

COMPLAINT

1. On the 5th June 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 Regulation¹ (the “**Regulation**”), alleging that following the Commissioner’s legally-binding decision² to fulfil the complainant’s Subject Access Request, [REDACTED] (the “**controller**”) provided the data subject with a heavily redacted copy of a Fact Finding Report (the “**Report**”) and is “*concerned with the amount of redacted, in that in certain areas it is not possible to decipher what personal data is being processed about the complainant*”.
2. The complainant submitted a copy of the redacted Report and the following relevant facts in relation to his complaint:
 - a. that large chunks of text are redacted, including the signatories of the Board Members involved in its preparation. Additionally, the documents mentioned in the Report as integral parts, were not included in the provided document, and consequently not made available to the complainant;
 - b. that besides the extent of the redaction, it is evident that the Report “*is not a true and complete copy of the Report which relates to the Complainant*”. In fact, the complainant specifically referred to the conclusive paragraph on page eight (8) of the Report which

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

² Commissioner’s legally-binding decision dated 2nd May 2023, registered internally as CDP/COMP/3/2023.

states that, “[m]a’ dan ir-rapport qed ikunu mehmuzà dokumenti li ngħataw lill-Bord u li kienu l-bazi, flimkien mal-laqgħat ma’ diversi ufficjali, biex toħrog ir-rakkomandazzjoni ta’ dan l-eżercizzju ‘fact-finding’ fit-Teatru Manoel”. The complainant noted that none of these documents were provided, not even in a redacted format, and consequently, the Complainant asserts that the controller failed to faithfully fulfil the Subject Access Request as ordered by the Commissioner; and

- c. that the complainant is requesting the Commissioner to assess and determine whether the controller has lawfully complied with the Commissioner’s decision dated 2nd May 2023³.

INVESTIGATION

3. On the 14th June 2023, pursuant to this Office’s internal investigation procedure, the Commissioner provided the controller with a copy of the complaint, including the documentation attached thereto, and provided the controller with the opportunity to put forward its submissions in order to defend itself against the allegation raised by the complainant.
4. By means of a letter dated the 5th July 2023, the controller through its legal counsel, submitted the following principal arguments for the Commissioner to consider in the legal analysis of the case:

The Facts

- a. that during a meeting of the controller’s Management Committee, it was decided to suspend the complainant from his duties following recommendations by an independent ad hoc Fact-Finding Board (the “**Board**”) set up to investigate alleged instances of serious gross misconduct on the part of the complainant during the performance of his duties as Chief Executive Officer (CEO);
- b. that a Report was compiled by an independent ad-hoc Board and passed on to the controller’s Management Committee. On the 8th November 2022, the controller’s Management Committee suspended the complainant;
- c. that on the 11th November 2022, the complainant requested a copy of the Report;

³ Ibid 2.

- d. that on the 16th December, 2022, the controller received an email correspondence from the complainant, with a general Subject Access Request, wherein the complainant specifically requested that the controller provide information about the personal data held in relation to the recruitment, the conditions of employment and the allegations of misconduct that led to his suspension;
- e. that twelve (12) days later, the complainant filed a complaint⁴ with the Commissioner. In his email, he requested the Commissioner to instruct the full disclosure of the Report and to impose a penalty on the controller;
- f. that on the 3rd May 2023, the Commissioner issued the decision⁵, pursuant to which the controller was ordered to *“comply with the complainant’s request to exercise his right pursuant to article 15 of the Regulation. In accordance with article 15(4) of the Regulation, the controller shall redact any personal data pertaining to third parties when providing access to the complainant’s personal data”*;
- g. that in compliance with the above-cited decision, on the 23rd May 2023, the controller forwarded a copy of the Report and it redacted personal data pertaining to third parties mentioned in the Report;
- h. that the complainant was not satisfied with the decision and instead of appealing the decision dated the 2nd May 2023 is now lamenting the redaction of the Report. In fact, in this latest complaint, the complainant requested the Commissioner to order the controller to provide a *“full and unredacted Report”*. The controller argued that the complainant’s request should not be entertained for the following reasons:

(A) The data redacted pertains to third parties who lodged a complaint

- i. that the Report contains a series of complaints regarding the complainant’s behaviour, along with recommendations by the ad hoc Board. The redacted data pertains to other data subjects who have filed complaints about the complainant’s behaviour at the workplace;
- j. that the redaction was absolutely necessary to protect the fundamental rights of employees, who voluntarily came forward to recount their experience at their

⁴ Ibid 2.

⁵ Ibid 2.

workplace to the ad hoc Board. Article 15(4) of the Regulation clearly establishes that “[t]he right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others”;

- k. that the controller is seriously concerned about the fundamental rights of those employees who appeared before the ad hoc Board, without being aware of or providing consent for the sharing of their personal life experiences and their personal data with any third party;

(B) Application of the restriction in terms of Subsidiary Legislation 586.09

- l. that in the given circumstances, especially considering the data redacted, the controller does not agree with the complainant’s view that the derogations must be applied restrictively. In this regard, the controller referred to the Regulation 4 of the Restriction of the Data Protection (Obligations and Rights) Regulations, Subsidiary Legislation 586.09 (the “**Subsidiary Legislation 586.09**”), which explicitly states that the rights of a data subject are not absolute. Indeed, the relevant Regulation specifies the following:

“4. Any restriction to the rights of the data subject referred to in Article 23 of the Regulation shall only apply where such restrictions are a necessary measure required:

*(b) for the prevention, detection, **investigation and prosecution of criminal offences**, including measures to combat any money laundering activity, and the execution of criminal penalties”* [emphasis added by the controller];

- m. that in these circumstances, the controller contends that the applied restriction respects the essence of the fundamental rights and freedoms of the complainant. Furthermore, it is deemed necessary and proportionate to safeguard the fundamental rights of third parties. The restriction is necessary to protect the freedoms of the employees who lodged their complaints. There is no doubt this restriction is aimed at safeguarding such interest and such protection should be entirely unfettered;

- n. that the 'Guidelines 10/2020 on restrictions under Article 23 GDPR'⁶ delve into the two tests required:

"41. The objective to be safeguarded provides the background against which the necessity of the measure may be assessed. It is therefore important to identify the objective in sufficient detail so as to allow the assessment on whether the measure is necessary. For example, if in administrative proceedings it is necessary to restrict part of the investigation, but some information can already be disclosed to the data subjects concerned, then that information should be provided to the person. The case law of the CJEU applies a strict necessity test for any limitations on the exercise of the rights to personal data protection and respect for private life with regard to the processing of personal data: 'derogations and limitations in relation to the protection of personal data (...) must apply only insofar as is strictly necessary'. The ECtHR applies a test of strict necessity depending on the context and all circumstances at hand, such as with regard to secret surveillance measures.

42. If this test is satisfied, the proportionality of the envisaged measure will be assessed. Should the draft measure not pass the necessity test, there is no need to examine its proportionality. A measure which is not proved to be necessary should not be proposed unless and until it has been modified to meet the requirement of necessity.

43. The necessity and proportionality test typically implies assessing the risks to the rights and freedoms of the data subjects. The risks to the rights and freedoms of data subjects are detailed in point 4.7 of these guidelines. 44. According to the proportionality principle, the content of the legislative measure cannot exceed what is strictly necessary to safeguard the objectives listed in Article 23(1)(a) to (j) GDPR. The restriction must therefore be appropriate for attaining the legitimate objectives pursued by the legislation at issue and not exceed the limits of what is appropriate and necessary in order to achieve those objectives. According to the CJEU case law, Article 23 GDPR cannot be interpreted as being capable of conferring on Member States

⁶ European Data Protection Board, 'Guidelines 10/2020 on restrictions under Article 23 GDPR' (Version 2.1) adopted on 13 October 2021.

- c. that as recently reiterated by the Court of Justice of the European Union (the “CJEU”)⁹:

“With regard to the objectives pursued by Article 15 of the GDPR, the Court notes that the right of access provided for in that article must enable the data subject to ensure that the personal data relating to him or her are correct and that they are processed in a lawful manner.”

“In particular, that right of access is necessary to enable the data subject to exercise, depending on the circumstances, his or her right to rectification, right to erasure (‘right to be forgotten’) or right to restriction of processing, conferred, respectively, by Articles 16, 17 and 18 of the GDPR, as well as the data subject’s right to object to his or her personal data being processed, laid down in Article 21 of the GDPR, and right of action where he or she suffers damage, laid down in Articles 79 and 82 of the GDPR (judgment of 12 January 2023, Österreichische Post (Information regarding the recipients of personal data), C-154/21, EU:C:2023:3, paragraph 38 and the case-law cited)”;

- d. that the complainant made reference to the controller’s submissions, in which it asserted that *“the Complainant is not satisfied with the (Commissioner’s decision and instead of appealing the decision CDP/COMP/3/2023 is now lamenting the fact that the report has been redacted”*. The complainant contests this submission as being outright unfounded and fundamentally flawed in fact and at law. In fact, the complainant argues that it is the controller who, through its submissions, is once again attempting to bring the Commissioner to overturn his first decision¹⁰, which decision the controller chose not to appeal;
- e. that the Commissioner’s original decision was clear and correct, in determining that the Report contained the complainant’s personal data, thereby instructing the controller to *“comply with the complainant’s request to exercise his right pursuant to article 15 of the Regulation”*. Indeed, the Commissioner also decided that *“[i]n accordance with article 15(4) of the Regulation, the controller shall redact any personal data pertaining to third parties when providing access to the complainant’s personal data”*. Notably, the complainant refrained from appealing the decision¹¹, because he does not contest

⁹ Case C-154/21, ‘RW vs Österreichische Post AG’, decided on the 12th January 2023, and ‘F.F. vs Österreichische Datenschutzbehörde’, decided on the 4th May 2023.

¹⁰ Ibid 2.

¹¹ Ibid 2.

the validity thereof. However, the complainant felt compelled to file a follow-up complaint against the controller due to concerns about the controller's adherence to the Commissioner's order. The complainant lacks confidence that the controller is implementing the order faithfully and within the legal parameters. The complainant submits that whereas the Commissioner's decision does mention that the "*controller shall redact any personal data pertaining to third parties*", it also a fact that the Commissioner does not make this statement in a vacuum, but rather, the Commissioner qualified such statement with the preceding phrase "*[i]n accordance with article 15(4) of the Regulation*";

- f. that article 15(4) of the Regulation constitutes the exception to the Subject Access Right, which is considered a fundamental right, and exceptions to fundamental rights must be applied narrowly. The complainant laments about the controller's interpretation of this exception and is concerned about the perceived broad application, which is particularly evident in the heavy redaction of the Report;
- g. that as confirmed in the aforementioned CJEU¹² judgement, when applying the right of access "*a balance will have to be struck between the rights in question*";
- h. that there must be a clear and express '*right*' or '*freedom*' of a third-party that will be materially impacted by the granting of a copy of the personal data;
- i. that individuals (employees of the controller) who allegedly lodged complaints against a person (the accused) with a Board would reasonably expect that such Board will compile a report with recommendations pertaining to the complaints against the accused;
- j. that where a complaint lodged by a complainant (or any statement provided by such complainant to the Board) contains personal data pertaining to the complainant specifically (such as, medical conditions and medication), which does not relate to the accused person, there may be a consideration for balancing the right to privacy of the complainant. In such instances, the disclosure of the Report would be made, barring information that is strictly necessary to protect the privacy rights of the complainant. Similarly, if the Report or statements presented to the Board, or the Report of the Board itself, contains information protected by law that establishes rights and freedoms (for

¹² Case C-487/21, '*F.F. vs Österreichische Datenschutzbehörde*', decided on the 4th May 2023.

- example by intellectual property law or trade secret law), any disclosure should be limited only to the extent that is strictly necessary to protect those defined rights at law;
- k. that in reference to the controller's assertion that "[t]he data redacted pertains to third parties who lodged a complaint", the complainant argued that the lodging a complaint does not imply that the complaint does not encompass personal data related to the person against whom the complaint is filed. On the contrary, it is firmly submitted that any complaint and, or statement "about the Complainant's behaviour at the workplace" qualifies as 'personal data', as it identifies and pertains to the complainant. This complaint does not fall under the category of private correspondence or private confessions to a priest or therapist, but rather, it constitutes a formal declaration submitted within an official context, intended to trigger a course of action which involves discussions and subsequent consequences;
- l. that the complainant referred to the 'Guidelines 01/2022 on data subject rights - Right of access'¹³ which outlines the CJEU's definition of 'personal data'. The complainant specifically cited 'Example 15' in which the European Data Protection Board (the "EDPB") gives an example describing that subjective comments made by an employer about a candidate during a job interview, including comments about the candidate's behaviour, must be provided to the candidate if so requested via a Subject Access Request. The EDPB clearly emphasises that a Subject Access Request should include, as a general rule, disclosure of *inter alia* data actively provided by data subjects, but also 'observed data', and 'data derived from other data' and 'data inferred from other data'. More specifically, in 'Example 16', the EDPB states: "Example 16: Elements that have been used to reach a decision about e.g. employee's promotion, pay rise or new job assignment (e.g. annual performance reviews, training requests, disciplinary records, ranking, career potential) are personal data relating to that employee";
- m. that all elements contributing to a decision regarding an employee constitute 'personal data', which the data subject has the right to request under Regulation. The restriction on information primarily pertains to details about third parties, however this restriction does not extend to the contents of such subjective statements provided by such third parties. In this regard, the complainant quotes that "the EDPB recalls in this context that the protection of natural persons with regard to the processing of personal data

¹³ European Data Protection Board, 'Guidelines 01/2022 on data subject rights - Right of access' (Version 2.0), adopted on the 28th March 2023

encompasses all the types of personal data listed above and that a restrictive interpretation of the definition contravenes the provisions of the GDPR and ultimately violates Art. 8 of the Charter of Fundamental Rights”;

- n. that the complainant having reviewed the redacted version of the Report as presented to him, does not have any comfort whatsoever that the redaction is indeed limited to what is strictly necessary, and neither does he have any comfort that there was a genuine need to protect any real and specific right or freedom of a third party;
- o. that it is for this reason that the complainant has requested the Commissioner to assess whether the redaction was carried out in accordance with the spirit of the Commissioner’s Decision and executed within the strict parameters of the law, by way of exception and limited to what is strictly necessary;
- p. that additionally, the controller declares in its submission that *“the Controller is seriously concerned about the fundamental rights of those employees who appeared before the ad hoc Fact-Finding Board not knowing and not consenting to their personal life experiences and their personal data to be shared to any third party”*. In this regard, the complainant submitted:
 - i. that the controller has not identified or defined the nature of *‘fundamental rights’*, nor has the controller demonstrated how third parties will be adversely affected in this specific situation. In line with the EDPB Guidelines 01/2022¹⁴, *“[t]he controller must be able to demonstrate that the rights or freedoms of others would be adversely affected in the concrete situation”*;
 - ii. that the controller has failed to provide any evidence indicating or suggesting that individuals who filed complaints with the Board were promised or granted any form of rights, such as the right to secrecy or non-disclosure, and even if they would have been so promised, such a promise would have been unlawful and fundamentally flawed, since any person who is accused of some wrongdoing, has a fundamental right to be informed about the nature of the accusations against them, such that they can defend themselves in what should be an objective and transparent process;

¹⁴ Ibid 13.

- iii. that any individuals who are invited to contribute or voluntarily choose to contribute to a Board know that whatever it is that they declare will be quoted and used elsewhere and will be disclosed within appropriate fora and, or shared in accordance with data protection laws. It is implausible for anyone to make allegations in a formal setting, like a Board, without the expectation that their statements will be disclosed;
- iv. that individuals contributing in such fora know (and ought to be told) that their contributions are their own responsibility, subject to accountability, and their statements will be disclosed;
- v. that the complainant is not a '*any third party*', but he is the individual facing these accusations. Furthermore, these third parties are not merely giving an account of '*personal life experiences*' (as the controller chooses to describe this) but are rather given an account of **the complainant's** alleged behaviour at his workplace. In support of this, the complainant referred to '*Doreen Camilleri vs the Commissioner for Information and Data Protection*'¹⁵ as quoted in the complainant's first set of submissions to the Commissioner wherein the Court confirmed that a similar report prepared by an ad hoc Board in circumstances akin to those in this case is not a confidential report, and the concerned employee is entitled to access it in full, with the exception of redacted names of complainants;
- vi. that considering that the Board disclosed its Report and its findings to the controller and the Ministry, it is somewhat brazen for the controller to be arguing that the complainant should not have access to the Report because those employees who complained before the Board were "*not knowing and not consenting*" to the disclosure. Indeed, this is a convenient excuse to try to get away with what appears to be an excessive redaction;
- q. that lastly, as regards the controller's submission that Subsidiary Legislation 586.09 must not be applied restrictively based on regulation 4(b), it is respectfully submitted that the controller can hardly rely on regulation 4(b) of Subsidiary Legislation 586.09, as the controller processes the complainant's personal data contained in the Report

¹⁵ Appeal No 39/2016 in the names of Doreen Camilleri Vs the Commissioner for Information and Data Protection

solely because it acts in its capacity as the ‘*employer*’ of the complainant, and not in its capacity of an authority that necessitates processing for the prevention, detection, investigation and prosecution of criminal offences. Additionally, “*even if (dato ma non concessa) [the controller] were deemed to be acting within such a capacity, such that it were found to be processing this personal data for the prevention, detection, investigation and prosecution of criminal offences, [the controller] must still be in a position to demonstrate (with facts) that its decision to restrict the Access Rights by virtue of S.L. 586.09 Reg. 4(b) is based on “a necessary measure required” for that purpose of investigating/prosecuting a criminal offence*” [emphasis added by the complainant];

- r. that in other words, the controller cannot simultaneously rely on the derogation contemplated under article 15(4) of the Regulation to protect alleged rights or freedoms of third parties and assert that the non-disclosure is based on a necessary measure essential for the investigation and, or prosecution. Relying on regulation 4(b) of Subsidiary Legislation 586.09 requires the controller to demonstrate to the Commissioner’s satisfaction that non-disclosure was essential in the context of the investigation or prosecution, thus proving that the investigation or prosecution would not be possible if the disclosure were to occur;
 - s. that the controller is citing regulation 4(b) of Subsidiary Legislation 586.09 by taking it entirely out of context, as regulation 4(b) of Subsidiary Legislation 586.09 has nothing to do with the protection “*of the employees who lodged their complaints*” and the controller is just blatantly confusing concepts when it declares that “[*t*]here is no doubt this restriction aims at safeguarding such interests and such protection should be entirely unfettered”; and
 - t. that the restriction or limitation of any right to access information, cannot be deemed ‘*unfettered*’, let alone ‘*entirely unfettered*’. It is for this reason that the complainant has found it necessary, once again, to seek recourse and ensure that his fundamental rights at law are not trampled over, despite a clear order of the Commissioner in this respect.
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 11th August 2023, the controller through its legal counsel, submitted its reply and highlighted the following salient argument:

- a. that “[i]n his submissions, the Complainant submits that the Report contains personal data pertaining to him which has had and continues to have a material impact on his privacy, his work, his social life and his reputation. With all due respect, the Report has never impacted any of the aforementioned. For the umpteenth time, the Report was always treated confidentially and the contents (as the Complainant knows already) includes complaints made by third parties about him. It is clear that the Complainant was not satisfied with the Decision by the Honourable Commissioner and has instituted this latest complaint simply to get a copy of the full and unredacted Report to be able to extract all personal data pertaining to individuals who filed a complaint against him”;
- b. that “[i]n any case, the Committee contends that statements made in paragraph numbered one (1) of the Complainant’s submissions are solely and exclusively intended to misguide this office. The Complainant submits that the report contains information which comprises personal data which identifies the Complainant, and which is likely to be incorrect, and which therefore he has a direct and urgent need to assess, also in view of the disciplinary actions taken against him. This is misleading because the Complainant already has the personal data requested and this following the Decision quoted above! The Complainant is perfectly aware of the complaints brought against him by third parties”;
- c. that “[t]he Complainant quotes two CJEU Cases, namely C-154/21 and C-487/21. For starters, the facts of both cases quoted have absolutely nothing to do with the circumstances relating to this present complaint. In the *Österreichische Datenschutzbehörde and CRIF* case, CRIF was a business consulting agency providing, at the request of its clients, information on the creditworthiness of third parties. In this case, it appears that it processed the personal data of the applicant in the main proceedings, an individual. The latter applied to CRIF, on the basis of the General Data Protection Regulation, for access to personal data concerning him. In addition, he asked to be provided with a copy of the documents, namely emails and database extracts containing, inter alia, his data, ‘in a standard technical format’. In response to that request, CRIF sent the applicant in the main proceedings, in summary form, the list of his personal data undergoing processing. Being of the view that CRIF should have sent him a copy of all documents containing his data, such as emails and database extracts, the applicant in the main proceedings lodged a complaint with the *Österreichische Datenschutzbehörde* (Austrian Data Protection Authority) In response

to that request, CRIF sent the applicant in the main proceedings, in summary form, the list of his personal data undergoing processing. Being of the view that CRIF should have sent him a copy of all of the documents containing his data, such as emails and database extracts, the applicant in the main proceedings lodged a complaint with the Österreichische Datenschutzbehörde (Austrian Data Protection Authority)”;

- d. that “[w]ith regards to the CJEU Judgement in Case C-154/21 – Österreichische Post – a citizen requested Österreichische Post, the principal operator of postal and logistical services in Austria, to disclose to him the identity of the recipients to whom it had disclosed his personal data”;
- e. that “[s]urely, when examining the above cited judgements, one cannot draw parallels to this present complaint and more pertinently the judgement do not delve into the safeguards contemplated in Article 15(4)”;
- f. that “[i]n his submissions (paragraph numbered four (4)), the Complainant submits that the Committee is attempting to have the decision overturned. This is fundamentally flawed from every aspect. Had the Committee wished to appeal the decision, it could have easily done so but it chose to abide by the Decision cited above. It is the Complainant who chose to file a fresh complaint to attempt to overturn the Decision and this is apparent for this office to see – precisely when he requests the **full and unredacted Report**” [emphasis has been added by the controller];
- g. that “[w]ith reference to the paragraph numbered seven (7) wherein the need for balance is quoted from judgement C-487/21 it is worth highlighting that the Complainant chose to omit the fact that the Court also pointed towards the importance of safeguarding third party rights: “In the event of conflict between, on the one hand, exercising the right of full and complete access to personal data and, on the other hand, the rights or freedoms of others, the Court takes the view that a balance will have to be struck between the rights and freedoms in question. **Wherever possible, means of communicating personal data that do not infringe the rights or freedoms of others should be chosen**, bearing in mind that the result of those considerations should not be a refusal to provide all information to the data subject”” [emphasis has been added by the controller];
- h. that “[o]nce again in paragraphs numbered eight (8) and nine (9) of the Complainant’s submissions, the Complainant seemingly argues that his own rights to have access to

third party data outweighs the right of third parties (in this case employees lodging complaints against him) to have their own data safeguarded. Indeed, in paragraph numbered nine (9) the Complainant goes as far as to assert that the employees lodging complaints should have known that their data would be made disclosed to the Complainant, which reasoning, it is submitted, is altogether flawed and entirely unacceptable. In any case, all the arguments put forward in the complainant submissions seem to point to one conclusion – that is, that the Commissioner should not have applied the limitation established in Article 15(4). The EDPB Guidelines 01/2022 on the Data Subject Rights – Rights of Access (March, 2023) delves into the limits and restrictions and states the following: “The GDPR allows for certain limitations of the right of access. There are no further exemptions or derogations. The right of access is without any general reservation to proportionality with regard to the efforts the controller has to take to comply with the data subject’s request. According to Art. 15(4) the right to obtain a copy shall not adversely affect the rights and freedoms of others. The EDPB is of the opinion that these rights must be taken into consideration not only when granting access by providing a copy, but also, if access to data is provided by other means (on-site access for example). Art. 15(4) is not, however, applicable to the additional information on the processing as stated in Art. 15(1) lit. a.-h. The controller must be able to demonstrate that the rights or freedoms of others would be adversely affected in the concrete situation. Applying Art. 15(4) should not result in refusing the data subject’s request altogether; it would only result in leaving out or rendering illegible those parts that may have negative effects for the rights and freedoms of others””;

- i. that *“in accordance with the opinion above the Committee, as controller, must be able to demonstrate that the rights or freedoms of others would be adversely affected in the concrete situation. In this case, the redacted data pertains to third party individuals who have made complaints vis-à-vis the Complainant’s behaviour at the work-place. This was not contemplated in the examples cited by the Complainant in paragraph numbered eleven (11) of his submissions. 9. The Committee also reiterates that the Report in its entirety was passed on to the Executive Police, which on its part, is still investigating. It is reasonable, and certainly not superficial, to argue that the personal data of third parties needs to be safeguarded especially in the light of the ongoing investigations. As held in the EDPB Guidelines 10/2020 on restrictions under Article 23 GDPR: ’24. In certain cases, providing information to the data subjects who are under investigation might jeopardise the success of that investigation. Therefore, the*

restriction of the right to information or other data subject's rights may be necessary, under Article 23(1)(d) GDPR'.”;

- j. that “[i]n furtherance and without prejudice to the above, the Guidelines on the Rights of Individuals with regard to the Processing of Personal Data issued by the EDPS establish a much wider application of the aforementioned restriction than that which is being argued by the complainant. In fact, it is stated in the said guidelines that whilst the wording of the Regulation speaks of the investigation of a criminal offence: ‘the EDPS considers that it has to be interpreted in the light of the ratio legis of the provision, and in particular in the light of Article 13 of Directive (EC) 95/46, so as to provide for certain restrictions on the duty to inform the data subject as a measure preliminary to an internal inquiry (detection of an infringement)’.¹⁶ Consequently, said Guidelines also provide that the restriction ‘also covers disciplinary proceedings and administrative enquiries’¹⁷”;
- k. that “[i]n addition to the foregoing, and without prejudice to the above, the Committee submits that the Complainant is attempting to disregard the fact that the rights of data subjects are not absolute. It is incumbent on the Committee to also take heed of and protect the interests of third parties, which should also be safeguarded in this case. All of this is mandated by the GDPR itself, considering that a restriction to the data subject's right is also envisaged under Art. 23 of the GDPR so as to safeguard: ‘(i) the protection of [...] the rights and freedoms of others’”;
- l. that “[a]ll the above considered, the Committee asserts that all the aforementioned factors lean towards the application of the restriction rather than the general rule of the right of access of the data subject”;
- m. that “[i]n these particular circumstances, the Committee argues that the restriction being applied in this instance respects the essence of the fundamental rights and freedoms of the Complainant and is necessary and **proportionate** to contemporaneously allow the safeguarding and the fundamental rights of third parties. The restriction is necessary to protect the freedoms of the employees lodging the

¹⁶ European Data Protection Supervisor, ‘Guidelines on the Rights of Individuals with regard to the Processing of Personal Data’ (Version 2.1), page 27.

¹⁷ Ibid.

complaints. There is no doubt this restriction aims at safeguarding such interests” [emphasis has been added by the controller];

- n. that “[c]onsidering the legal basis afore cited and taking into account the fundamental rights of third parties, it results that there was no breach in the implementation of the Decision. In light of the above as well as the reply filed by the Committee, [the controller] contends that the request submitted by the Complainant cannot and should not be upheld”.

LEGAL ANALYSIS AND DECISION

The Applicability of the Restriction

7. The issue of the whether the controller invoked a restriction or not, has already been addressed in the Commissioner’s legally-binding decision dated 2nd March 2023. For clarity, neither throughout this investigation nor the initial investigation did the controller submit any evidence to concretely demonstrate that the restriction was invoked. In fact, it was only during the course of the initial investigation that the controller indicated for the **first time** that it had decided to restrict the fundamental right of the complainant on the basis of regulation 4(b) of Subsidiary Legislation 586.09.
8. Within this context, the Commissioner considered article 23(2)(h) of the Regulation, which provides that any legislative measure should contain specific provisions at least, where relevant, as to the “*right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction*”. Regulation 6 of Subsidiary Legislation 586.09 states that the “*data controller shall inform the data subject about any restriction provided for under these regulations*”. This is subject to the proviso, which reads as follow: “[p]rovided that such a disclosure will not be prejudicial to the purposes of the restriction applied pursuant to these regulations”.
9. In this regard, the Commissioner will not delve into the merits of the restriction mentioned by the controller during the course of the investigation, and whether this restriction was indeed necessary and proportionate.

Limitation in terms of article 15(4) of the Regulation

10. As a preliminary step, the Commissioner considers the controller’s submissions dated the 5th July 2023, wherein the controller emphasised on the necessity of redacting passages of the

report to safeguard the fundamental rights of its employees who had voluntarily shared their experiences with the ad hoc Board. According to the controller's submissions, this redaction was essential to comply with article 15(4) of the Regulation, which mandates that the right to access personal data should not infringe upon the rights and freedoms of others.

11. In this regard, the Commissioner examines article 15(4) of the Regulation, which entails that the right of access should not adversely affect the rights or freedoms of others. Additionally, recital 63 of the Regulation adds further clarity to this provision by stating that the right to access personal data "*should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. However, the result of those considerations should not be a refusal to provide all information to the data subject*". Hence, a balancing of rights exercise should be conducted by the controller to balance the right of access to personal data against an identified risk, which may be brought about by the disclosure of the personal data.
12. Article 15(4) of the Regulation, which caters for a limitation to the fundamental right of access, should be interpreted restrictively. Furthermore, pursuant to the principle of accountability as set forth in article 5(2) of the Regulation, the onus for applying this limitation rests with the controller which is required to effectively demonstrate that the rights and freedoms of others would be adversely affected in the concrete situation.
13. Within this context, the European Data Protection Board (the "**EDPB**") made it clear that the applicability of article 15(4) of the Regulation should not result in an outright denial of the data subject's request, but rather, "*it would only result in leaving out or rendering illegible those parts that may have negative effects for the rights and freedoms of others*"¹⁸ [emphasis has been added]. The EDPB continued by stating that "*instead of rejecting to provide a copy*", "*information concerning others has to be rendered illegible as far as possible*"¹⁹.
14. Furthermore, the EDPB clarified that the phrase '*personal data concerning him or her*' should not be narrowly construed by controllers. The EDPB emphasised the importance of avoiding overly restrictive interpretations of this phrase, thereby ensuring that individuals' rights to data protection are effectively upheld.

¹⁸ Ibid 13.

¹⁹ Ibid 13.

15. With specific reference to the applicability of article 15(4) of Regulation, the EDPB commented that:

“When the Art. 15(4) GDPR assessment proves that complying with the request has adverse (negative) effects on other participants' rights and freedoms (step 1), the interests of all participants need to be weighed taking into account the specific circumstances of the case and in particular the likelihood and severity of the risks present in the communication of the data. The controller should try to reconcile the conflicting rights (step 2), for example through the implementation of appropriate measures mitigating the risk to the rights and freedoms of others. As emphasised in Recital 63, protecting the rights and freedoms of others by virtue of Art. 15(4) GDPR should not result in a refusal to provide all information to the data subject. This means, for example, where the limitation applies, that information concerning others has to be rendered illegible as far as possible instead of refusing to provide a copy of the personal data. However, if it is impossible to find a solution of reconciliation of the relevant rights, the controller has to decide in a next step which of the conflicting rights and freedoms prevails (step 3)”²⁰.

16. In light of the considerations outlined, the Commissioner proceeds to analyse whether the disclosure of the full and unredacted copy of the Report would indeed impinge upon the rights and freedoms of the third parties involved. Consequently, the Commissioner conducted a comprehensive review of the complete and unredacted Report requested by the complainant, along with its annexes. A thorough comparison was conducted between the redacted sections and the unredacted version of the Report, and it was determined that the document in question comprises a compilation of complaints lodged against the complainant, alongside recommendations provided by an ad hoc Board.

17. The Commissioner acknowledges that the personal data redacted belong to both the complainant and the relevant third parties. Thus, the Commissioner examines the judgement of ‘*Peter Nowak vs Data Protection Commissioner*’, wherein the Court of Justice of the European Union held that “[t]he same information may relate to a number of individuals and may constitute for each of them, provided that those persons are identified or identifiable, personal data, within the meaning of Article 2(a) of Directive 95/46” [emphasis has been added]. The Court underscores the possibility that personal data may indeed be relevant to multiple

²⁰ Ibid 13.

individuals concurrently. However, this circumstance does not automatically imply the necessity to grant access to personal data associated with another individual, as the controller is bound by the stipulations set forth in article 15(4) of the Regulation.

18. In this regard, the Commissioner carefully analysed the intricate balance between the right to access information as outlined in article 15 of the Regulation and right to the protection of personal data, particularly concerning other parties' rights and freedoms under article 15(4) of the Regulation. The Report in question contains personal data pertaining to various individuals, particularly employees of the controller. It delves into intricate details about their professional roles, experiences and interactions within the workplace. Furthermore, the Report includes specific information such as the employment duration, descriptions of their day-to-day work activities and accounts of relevant events they encountered while carrying out their duties. It also provides insights into the employees' perceptions of their professional relationships, including interactions with the complainant. It contains testimonials from multiple employees, each presenting their perspective on various incidents and events, including instances of alleged harassment, with detailed narratives often including dates and incident descriptions, as well as the rationale for perceiving certain behaviours as harassment.
19. Additionally, the Report identifies individuals with whom the Board met during its investigation, providing comprehensive details extending beyond mere identification to include descriptions of interactions, experiences and perceptions, all of which could easily lead to the identification these individuals. Consequently, the report contains a compilation of personal data that if disclosed, could significantly jeopardise the rights and freedoms of the individuals involved, as highlighted by the Commissioner's assessment. Consequently, the Commissioner discerned that even if the basic personal data (such as names and surnames) of the third parties were obscured, the content of their statements remained completely identifiable to the complainant. This is due to the detailed experiences recounted by the employees which enables the complainant to easily single them out.
20. The Commissioner analyses whether the disclosure of the unredacted report would directly impinge upon the right to protection of personal data enshrined in article 8 of the EU Charter of Fundamental Rights for other employees involved. Considering that the Report contains personal information about these individuals, full disclosure would effectively deprive these employees of their ability to maintain control over this personal information, exposing them to unwanted scrutiny and potential harm.

21. The Commissioner identifies significant harm and risks associated with full disclosure, particularly concerning the potential harm to the rights and freedoms of others. Hence, divulging unredacted versions of the report could compromise the confidentiality of employees who provided testimonies expecting anonymity, infringing upon their fundamental right to data protection and potentially subjecting them to reputational damage within their professional spheres. Moreover, these individuals entrusted the controller with sensitive information under the presumption of confidentiality, and thus, disclosure could lead to breaches of trust and expose them to further distress or retaliation.

The Redacted Names of the Board Members

22. The essence of the document requested by the applicant relates to the report of the Fact-Finding Board, which had been appointed by the Permanent Secretary within the Ministry for National Heritage, the Arts, and Local Government, dated the 7th November 2022, to specifically carry out the necessary verifications regarding the complainant's behaviour. Upon analysing the requested report, the Commissioner noted that the names and designations of the Board Members presiding on the Fact-Finding Board have been redacted.
23. For the purpose of this legal analysis, the Commissioner seeks to establish whether the names and designations of the Board Members presiding on the Fact-Finding Board, are deemed to constitute personal data. In this regard, the Commissioner considers the definition of '*personal data*' as contained in article 4(1) of the Regulation which provides that "*'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;*" [emphasis has been added].
24. The Commissioner analyses that the definition of '*personal data*' is intended to be applied in such a broad manner considering that the protection of natural persons in relation to the processing of personal data is a fundamental right as enshrined in article 8(1)²¹ of the Charter of Fundamental Rights of the European Union. However, in '*Volker und Markus Schecke and*

²¹ Article 8(1) of the Charter of Fundamental Rights of the European Union: "*Everyone has the right to the protection of personal data concerning him or her.*"

*Eifert vs Hessen*²², the Court of Justice of the European Union (the “CJEU”) noted that “the right to the protection of personal data is not, however, an absolute right, but must be considered in relation to its function in society.”

25. The Commissioner analyses the settled case-law²³ of the Information and Data Protection Appeals Tribunal, wherein it decided in favour of the disclosure of personal data when these pertain to individuals occupying headship positions. This position was also later confirmed by the Court of Appeal, specifically in the judgment ‘*Allied Newspapers Limited vs Foundation for Medical Services*’²⁴, which provided that “[b]l-ebda mod il-kuntratt ta’ impjieg ta’ Neville Gafà u Carmen Ciantar mal-fondazzjoni appellanta, **entità pubblika ffinanzjata minn fondi pubbliċi, ma jistgħu jitqiesu li huma dokumenti eżentati taħt l-artikolu 31(2) tal-Kap. 496, ‘il għaliex huwa fl-interess pubbliku li tiġi żvelata l-informazzjoni mitluba, biex jitharsu wkoll il-prinċipji tat-trasparenza u tal-kontabilità f’kuntast ta’ kuntratti ta’ impjieg**” [emphasis has been added].

26. The Commissioner concludes that the controller had failed to demonstrate how disclosing the names and the designations of the Board Members presiding on the Fact-Finding Board would prejudice the private affairs of such individuals, especially when considering that they were acting in their professional capacity. Therefore, this information directly relates to their professional work conduct and not their private lives. Consequently, the Commissioner notes that the controller did not even attempt to demonstrate that there exists a real and non-hypothetical risk that would lead to an adverse effect on their rights and freedoms, and more specifically on the private lives of Board Members presiding on the Fact-Finding Board.

On the basis of the foregoing, the Commissioner decides that the controller’s decision to redact the third parties’ personal data from the Fact-Finding Report, including its annexes, is justified under article 15(4) of the Regulation. However, upon reviewing the documentation requested, the Commissioner has identified certain statements which should be disclosed to the complainant. These statements exclusively pertain to the complainant’s personal data and do not implicate the personal data of any third parties.

²² Joined cases C-92/09 and C-93-09, ‘*Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*’, decided on the 9th November 2021.

²³ ‘*Public Broadcasting Services Limited vs Il-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data*’, decided on the 12th July 2017; *Allied Newspapers Limited vs. Foundation for Medical Services*’, decided on the 30th January 2020.

²⁴ Appell Inferjuri Numru 11/2020 LM, ‘*Allied Newspapers Limited vs. Foundation for Medical Services*’, decided on the 18th November 2020.

In relation to the names and designations of the Board Members presiding on the Fact-Finding Board, the Commissioner has found that the controller failed to demonstrate that the disclosure of such personal data would adversely affect the rights and freedoms of these individuals.

In accordance with article 58(2)(c) of the Regulation, the controller is hereby ordered to provide the complainant with a copy of the requested Report, containing only the necessary redactions. The names and designations of the Board Members shall be provided. For the purpose of ensuring consistency with the decision, the Commissioner shall provide, under separate cover, a copy of the requested Report as should be provided to the applicant containing these redactions.

The aforementioned order shall be complied without undue delay and by no later than five (5) working days from receipt of this legally-binding decision and confirmation of the action taken shall be notified to the Commissioner immediately thereafter.

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

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.

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