

[REDACTED]

vs

[REDACTED]

COMPLAINT

1. On the 12th January 2024, [REDACTED] (the “**complainant**”) lodged a complaint with the Information and Data Protection Commissioner (the “**Commissioner**”) pursuant to article 77(1) of the General Data Protection Regulation (the “**Regulation**”) stating that she received a text message from [REDACTED] (the “**controller**”) for the purpose of political campaigning. The complainant alleged that the controller unlawfully processed her personal data, and therefore, considered that the processing of her personal data infringes the provisions of the Regulation.

INVESTIGATION

2. As part of the investigation procedure of this Office, the Commissioner provided the controller with a copy of the complaint and the opportunity to submit any information which he deemed relevant and necessary to defend himself against the allegation raised by the complainant. By means of an email dated the 9th February 2024, the controller submitted the following arguments for the Commissioner to consider during the legal analysis of this case:
 - a. that the details pertaining to the complainant were obtained from publicly available sources, including her own personal social media profile and posts, where she disclosed her date of birth and her personal mobile number¹;

¹ The controller submitted screenshots taken from social media to demonstrate that the date of birth and the mobile number of the complainant were made publicly available by the complainant.

- b. that the personal data of the complainant were processed for the purpose of enabling the controller to exercise his campaigning activities as an electoral candidate on the [REDACTED] district, which includes the locality where the complainant is registered as a voter pursuant to the electoral register; and
 - c. that although the personal data of the complainant were obtained from publicly available sources, the data of the complainant were deleted from his records.
3. The complainant was given the opportunity to rebut the arguments of the controller. However, on the 5th March 2024, the complainant informed the Commissioner that she would like to rely on the contents of her complaint.

LEGAL ANALYSIS AND DECISION

4. For the purpose of this legal analysis, the Commissioner sought to establish whether the processing of personal data conducted by the controller, particularly the use of personal data collected through social media for political campaigning purposes, complies with the provisions of the Regulation. It is well-established fact that for the proper functioning of the electoral process in a democratic society, political parties, election candidates and campaigners should be able to effectively engage with their constituents for the purpose of carrying out political campaigning and promoting their political ideologies and messages. However, whenever there is engagement with voters, political campaigners should be transparent and ensure that they have a lawful basis for the processing activity, particularly that the data subject can reasonably expect that their data will be processed in that manner for the specific purpose of political campaigning.
5. By means of an email dated the 9th February 2024, the controller confirmed that he processed the personal data of the complainant, specifically, the name, the mobile number, and the date of birth of the complainant for political campaigning purposes. The controller submitted screen shots taken from social media to demonstrate that it was the complainant who made her date of birth and mobile number publicly available.
6. The Commissioner clarifies that any information which may be obtained from public sources does not serve as an automatic exemption to enable the controller to process the personal data pertaining to the complainant. In fact, the controller should fully comply with its data

protection obligation regardless of the source from where the data originate. This is made abundantly clear in article 14 of the Regulation which imposes an obligation upon the controller to provide the data subject with information about the processing operation where the personal data have not obtained from the data subject. In particular, article 14(2)(f) of the Regulation states that the controller should inform the data subject *“from which source the personal data originate, and if applicable, whether it came from publicly accessible sources”* [emphasis has been added].

7. The European Data Protection Board (the **“EDPB”**) in its Statement 2/2019 on the use of personal data in the course of political campaigns emphasises that personal data which have been made public or otherwise been shared by voters, even if the data is not revealing political opinions, are still subject to the data protection legislation:

“Personal data which have been made public, or otherwise been shared by individual voters, even if they are not data revealing political opinions, are still subject to, and protected, by EU data protection law. As an example, using personal data collected through social media cannot be undertaken without complying with the obligations concerning transparency, purpose specification and lawfulness” [emphasis has been added].

8. In the case of political campaigning, processing of personal data is generally conducted to pursue the legitimate interest of the political campaigners and the public in general. However, article 6(1)(f) of the Regulation could only serve as the appropriate legal basis if the controller manages to effectively demonstrate that this interest is not overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. Recital 47 of the Regulation sheds light on the balancing test that needs to be conducted by the controller, particularly, that the controller should process data in such a manner that the *“data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place.”* [emphasis has been added].
9. During the course of the investigation, it was revealed that the controller processed data from social media to match other information, such as personal data obtained from the Electoral Register, to customise voter outreach and create a profile on voters. In fact, the controller stated that *“I sourced such information for the purpose of exercising campaigning activities*

as an electoral candidate on the ● District which includes the locality in which the complainant is registered as a voter on the electoral register”. This poses the question: ‘Can the data subject reasonably expect that the information she puts on social media be collected and used by campaigners for political engagement purposes?’

10. The element of ‘reasonable expectation’ is one of the critical factors which should be taken into consideration by the controller prior to the processing of personal data for the purpose of political campaigning. The element of ‘reasonable expectation’ is not just one of the conditions for ensuring the lawfulness of the processing pursuant to article 6(1)(f) of the Regulation, but it is also crucial to safeguard the principle of fairness. The EDPB in its Guidelines 2/2018 highlights the correlation between the element of ‘reasonable expectation’ and the principle of fairness:

“Article 5(1)(a) GDPR provides that personal data must be processed lawfully, fairly and transparently in relation to the data subject. The principle of fairness includes, inter alia, recognising the reasonable expectations of the data subjects, considering possible adverse consequences processing may have on them, and having regard to the relationship and potential effects of imbalance between them and the controller.” [emphasis has been added].

11. In this regard, the Commissioner emphasises that political campaigners should only process the personal data of voters in a transparent manner and for the reason that the voters reasonably expect. Whereas there is a reasonable expectation that data contained in the Electoral Register may be used by political campaigners for the purpose of engaging with voters and exchanging political messages, the Commissioner does not consider that the complainant can reasonably expect that the information which she published on social media would be collected and used by the controller for the purpose of political campaigning. This leads the Commissioner to conclude that the practice of collecting data from social media to create a profile on voters without their consent and knowledge is tantamount to an unfair practice.
12. This is also in line with the Guidelines published by the Committee of the Convention for the protection of individuals with regard to the automatic processing of personal data (Convention 108), which states that “[p]olitical campaigns should not “scrape” data from social media for the purposes of building profiles on the electorate”.

On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller's practice of collecting and using data from social media for the purpose of political campaigning, without the knowledge and consent of the complainant, is tantamount to an unfair practice and an infringement of article 6(1) of the Regulation.

The controller is being warned that in the event of another infringement of a similar nature, the appropriate corrective action shall be taken accordingly.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
(Signature)
Date: 2024.03.07
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**Ian Deguara
Information and Data Protection Commissioner**

Right of Appeal

The parties are hereby being informed that 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 to the Information and Data Protection Appeals Tribunal within twenty (20) days from the service of the said decision as provided in article 23 thereof.

An appeal to the Tribunal shall be made in writing and addressed to The Secretary, Information and Data Protection Appeals Tribunal, 158, Merchants Street, Valletta.