

CDP/COMP/1000/2023

[REDACTED]

vs

[REDACTED]

## COMPLAINT

1. On the 15<sup>th</sup> December 2023, Mr [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<sup>1</sup> (the “Regulation”) stating that on that same day, he received a phone call from [REDACTED] or his Office (the “controller”) to congratulate him on his birthday. The complainant alleged that the controller unlawfully processed his full name, home telephone number and birth date for political gain, and therefore, considered this processing activity conducted by the controller to be an infringement of the Regulation.
2. The complainant further submitted that “[o]n asking from where did he get my personal information, the caller insinuated that it is random to which I replied how can it be random if you know my name, my telephone number and birth date. The caller would not state his name and subsequently hang up on me. This is in clear violation of the data protection act and my personal data is being used and abused and used without my consent. I have never given my consent for any of my personal data to be kept by [REDACTED] or his office. This is in clear breach of the Data Protection Act and my personal data is being used and abused by him or his office for political gains”.

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<sup>1</sup> 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.

## INVESTIGATION

3. As part of the investigation procedure, the Commissioner provided the controller with a copy of the complaint and the opportunity to provide any information which he deemed relevant and necessary to defend himself against the allegation raised by the complainant. By means of a letter dated the 25<sup>th</sup> January 2024, the controller submitted the following arguments for the Commissioner to consider during the legal analysis of this case:
- a. that the controller rebuts any claims of “*abuse for political gain*” and the allegation raised by the complainant is totally unfounded and untrue;
  - b. that it is totally inconceivable that knowing the name of a person is tantamount to abuse and this is because the name of the complainant, like all the other names, is found in the Electoral Register, a register which is accessible to the public;
  - c. that telephone numbers are also accessible to the public by means of the directory;
  - d. that contrary to the name and/or telephone number, the date of birth of a person is not publicly available, and it is up to the individual to make such information available, and in fact, in this case, it was the complainant himself who made his date of birth publicly available;
  - e. that the complainant made his date of birth known to the general public on a social media platform, and thus, it is quite surprising that the complainant is alleging abuse and infringement of the data protection legislation, when that same person made this information public;
  - f. that without prejudice to the above, the controller, as any other political person, has to communicate effectively with his constituents and to this end, any handling and processing of personal data is done in a way which is compliant with the data protection legislation;
  - g. that the controller referred to section 5 of the Guidelines on the Processing of Personal Data for Political Purposes issued by the Commissioner, which provides that the “*controller may use the personal data contained in the Electoral Register or in printed or online telephone directly services for the purpose of sending personalised political*

*campaigning material or voice messages to the respective registered voters, unless the data subject gives notice to object such processing”;*

- h. that in this particular phone call, rather than a political message, the complainant received birthday greetings; and
  - i. that also in line with section 11.1 of the Guidelines, the complainant had and has every right to ask the controller *“not to proceed with the call and delete their personal contact details accordingly”*, however, the complainant failed to exercise this right and proceeded to lodge a frivolous complaint against the controller.
4. Pursuant to article 58(1)(a) of the Regulation and based on the submissions provided by the controller, the Commissioner requested the controller to indicate the source from where the telephone number of the complainant was obtained.
  5. The complainant was given the opportunity to rebut the arguments raised by the controller. By means of an email dated the 18<sup>th</sup> February 2024, the complainant submitted the following:
    - a. that whilst the controller is happy to cite the Electoral Register, the home telephone number of the complainant is not listed in the telephone directory;
    - b. that the controller failed to submit any evidence to demonstrate from where the home telephone number of the complainant was obtained;
    - c. that the complainant could not request the caller to remove his personal data because the caller hung up on the complainant when requested to indicate the source from where his personal data was obtained;
    - d. that the office of the controller does not go on a witch hunt on Facebook, delving into **each user’s profile out of the million registered users to check which** Facebook users form part of his constituency; and
    - e. that it is amply clear that the controller holds organised data collected in some form, being a database, spreadsheet or whatever, for motives that the complainant had never agreed to or signed up for, and this in itself is an infringement of the data protection legislation.

6. Given that the complainant emphasised that his home telephone number is not made publicly available, the Commissioner reiterated his request pursuant to article 58(1)(a) of the Regulation and requested the controller to indicate the source from where the telephone number of the complainant was obtained. In addition, the Commissioner provided the controller with a copy of the submissions made by the complainant and gave the controller the final opportunity to rebut the arguments of the complainant. The controller failed to reply despite the fact that the Commissioner received an electronic receipt automatically generated by the email server when the communication was read.

### LEGAL ANALYSIS AND DECISION

7. 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 in a functioning democratic society, political parties 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 legal 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.
8. By means of the submissions dated the 25<sup>th</sup> January 2024, the controller confirmed that he processed the personal data of the complainant, specifically, the full name, the telephone number, and the date of birth of the complainant for political campaigning purposes. The controller went on to further explain that:

Personal data pertaining to the complainant	The Source of the Data
Full name	<i>“The name of the complainant, like all other names, is found in the Electoral Register, a register which is accessible to the general public.”</i>
Telephone number	<i>“telephone numbers are also accessible for the general public on the directory.”</i>

Date of birth	<i>Contrary to the name and / or telephone number, the date of birth of a person is not publicly available. It is up to the individual to make such information available. In fact, in this particular case, Mr ██████ made his date of birth known to the general public on a social media platform<sup>2</sup></i>
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9. In the present case, the controller stated that the date of birth of the complainant was obtained from the Facebook profile of the complainant. In fact, the controller submitted a screen shot taken from the profile of the complainant to demonstrate that it was the complainant who made his date of birth publicly available.
  
10. However, the controller failed to indicate the source from where he obtained the home telephone number of the complainant. The complainant emphasised that his telephone number is not available in any telephone directories. Throughout the course of the investigation, the Commissioner did not find any evidence to demonstrate that the telephone number of the complainant is contained in any public directory services. It remains unclear from where the controller obtained the home telephone number of the complainant, which leads the Commissioner to conclude that this data was unlawfully processed by the controller.
  
11. The controller referred to section 5 of the Guidelines on the Processing of Personal Data for Political Campaigning Purposes issued by the Commissioner, which provides that the *“controller may use the personal data contained in the Electoral Register or in the printed or online telephone directory services for the purpose of sending personalised political campaigning material or voice messages to the respective registered voters, unless the data subject gives notice to object such processing”*.
  
12. 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 obligations regardless from where the data originate. This is made abundantly clear by 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 been obtained from the data subject. In particular, article 14(2)(f) of the Regulation states that

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<sup>2</sup> The controller submitted evidence that the complainant made his date of birth publicly available on social media.

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].

13. The European Data Protection Board (the “EDPB”) in its Statement 2/2019 on the use of personal data in the course of political campaigns emphasised 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].

14. 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.*”.

15. During the course of the investigation, it was revealed that the controller is processing data from a social media platform to match other information, such as personal data obtained from the Electoral Register, to customise voter outreach and build information on voters. This poses the question: ‘Can the data subject reasonably expect that the information he puts on his personal social media profile be used by political campaigners for political campaigning purposes?’

16. The element of ‘reasonable expectations’ 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 expectations’ 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 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].*

17. In this regard, the Commissioner emphasises that political campaigners should only process personal data of voters in a transparent manner and for reason which the voters reasonably expect to. 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 he 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.
18. 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 processing of the personal data pertaining to the complainant 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.**

**By virtue of article 58(2)(d) of the Regulation, the Commissioner is ordering the controller to erase all personal data pertaining to the complainant without undue delay and by no later than**



**five (5) working days from the date of receipt of this legally binding decision, and to inform the Commissioner of the corrective action taken immediately thereafter.**

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

Ian  
DEGUARA  
(Signature)

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by Ian DEGUARA  
(Signature)  
Date: 2024.04.02  
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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.

More information is available on our portal at the following hyperlink: <https://idpc.org.mt/appeals-tribunal/>

