-Qorti ma kienitx proporzjonata mal-ghan li kien hemm bzonn li jintlahaq.*

Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes ***that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention****. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2)*

(art. 10-2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary" [emphasis has been added by the controller];

f. that additionally, the controller noted that there has already been a pronouncement on this same case by the Broadcasting Authority. In a complaint brought before it regarding the reporting of these WhatsApp chats, it was explicitly stated that the contents of these WhatsApp chats were of public interest. The controller proceeded to refer to the Broadcasting Authority's decision dated 3rd May 2023, where the following was stated:

"Wara li l-Awtorità semgħet is-sottomissjonijiet taż-żewġ partijiet, nnotat dan li ġej:-

- *Huwa minnu li l-kwistjoni taċ-chats kienet ta' interess pubbliku minħabba r-relevanza tagħhom.*
- *Rat ukoll li diversi punti miċ-chats bejn il-membru parlamentari* [the third party] *u* [the complainant] *fosthom li d-deputat ħadet flus bħala senserija u l-kumment li kulħadd jitħanżer ġew irrappurtati permezz ta' rappurtaġġ ta' stqarrijiet jew kummenti minn kelliema politiċi"*; and

g. that *"ghaldaqstant l-esponenti jissottometti li dan l-ilment ta'* [the complainant] *akkuzzat bil-qtil ta' Daphne Caruana Galizia jvergi fuq il-frivolu u vessattorju stante li huwa car li l-ipprocessar ta' data saret minn gurnalist fl-interess pubbliku u ghalhekk tali ilment ghandu jigi michud".*

5. On the 12th May 2023, the Commissioner provided the complainant with the opportunity to rebut the arguments made by the controller. On the 29th May 2023, the complainant rebutted the arguments and submitted the following principal arguments:

a. that the complainant submits that the controller's arguments are unfounded both at fact and at law;

b. that the controller does not dispute that he published over three hundred seventy (370) pages of private chats between the complainant and a third party. These chats span over a three (3) month period and contain information about intimate sexual behaviour, private familial relations, sensitive personal circumstances, and personal thoughts and opinions. Such information was expressed in the context of a private conversation between adults.

c. that *"to defend his illegal behaviour Mr.* [redacted] *premises that: 'minn qari ta' dawn c-chats wiehed minnufih jinduna x'inhu dak ta' interess publiku bejn persun (sic) akkuzzata (sic) bil-qtil tal-gurnalista Daphne Caruana Galizia li kien wiehed min-negozjanti ewlenin f'pajjizna mdahhal f'bosta negozju tal-Gvern u Membru Parlamentari parti mill-istess Gvern'. And that the publication was 'fl-interess pubbliku u bid-dritt tal-liberta tal-espressjoni'. To support this, he cites article 9(1) of Chapter 586 of the Laws of Malta"*;

d. that the controller's attempt to justify his indiscriminate and illegal processing of personal data as being in the public interest is, respectfully, incorrect;

e. that in order for any public interest argument to succeed, one must demonstrate that the processing was: (i) proportionate, (ii) necessary and (iii) for substantial public benefit. The Information Commissioner's Office states: *"Substantial public interest means the public interest needs to be real and of substance. Given the inherent risks of special category data, it is not enough to make a vague or generic public interest argument - you should be able to make specific arguments about the concrete wider benefits of your processing"*[3];

f. that the controller has not, at any point, demonstrated, whether specifically or otherwise, how publishing the entire three hundred seventy (370) pages of private conversation was in the public interest, for substantial public benefit, or proportionate. The submissions provided are vague and generic, lacking specific and concrete reasons that demonstrate the wider benefits of processing thousands of messages. An intrusion of one's right to a private life (where personal chats are made available for public

[3] Information Commissioner's Office (ICO), *'Special category data'* available at: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/lawful-basis-for-processing/special-category-data/

consumption) would, at the least, have necessitated a distinct justification for each page of chats that was published;

g. that on page 3 of the controller's submissions, he cites four (4) *'punti li hargu miz-zvelar ta' dawn ic-chats'*. The controller further asserts that these points hold no significance in relation to the public interest test;

h. that firstly, the fact that, out of over three hundred seventy (370) pages of chats, the controller could only sum up four (4) points in an attempt to justify his defence speaks volumes. The least the controller could have done was convincingly demonstrate how publishing such a large amount of data was proportionate to the four points he seems to argue are in the public interest. Secondly, the complainant submitted that even these four (4) points do not satisfy the public interest test. The facts referred to in these points: (i) have either already been published in the past and hold no news value, (ii) could have been demonstrated without resorting to processing sensitive and private personal data, and (iii) are inaccurate and presented with a false slant. The complainant addressed each fact individually in the order presented in the controller's submissions;

   i. that the fact that the third party was the recipient of money as a gift from the complainant, in exchange for a brokerage fee, has been in the public domain since at least July 2021, when the then Standards Commissioner, Dr George Hyzler, found the third party in breach of the Parliamentary Code of Ethics[4]. The incident was evidently settled and considered *res judicata*. Therefore, there was no substantial public interest for the controller to publish these chats;

   ii. that the controller did not demonstrate how the fact that the third party said *'ma jimpurtanix kulhadd jithanzer'* is in the substantial public interest, necessary or for substantial public benefit. Nevertheless, for the sake of argument, if the publication of this message was the controller's objective, he absolutely did not need to publish over three hundred seventy (370) pages and thousands of chats to achieve his aim;

[redacted]

iii. that the controller failed to demonstrate why publishing over three hundred seventy (370) pages of chats was necessary to establish that the third party was awarded a Consultancy post with the Institute of Tourism Studies (ITS). The complainant contends that the controller had less intrusive methods available to acquire the information and make it public without resorting to publishing private conversations. One such alternative was to file a freedom of information request under Chapter 496 of the Laws of Malta with the relevant public authority to obtain information regarding consultancy posts awarded by ITS. Nevertheless, for argument's sake, if the publication of this message was the controller's objective, there was absolutely no need to publish over three hundred seventy (370) pages and thousands of chats to achieve his aim;

iv. that the controller claimed that the chats established *'bosta rigali li* [the complainant] *ta' lil* [the third party] *fosthom basktijiet u hwejjeg tad-ditta li jiswew l-eluf'*. However, the controller stops short of indicating exactly which part of the chats he is basing his assertion on. He refrains from doing so because such an assertion is gratuitous, false, and based on a prejudiced perception that does not reflect the content of the leaked chats. The only reference to a bag in the leaked chats is on June 18. The circumstances seemingly related to the bag were extensively reported in 2021, and therefore, the dissemination of over three hundred seventy (370) pages of chats serves no journalistic value or substantive public benefit;

i. that in light of the above, it is evident that the controller's public interest argument is, at best, vague and generic. He fails to specifically demonstrate concrete and substantial reasons for leaking over three hundred seventy (370) pages of chats. If his intention had been to inform the public of the aforementioned four points, he could have easily only published the relevant extracts. His primary intention was to cause as much emotional and reputational damage to the third party, and the complainant. His arguments are vague, and the points he mentions mostly amount to a repetition of what other news portals had already reported long before he decided to illegally leak the private conversations. From reading the controller's blog on the day he leaked the chats, his primary motivation seems to be to subject the third party, to public

humiliation and to advance his legal interests before the Court of Magistrates. Public interest appears to have been only an afterthought, if considered at all;

j. that the controller's final remaining argument was an attempt to justify the Broadcasting Authorities' decision of the 3rd May 2023. In its decision, the Broadcasting Authority referred to the chats and stated vaguely, *'il-kwistjoni tac-chats kienet ta' interess pubbliku minhabba r-relevanza taghhom'*. The Authority, respectfully, did not specify what exactly is meant by *'il-kwistjoni tac-chats'* and *'r-relevanza taghhom'*. Despite this ambiguity, the Authority's remark is irrelevant to the issue before the Commissioner. The substantial public interest referred to in article 9(1) of Chapter 586 is not determined by the Broadcasting Authority, who, after all, was very careful and itself steered clear of publishing any of the contents of the leaked chats. It remains incumbent on the controller to convincingly demonstrate how publishing over three hundred seventy (370) pages of chats, most of which relate to sexual behaviour, private gossip, and intimate issues, serves the substantial public interest; and

k. that the complainant reiterates his request to the Commissioner to order the controller to immediately remove the post containing and referring to his personal data.

6. In line with the Office's complaint-handling procedure, the Commissioner provided the controller with the final opportunity to rebut the arguments made by the complainant. In this regard, on the 14th July 2023, the controller submitted its reply and highlighted the following salient arguments:

a. that *"din hija risposta ulterjuri ghar-replika tar-risposta rigward l-ilment mressaq minn* [the complainant] *ghar-rigward tal-Whatsapp chats li gew zvelati mill-esponenti fuq is-sit elettroniku tal-esponenti. Illi fil-verita l-esponenti ftit ghandu xi jzid u jerga jtenni li filwaqt mhux kontestat illi ppublika c-chats ta' bejn* [the complainant] *u l-*[the third party] *u jerga jishaq li ghall kuntrarju ta' dak indikat fir-replika tas-*[the complainant], *l-esponenti jtenni li dawn c-chats gew zvelati "fl-interess pubbliku u bid-dritt tal-liberta tal-espressjoni"* [sic];

b. that *"l-esponenti jishaq illi l-erbgha punti li tqajmu fir-risposta tieghu sabiex jaghtu evidenza tal-element ta' interess pubbliku, huma biss ezempji u m'ghandhom qatt*

jitqiesu bhala l-unika prova ta' interess pubbliku kif qieghed jigi insinwat fis-sottomisjonijiet tas- [the complainant] *proprio f'punt numru 9 tar-risposta tieghu"*;

c. that *"l-esponenti jishaq illi hemm bosta ezempji ohra li jqanqlu element t'interess pubbliku meta jinqraw fil-kuntest shih tal-whatsapp chats inkluz il-fatt illi l-*[the third party] *ma ddikjaratx li kellha kunflitt ta' interess meta f'Gunju tas-sena 2019, kienet attendiet l-assemblea parlamentari tal-Kunsill tal-Ewropa biex tikkritika il-principju tar-rule of law u ghamlet referenza ghal 17 Black, kumpanija registrata f'Dubai proprjetà ta'* [the complainant]";

d. that *"oltre' minn hekk, l-istess Information Commissioner's Office tar-Renju Unit li jigi kwotat fir-replika tar-risposta tas-*[the complainant], *minbarra dak kwotat mis-*[the complainant] *jistqarr wkoll is-segwenti"*

> *"You should focus on showing that your overall purpose for processing has substantial public interest benefits. You* ***do not need to make separate public interest arguments or show specific benefits each time you undertake that processing, or for each separate item of special category data, as long as your overall purpose for processing special category data is of substantial public interest****. However, you must always be able to demonstrate that all your processing under the relevant condition is actually necessary for that purpose and complies with the data minimisation principle"*[5] [sic] [emphasis has been added by the controller];

e. that *"kif jirrizulta mill-istqarrija tal-Information Commissioner's Office, wiehed ghandu jiffoka fuq l-iskop generali tal-iprocessar u jekk dan ghandux beneficcji sostanzjali ta' interess pubbliku"*;

f. that *"l-interess pubbliku jkopri firxa wiesgha ta' valuri u principji relatati mal-gid pubbliku jew dak li hu fl-ahjar interess tas-socjeta'. Konsegwentament ma hemmx bzonn argumenti separati ta' interess pubbliku sabiex l-esponenti jiggustifika kull pagna li giet ippublikata, ilghaliex l-iskop generali tal-izvelar tac-chats fit-totalita'*

[5] Information Commissioner's Office (ICO), *'What are the substantial public interest conditions?'* available at: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-are-the-substantial-public-interest-conditions/

taghhom huma evidenza fil-kontenut taghhom li r-raguni tal-izvelar kien relatat mal-interess pubbliku";

g. that *"[i]d-dritt ghall-informazzjoni huwa inerenti f'kull socjeta' demokratika u ghalhekk il-pubbliku in generali ghandu il-jedd ikun infurmat b'dak kollu li kien qed jigri madwaru. Din il-manzjoni hija fdata fil-gurnalizmu u b'hekk fil-kuntest shih tal-whatsapp chats li gew zvelati, b'mod partikolari il-kontenut taghhom, il-pubblikazzjoni ta' dawn ic-chats huwa gustifikat u proporzjonali ghall-ghan legittmu segwit proprio l-ghan tal-interess pubbliku"*; and

h. that *"[m]il-gdid l-esponenti jaghmel referenza ghar-risposta tieghu li jemmen li diga tkopri il-punti kollha elenkati anke' fir-replika ghar-risposta"*.

LEGAL ANALYSIS AND DECISION

General Considerations

7. As a preliminary point, the Commissioner establishes that the contents of the WhatsApp chats that were published on the controller's blog contain *'personal data'* within the meaning of article 4(1) of the Regulation as the information relates directly to the complainant.

8. The Commissioner establishes that the definition of *'personal data'*, particularly the phrase *'any information'* intends to assign a wide interpretation of what may constitute *'personal data'*. The Court of Justice of the European Union had shed further light on the definition of '*personal data*' and held that *"[t]he use of the expression 'any information' in the definition of the concept of 'personal data', within Article 2(a) of Directive 95/46, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private,* ***but potentially encompasses all kinds of information****, not only objective but also subjective, in the form of opinions and assessments,* ***provided that it 'relates' to the data subject****."*[6] [emphasis has been added].

9. The blog post is made available to an infinite number of persons, and consequently the dissemination of the complainant's personal data is not considered to be an activity conducted

[6] Case C-434/16, *'Peter Nowak vs Data Protection Commissioner'*, decided on the 20th December 2017.

by a natural person in the course of a purely personal or household activity. The processing of personal data falls within the material scope of the Regulation, and therefore the controller is required to comply with the principles relating to the processing of personal data set out in article 5 of the Regulation, in particular, by ensuring that the personal data are processed lawfully, fairly and in a transparent manner to the data subject.

The Notion of *'Private Life'*

10. The Commissioner proceeds to examine the nature of the communications concerning private life within the broader societal context. The determination of whether these communications fall within the scope of private life hinges on their relevance and effect on the wider community. In the case of *'El-Masri vs The Former Yugoslav Republic of Macedonia'*[7], the Court acknowledged the expansive nature of '*private life'*, encompassing moral and physical integrity. The Court further recognised that *"these aspects of the concept extend to situations of deprivation of liberty.* ***Article 8 also protects a right to personal development, the right to establish and develop relationships with other human beings and the outside world****. A person should not be treated in a way that causes a loss of dignity, as "the very essence of the Convention is respect for human dignity and human freedom". Furthermore, the mutual enjoyment by members of a family of each other's company constitutes a fundamental element of family life. The Court reiterates that an essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities"* [emphasis has been added].

11. The Commissioner considers the Court's ruling in *'Von Hannover vs Germany (No 1)'*[8], wherein it reiterated the fundamental importance of protecting private life from the point of view of the development of every human being's personality, and that protection extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a *'legitimate expectation'* of protection and respect for their private life.

12. While recognising the importance of freedom of expression, the Commissioner emphasises the crucial role of safeguarding the rights and reputation of others, particularly when media content

[7] Application No. 39630/09, *'El-Masri vs The Former Yugoslav Republic of Macedonia'*, decided on the 13th December 2012.
[8] Application No. 59320/00, *'Von Hannover vs Germany (No 1)'*, decided on the 24th June 2004.

divulges intimate or personal information. In the case of *'Rodina vs Latvia'*[9], *"[t]he Court accepts that the photograph was not taken without the applicant's knowledge; it did not show her in an unfavourable light. The family photograph in the present case merely showed all the family members. However, the Court considers that* ***even a neutral photograph accompanying a story portraying an individual in a negative light constitutes a serious intrusion into the private life of a person who does not seek publicity*** *"* [emphasis has been added].

13. The Commissioner acknowledges that invoking the protection of article 8 of the European Convention on Human Rights, requires an attack on a person's reputation to reach a specific level of seriousness, resulting in prejudice to the individual's right to enjoy a private life with respect. This criterion extends to both social and professional reputation. In this regard, the Commissioner examines the judgment of *'Bédat vs Switzerland'*[10], wherein the Court reaffirmed that *"the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life. The concept of "private life" is a broad term which is not susceptible to exhaustive definition.* ***It covers the physical and psychological integrity of a person,*** *and can therefore embrace multiple aspects of the person's identity such as, for example, gender identification, sexual orientation, name and elements relating to a person's right to his or her image. It covers personal information which individuals can legitimately expect should not be published without their consent. In order for Article 8 to come into play, however,* ***an attack on a person's reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life*** *"* [emphasis has been added].

14. Judgments such as *'Von Hannover vs Germany (No 1)'*[11], *'Max Mosley vs News Group Newspapers'*[12], and others underscore the necessity of evaluating whether published content serves a debate of general interest, highlighting the lack of legitimate public interest in certain private life details. In the case of *'Couderc and Hachette Filipacchi Associés vs France'*[13], the Court observed that photographs featured in the *'sensationalist'* press or *'romance'* magazines, often cater to the public's curiosity about an individual's private life. Such materials are

[9] Applications Nos. 48534/10 and 19532/15, *'Rodina vs Latvia'* decided on the 14th May 2020.
[10] Application No. 56925/08, *'Bédat vs Switzerland'*, decided on the 29th March 2016.
[11] Ibid No. 8.
[12] Application No. 48009/08, *'Max Mosley vs News Group Newspapers'* decided on the 10th May 2011.
[13] Application No. 40454/07, *'Couderc and Hachette Filipacchi Associés vs France'* decided on the 10th November 2015.

frequently obtained through persistent harassment, leading to a profound intrusion into the person's private life or even a sense of persecution.

15. The Commissioner considered the contents of the hundreds of published chat pages between the complainant and a third party. In doing so, the Commissioner takes note of the precedent set in *'Matalas vs Greece'*[14] where the Court deliberated that statements contained in private documents that were not meant to be publicly disseminated, and which were made known only to a restricted number of persons, were not only capable of tarnishing the targeted person's reputation, but also of causing harm to both their professional and social environment. Accordingly, the Court held that such accusations attained a level of seriousness sufficient to harm one's rights under Article 8 of the European Charter of Human Rights, and therefore examined whether the domestic authorities struck a fair balance between, on the one hand, the applicant's freedom of expression, as protected by Article 10 of the European Charter of Human Rights, and, on the other, the recipient's right to respect for her reputation under Article 8 of the European Charter of Human Rights.

Court's Ban on Publications

16. Without prejudice to the foregoing, the Commissioner takes note of the ban imposed by the Court of Magistrates on the 30th November 2020, which was reconfirmed by the Criminal Court given on the 29th November 2021 by Magistrate Edwina Camilleri, which included a clear and specific order concerning the dissemination of information pertaining to the proceedings. Specifically, it stated that *"ma jsir ebda pubblikazzjoni kemm fil-midja lokali, fuq il-midja soċjali, fil-mezzi tax-xandir, f'kwalunkwe kitba stampata kemm dattilografikament kif ukoll elettronikament tal-kontenut tal-atti u d-dokumenti li jinsabu fl-atti proċesswali fl-isem "Ir-Repubblika ta' Malta vs* [redacted] *" li għalihom għandhom aċċess unikament il-partijiet"* **(marked and annexed Doc IDPC 1)**.

17. The Court of Magistrates and the Criminal Court explicitly ordered that no information from the procedural acts of the case, including its documents, is to be published in any form, whether through local media, social platforms, or any other medium. This restriction was strictly confined to accessibility by the parties directly involved. The Court's decision underlines its

[14] Application No. 1864/18, *'Matalas vs Greece'* decided on the 25th March 2021.

primary purpose to safeguard the integrity of the legal process while upholding confidentiality. It is imperative to note that the Commissioner's authority does not extend to challenging or overturning decisions made by superior courts. Upholding this principle is fundamental in preserving the credibility of the legal framework and maintaining adherence to the rule of law.

18. However, without prejudice to the above, the Commissioner notes that in *'Bédat vs Switzerland'*[15], the Court held that *"the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, as well as the need to prevent the disclosure of information received in confidence, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Indeed, the protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means. In its judgment in Pentikäinen, the Court pointed out that the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly. In particular, it is inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them. However, consideration must be given to everyone's right to a fair hearing as secured under Article 6 § 1 of the Convention, which, in criminal matters, includes the right to an impartial tribunal and the right to the presumption of innocence. As the Court has already emphasised on several occasions: 'This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice'".*

[15] Ibid No. 10.

Article 85 of the Regulation and the Applicable National Legislative Measures

19. The Commissioner recognises that the right to the protection of personal data and the right to freedom of expression are both fundamental rights[16], and further acknowledges that the rules governing the right to the protection of personal data should be reconciled with the freedom of expression and information. Notwithstanding this, these two rights are not absolute, and do not prevail over one another, as they are of equal importance.

20. Privacy and freedom of expression have equal weight in the case law of the European Court on Human Rights (**"ECHR"**), and hence, *"[i]n cases which require the right to respect for private life to be balanced against the right to freedom of expression,* [...] *these rights deserve equal respect"*[17]. Therefore, a fair balance needs to be found between the two rights, which has also been recognised by the European legislator. Indeed article 85[18] of the Regulation contemplates for exemptions or derogations when personal data are processed in the context of the right to the freedom of expression.

21. In that connection, recital 153 of the Regulation states that "***Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights.***" [emphasis has been added]. Article 85 of the Regulation provides significant margin of flexibility to the Member States as to how to strike the right balance between the right to data protection and the freedom of expression[19] in their respective national legislative framework. Therefore, any comparative analysis in relation to the reconciliation exercise as established under article 85 of the Regulation is considered futile as this is a matter which is solely regulated by national law. In fact, the Court of Justice of the

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[16] Article 8(1) of the Charter of Fundamental Rights of the European Union states that *"Everyone has the right to the protection of personal data concerning him or her."*, and Article 11 of the Charter provides that *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."*

[17] Ibid No. 13.

[18] Article 85(1) of the Regulation reads as follow: *"Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purpose of academic, artistic or literary expression."*.

[19] In the *Satamedia* case, the Court of Justice of the European Union decided, concerning a reference for a preliminary ruling on the interpretation of Directive 95/46/EC in relation to the processing of personal data and freedom of expression: "*Article 9 of the directive refers to such a reconciliation. As is apparent, in particular, from recital 37 in the preamble to the directive, the object of Article 9 is to reconcile two fundamental rights: the protection of privacy and freedom of expression. The obligation to do so lies on the Member States.*" [Case C-73/07, 16 December 2008 § 54]

European Union, in its ruling *'Google v. CNIL'*[20], recognises that *"the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world"*.

22. In this context, article 9 of the Act lays down a non-exhaustive list of exemptions or derogations, which enable processing of personal data for the purpose of exercising the right to freedom of expression and information, specifically where such processing **is proportionate, necessary and justified for reasons of substantial public interest**. This provision does not give an automatic blanket exemption in every case and is only intended to apply where necessary **to strike a fair balance** between the right to the protection of personal data and the freedom of expression [emphasis has been added].

The Reconciliation of the Right to Protection of Personal Data with the Right to Freedom of Expression

23. For the purposes of this legal analysis, the Commissioner establishes that the placing of material on the internet could easily be considered to have the objective of disclosing information, opinions or ideas to the public[21], particularly, in light of the fact that the right to freedom of expression is important and even considered to be the fourth pillar of a democratic society.

24. However, the controller can only benefit from the journalistic exemption if he manages to effectively demonstrate that compliance with any of the provisions as specified in article 9(2) of the Act is incompatible with the purpose of the processing, and the processing is indeed proportionate, necessary and justified for reasons of substantial public interest. Accordingly, the Commissioner proceeded to examine whether the controller ensured that the processing operation met the conditions set forth in the proviso to article 9(1) of the Regulation.

25. The wording of the proviso to article 9(1) of the Regulation provides that "***the controller shall ensure***", which clearly demonstrates that the onus rests upon the controller to concretely show that the processing is proportionate, necessary and justified for reasons of substantial public interest. In light of the principle of accountability as held in article 5(2) of the Regulation, it remains the responsibility of the controller to demonstrate that it had conducted an exercise

[20] C-507/17, *'Google LLC vs CNIL'* decided on the 24th September 2019.
[21] Case C-345/17, *'Sergejs Buivids vs Datu valsts inspekcija'* decided on the 14th February 2019.

prior to the publication in order to determine how the conditions of the processing were fulfilled [emphasis has been added].

26. Whereas the Commissioner is mindful that the right to the freedom of expression should enjoy a broad scope of protection, the journalistic exemption must be applied only where it is necessary to reconcile the right to the protection of personal data and the right to freedom of expression. In this regard, the proviso to article 9(1) of the Act states that the processing for journalistic purposes shall be – '*proportionate*' – '*necessary*' – and – '*justified for reasons of substantial public interest*'. The requirements of necessity and proportionality, even though strictly related, require two different tests. The necessity test is a pre-condition for proportionality, which therefore means that the processing needs to first pass the necessity test based on the "*substantial public interest*" criteria. Once the controller considers the processing to be necessary, the controller has to ensure that the processing is proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable measures.

27. Within this context, the determining factor is certainly what constitutes '*substantial public interest*'. The Commissioner recognises that the public has a right to be informed about matters which are capable of contributing to a public debate. The decisive factor in balancing the right to the protection of personal data against the freedom of expression should lie in the contribution that the published information could or would make to a debate of *'substantial public interest'*. The wording used by the legislator, particularly the word '*substantial'* is indicative that the public interest should be real and of substance.

28. There is no definition in a legal text which defines the notion of *'public interest'*, however, this notion features predominantly in the case-law of the ECHR, which serves as guidance when it comes to the interpretation of the notion of 'public interest'. In the judgment of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*[22], the ECHR held that:

> "*Public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the*

[22] Application No. 931/13, *'Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland'* decided on the 27th June 2017.

case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. ***The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism.***"[23] [emphasis has been added].

29. In the present case, the controller had to prove how the publication of all the information in relation to the complainant was indeed capable of contributing to a debate in a democratic society, in particular, the controller had to show how the publication of three hundred seventy (370) pages of private conversations affects the public or concerns the public.

30. Primarily, the Commissioner notes that the controller chose to rely on the journalistic exemption in a general manner without taking into account the type of data contained in these chats. Some of the chats published between the two parties reveal information in relation to the sex life of the complainant. This information is deemed to be a special category of personal data in terms of article 9(1) of the Regulation and due to the fact that it is very intrusive and highly sensitive, the law provides heightened protection to special categories of personal data. In fact, the law prohibits the processing of such data unless there is a ground pursuant to article 9(2) of the Regulation that would permit such processing. For this reason, article 9(2) of the Act does not exempt processing of special categories of personal data for journalistic purposes, which therefore means that the controller shall have a valid lawful basis when processing information in relation to the sex life of the complainant and shall fully comply with the other provisions of the Regulation. In the submissions, the controller did not even attempt to explain which is the ground in terms of article 6(1) and 9(2) of the Regulation, which serves as the basis for the processing of the special categories of personal data pertaining to the complainant. This simply demonstrates that the controller did not undertake an assessment to determine which type of personal data were to be published on his blog. The Commissioner emphasises that any individual who seeks to rely on the journalistic exemption should be in a position to demonstrate that specific considerations were given, and this varies depending on the type of data processed and the level of intrusiveness.

[23] Ibid.

31. The submissions presented by the controller during the course of the investigation vaguely refer to the *'public interest'* aspect without presenting any detailed assessment to demonstrate how the controller ensured that the publication of all the messages contained in the three hundred seventy (370) pages (excluding special categories of personal data) met the requirements of article 9 of the Act. In particular, the controller failed to show how the dissemination of all the personal data pertaining to the complainant is a matter which affects the public or concerns the public.

32. It is abundantly clear that the controller published the conversations in complete disregard of the right to the protection of personal data of the complainant and the many other individuals who were mentioned in the chats. **The controller did not even attempt to redact or remove the personal data pertaining to other individuals. The Commissioner emphasises that the journalistic exemption should not be treated as a blanket exemption and the approach adopted by the controller certainly oversteps the boundaries of the right to the freedom of expression and interferes with the essence of the protection of the fundamental right to the protection of personal data pertaining to the complainant**. The complainant certainly did not have any reasonable expectation that his exchange with the third party, which specifically included details in relation to his private and family life, was going to be publicly disclosed.

33. The Regulation treats personal data as a fundamental right inherent to a data subject and his dignity. **It is in the judicious view of the Commissioner that, in principle, a personal exchange between two persons which involves intimate details about their respective private life shall be protected to the fullest extent.**

34. This therefore leads the Commissioner to conclude that the objectives which the controller sought to achieve with the publication of the chats went beyond the journalistic exemption and not in the public interest or resulting to benefit a democratic society. **The controller could have been faithful to his journalistic freedoms and conducted a thorough assessment by carefully going through all the messages included on the three hundred seventy (370) pages in order to identify those chats which were specifically in the substantial public interest to disclose**.

On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller failed to demonstrate that the processing of the personal data pertaining to the complainant is proportionate, necessary and justified for reasons of substantial public interest, and, therefore, the processing is deemed to be unlawful.

Consequently, in terms of article 58(2)(d) of the Regulation, the Commissioner is ordering the controller to erase the two (2) attachments from the blog post entitled [redacted][24], published on the controller's website on the 21st March 2023. The controller is requested to comply with this order within three (3) days from receipt of this legally-binding decision and inform the Commissioner of the action taken immediately thereafter.

As a result, 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 enforcement action shall be taken accordingly.

Non-compliance with this instruction shall make the controller liable to pay an administrative fine in accordance with article 83(2) of the Regulation, which fine shall be effective, proportionate and dissuasive.

Ian DEGUARA (Authentication)

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Date: 2024.01.19 10:50:52 +01'00'

Ian Deguara
Information and Data Protection Commissioner

[24] Ibid No. 2.

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.