

[REDACTED]

vs

[REDACTED]

COMPLAINT

1. On the 19th January 2024, [REDACTED] (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 Regulation¹ (the “**Regulation**”), alleging that the [REDACTED] (the “**[REDACTED]**”) disclosed his personal data to [REDACTED] (a “**third-party company**”), to conduct a survey on working conditions for film workers.

FACTS OF THE CASE

2. For the purpose of this complaint, the Commissioner assessed the relevant facts surrounding the complaint:

Summary of Events

- a. that the complainant received a call from a representative of a third-party company who stated that she was conducting a survey on working conditions for film workers. As a crew member in the film industry, the complainant inquired about the source of his contact information, the purpose of the survey and who will access the personal and sensitive responses. The caller replied that she could not disclose how she obtained the information, where the answers would be directed or the reason behind the survey;

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.

- b. that the complainant emphasised that it was unacceptable for callers to contact individuals, without clarifying how the third-party company acquired their contact details and where the information would be utilised;
- c. that subsequently, the complainant contacted an employee of the controller, who was unaware of any ongoing surveys but assured him of investigating the matter and returning with information;
- d. that later, the complainant received another call from the third-party company. The complainant emphasised that regardless of the survey process, callers should disclose where they got their data from, why they are asking such questions and where the answers will end up. When asking about who initiated this survey, he was told that it was the [REDACTED], but did not mention who specifically; and
- e. that the complainant stressed that neither he nor his colleagues authorised the disclosure of their contact information except to prospective employers accessing [REDACTED]'s crew database for recruitment purposes.

INVESTIGATION

Request for submissions

3. Pursuant to the internal investigation of this Office, the Commissioner provided the [REDACTED] with a copy of the complaint and gave the [REDACTED] the opportunity to submit any information which it deemed relevant and necessary to defend itself against the allegation raised by the complainant. Particularly, pursuant to article 58(1)(e) of the Regulation, the Commissioner requested the [REDACTED] to provide access to any agreements demonstrating a contractual relationship between the [REDACTED] and the third-party company. By means of an email dated the 25th February 2024, the [REDACTED] submitted the following arguments:
 - a. that the complainant stated that he received a phone call from a representative of [REDACTED] [REDACTED] without specifying the date or the caller's number. The representative informed the complainant that she was conducting a survey on working conditions for film workers;
 - b. that the complainant alleged that when he questioned the third-party company about how they obtained his personal details, the representative hung up. Subsequently, a

representative acting on behalf of the third-party company, called the complainant to explain the survey process. The third-party company clarified that the survey was being conducted on the instructions of the [REDACTED] and participation was voluntary. Following several telephone exchanges between the complainant, the third-party company and the [REDACTED] the complainant attempted to call the third-party company to answer the survey questions;

- c. that the [REDACTED] rebutted any claims of unauthorised disclosure of personal data and held that the complainant's assertion that receiving a phone call from the third-party company regarding a survey conducted by the [REDACTED] constitutes a breach of regulations, is totally unfounded and not true. The [REDACTED] noted that the complainant has personally accepted that his profile on the [REDACTED] administered by the [REDACTED], is made public (**marked and annexed as IDPC COM 1**);
 - d. that the privacy policy² of the [REDACTED] clearly states that personal information may be disclosed to third parties only as authorised by law. The privacy policy highlights all the rights of the data subjects, including the right to request that their information is not used or is amended if it results to be incorrect. Data subjects may also request that their data is erased, and the right to request data erasure; and
 - e. that according to the same policy, the complainant had the right "*to raise queries or complaints please in the first instance contact, The Data Protection Officer, on [REDACTED] or by telephone [REDACTED]*". Contrary to this, the complainant attempted to contact individuals unrelated to data protection, resulting in no official response being received.
4. Together with its submissions, the [REDACTED] provided a copy of the '*Non-Disclosure Agreement*' entered into by and between the [REDACTED] and the representative of the third-party company.
 5. On the 27th February 2024, the Commissioner provided the complainant with the opportunity to rebut the submissions of the [REDACTED]. The complainant submitted the following salient arguments for the Commissioner to consider during the legal analysis of the case:

² Opportunity for All, '*Privacy Policy*', available at: [REDACTED] [last accessed on the 24th May 2024].

- a. that the information and data on the [REDACTED] website are not accessible to the public, rather, they are restricted to employers and individuals who register on the website, usually only as employers;
- b. that the complainant called again to answer questions after he complained to the [REDACTED]. He intended to document the questions and share them with the media, however, both his mobile phones and home phone calls, as well as his texts, went unanswered. The complainant noted that he has records of the call dates on his phone;
- c. that the [REDACTED]'s employees stated that they were unaware of the survey but promised to investigate further. However, upon the complainant's second call, they refused to engage with him and never followed up;
- d. that the individual in charge of conducting the survey claimed he was not doing so voluntarily but was instructed to do it by the [REDACTED];
- e. that the complainant finds it concerning that both parties involved are secretive and refuse to provide answers regarding the origin of the information;
- f. that "[i]f there is an agreement where a third party could be given our contact details, nes that are not industry employers, then why all the secrecy when they were asked where they got the contact details from? And why were they not being transparent on who initiated such a survey in the first place?";
- g. that "[w]hy did I then call the [REDACTED], and was told that they did not know about the survey? Why then after I demanded that the person in charge of the actual survey call me, they told me that the [REDACTED] appointed them to do the survey. Why then did the [REDACTED] refuse to speak to me when I called the second time, even though they told me that they would get back to me after finding out more information about the survey, which they never did course"; and
- h. that "[s]ince the surveys were asking about conditions of work, they were asking about very sensitive information regarding their work, information that could patronize their position since surely there would be some if not many, negative comments and opinions. Since unfortunately the industry is built on one having to make an effort to upkeep one's positive attitude, one would think twice before expressing honestly about the negative aspects of their job, especially to a third party that initially refuses to give

information on who they are, their intentions and who appointed them in the first place. Sadly, blacklisting could badly hurt one's reputation and income, as so it happens in many cases, especially in the film industry".

6. On the 27th February 2024, the Commissioner requested the [REDACTED] to clarify whether the profiles on the [REDACTED] are created by the respective individuals, and if those individuals are able to amend the details themselves at any time. Additionally, the Commissioner asked for clarification on the legal basis relied upon to process such personal data in terms of article 6 of the Regulation. On the 1st March 2024, the [REDACTED] confirmed that the profiles on the [REDACTED] are created by the respective individuals and each user can amend the profile and details at any time. Regarding the legal basis relied upon, the [REDACTED] provided the following links:
- a. the Terms & Conditions of the Directory: [REDACTED]
[REDACTED]; and
 - b. the Privacy Policy of the Directory: [REDACTED]

The [REDACTED] further noted that, as per article 6 of the Regulation, by creating a user profile in the [REDACTED] the data subjects provided consent for the processing of their personal data for one or more specific purposes, in this case, a digital platform which streamlines the needs and demands of Malta's crew members with the different opportunities in the market.

7. In line with the Office's complaint-handling procedure, the Commissioner provided the [REDACTED] with the final opportunity to rebut the arguments made by the complainant. In this regard, by means of an email dated 18th March 2024, the [REDACTED] reiterated that "*any form of processing of personal data has been done in line with the General Data Protection Regulation*".
8. On the 27th March 2024, the Commissioner requested the [REDACTED] to provide further clarification on several points, namely:
- a. whether [REDACTED] was engaged to undertake processing activities on behalf of the [REDACTED];
 - b. whether the findings of the survey conducted by [REDACTED] were provided to the [REDACTED];

- c. whether there is any additional agreement in place with [REDACTED], besides the 'Non-Disclosure Agreement', that was already provided on the 25th February 2024;
 - d. a clear delineation of the purpose(s) of the [REDACTED], and who may have a user account on this directory;
 - e. clarification on the accessibility of the [REDACTED], specifically whether it is restricted to registered users only and whether individuals without accounts can access it; and
 - f. clarification on whether representatives of [REDACTED] [REDACTED] have access to the [REDACTED]. If they do not have user accounts, clarification is needed regarding how [REDACTED] accessed the user profiles on the [REDACTED].
9. In this regard, on the 8th April 2024, the [REDACTED] furnished the Commissioner with the following replies in response to the queries presented:
- a. that "[the [REDACTED]] confirms that [the third-party company] were engaged to undertake processing activities on behalf of the [the [REDACTED]]";
 - b. that "[the [REDACTED]] confirms that finds of the survey were provided by [the third-party company]";
 - c. that "[n]o other agreements are in place between [the [REDACTED]] and [the third-party company]";
 - d. that "[t]he aim of the digital platform is to serve as a crossroad for crew members, service providers and businesses within the film industry who are looking to collaborate or hire, helping talented crew connect with current employment opportunities through a transparent process contributing to the growth of Malta's film industry. Crew Members or those that are interested in working within the filming industry, Service Providers and Servicing companies/Businesses can have a user account";
 - e. that "[t]he [REDACTED] is restricted to registered users only"; and

- f. that “[the █████] extracted the list from █████ and was transferred to [the third-party company] as an excel sheet”.

LEGAL ANALYSIS AND DECISION

10. After examining the facts of the case, the Commissioner initiated the investigation by identifying the roles of the parties involved in the data processing activities in accordance with the Regulation. Based on article 4(7) of the Regulation, which defines the term controller as *“the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law”*, the Commissioner ascertains that the █████ assumes the functional role of a controller (the **“controller”**), and pursuant to article 5(2) of the Regulation, it is the responsibility of the controller to demonstrate full compliance with the provisions of the Regulation.
11. Additionally, the Commissioner establishes that the processing under investigation, namely the disclosure of the complainant’s personal data to the third party company, was carried out by this company on behalf of the controller, and therefore it acted as a processor within the meaning of article 4(8) of the Regulation, which defines the role of a processor as *“a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller”* (the **“processor”**).
12. The Commissioner scrutinises the European Data Protection Board’s (the **“EDPB”**) *‘Guidelines 07/2020 on the concepts of controller and processor in the GDPR’* (the **“Guidelines 07/2020”**) wherein it is stated that *“[t]he concepts of controller and processor are functional concepts: they aim to allocate responsibilities according to the actual roles of the parties. This implies that the legal status of an actor as either a “controller” or a “processor” must in principle be determined by its actual activities in a specific situation, rather than upon the formal designation of an actor as being either a “controller” or “processor” (e.g. in a contract). This means that the allocation of the roles usually should stem from an analysis of the factual elements or circumstances of the case and as such is not negotiable”*.
13. The incorporation of the principle of accountability into the Regulation aims to ensure that the controller’s responsibility for the processing of personal data is applied more effectively. The

accountability principle, which is further elaborated under article 24 of the Regulation, together with other more specific rules on how to comply with the Regulation and the distribution of responsibility, makes it necessary to define the different roles of several actors involved in a personal data processing activity. This principle provides that the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with the Regulation. In fact, recital 74 of the Regulation provides that “[t]he responsibility and liability of the controller for any processing of personal data carried out by the controller or on the controller’s behalf should be established. In particular, the controller should be obliged to implement appropriate and effective measures and be able to demonstrate the compliance of processing activities with this Regulation, including the effectiveness of the measures”.

14. The accountability principle is also reflected in article 28 of the Regulation, which lays down the controller’s obligations when engaging a processor. In instances wherein a controller engages a processor, the overarching accountability obligation of the controller to ensure compliance with data protection principles necessitates that the controller ensures that any contract with a processor effectively enables compliance with its obligations. Article 28 of the Regulation seeks to ensure that controllers have oversight of processors engaged by them, in fact article 28(1) of the Regulation imposes an obligation on controllers to “*use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject*”.
15. Under article 28(3) of the Regulation that imposes that the relationship between the controller and the processor shall be formalised by means of “*a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller*”. This contract or legal act must be “*binding on the processor with regard to the controller*” and must set out “*the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller*”. The contract also sets out how the relationship between a controller and processor should operate in practice³, and binds a processor to put appropriate security measures in place for the risk to personal data⁴.

³ Articles 28(3)(a), 28(3)(e), 28(3)(f), 28(3)(g) and 28(3)(h) of the Regulation

⁴ Article 28(3)(c) of the Regulation

16. The Commissioner considers the Guidelines 07/2020 wherein it is stated that “[t]he degree of detail of the information as to the security measures to be included in the contract must be such as to enable the controller to assess the appropriateness of the measures pursuant to Article 32(1) GDPR. Moreover, the description is also necessary in order to enable the controller to comply with its accountability duty pursuant to Article 5(2) and Article 24 GDPR as regards the security measures imposed on the processor. A corresponding obligation of the processor to assist the controller and to make available all information necessary to demonstrate compliance can be inferred from Art. 28.3 (f) and (h) GDPR”.

17. Accordingly, the Commissioner examines the ‘Non-Disclosure Agreement’ provided by the controller that was entered into by and between the [REDACTED] and the representative of the third-party company. The Commissioner emphasises that while an ‘Non-Disclosure Agreement’ serves to protect confidential information exchanged between parties, it typically focuses on confidentiality obligations rather than addressing the specific requirements for lawful data processing under the Regulation. In this regard, the Commissioner determines that the ‘Non-Disclosure Agreement’ does not fulfil the requirements of article 28(3) of the Regulation and consequently is not considered adequate to govern the relationship between the controller and the processor for the purposes of the Regulation.

On the basis of the foregoing considerations, the Commissioner is deciding that the controller failed to formalise the relationship between the controller and the processor by means of a contract or other legal act under Union or Member State law, leading to an infringement of article 28(3) of the Regulation. Furthermore, during the course of the investigation, the Commissioner established that the controller failed to demonstrate full compliance with the provisions of the Regulation, which is its responsibility, thereby infringing article 5(2) of the Regulation.

As a result, pursuant to article 58(2)(d) of the Regulation, the Commissioner is ordering the controller to bring the processing operation into compliance with the provisions of the Regulation, by adopting a contract or other legal act that is binding on the processor with regard to the controller. This contract or other legal act must set out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects, and the obligations and rights of the controller. Additionally, it must include the requirements set forth in articles 28(3)(a) to 28(3)(h) of the Regulation.



By virtue of article 58(2)(b) of the Regulation, the controller is hereby served with a reprimand and warned that in the event of similar infringement, the appropriate enforcement action shall be taken accordingly.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
(Signature)
Date: 2024.05.24
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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 Appeal Tribunal
158, Merchants Street
Valletta.