

██████████
vs
██████████

COMPLAINT

1. On the 5th July 2023, Mr ██████████ (the “**complainant**”), 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, his employer, ██████████ ██████████² (the “**controller**”) has breached his data protection rights by using his personal email address to communicate with him regarding work-related matters without obtaining prior consent, thereby disclosing his email address to other recipients. Furthermore, the complainant alleged that his personal data was also disclosed to an ‘*external body*’.

FACTS OF THE CASE

2. For the purpose of this complaint, the Commissioner assessed the relevant facts surrounding the complaint:
 - i. that upon realising that his personal email address had been shared with other staff members without his consent, he promptly notified the company’s HR Manager. However, “*instead of addressing the issue appropriately, the cargo manager sent an email attempting to cover up a separate issue that occurred prior to joining the department*”;

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 ██████████
██████████

- ii. that following his termination, the complainant received an email dated the 30th June 2023, from the Payroll Department, which included an external recipient who should have not been privy to its contents; and
- iii. that, as a result, sensitive information including the complainant's full name, address, identity card number, social security number, banking information and wage details were disclosed.

INVESTIGATION

Request for submissions

3. On the 1st August 2023, pursuant to the internal investigation procedure of this Office, the Commissioner provided the controller with a copy of the complaint, including the documentation attached thereto, and was requested to put forward its submissions on this complaint, including any other information, which it deemed relevant to submit in connection with the allegations raised by the complainant.
4. By means of an email dated 8th August 2023, through its legal counsel, the controller submitted the following main arguments for the Commissioner to consider in the legal analysis of the case:
 - i. that there was no breach of the complainant's data protection rights, as the disclosure of his personal email address does not, in the controller's opinion, constitute a disclosure of private sensitive information. An email address is, in itself, data that has no inherent or material sensitivity, and in any case, such information is widely disseminated through various sources, that its disclosure does not constitute the disclosure of sensitive data;
 - ii. that with reference to the email dated the 30th June 2023, the controller noted that the only '*outside party*' was the company's legal advisor. The controller emphasised that the legal advisor is bound by strict rules of confidentiality and hence any disclosure is entirely valid and does not constitute a breach. Furthermore, the complainant was made aware that the legal advisor of the controller was included in the correspondence, indicating the controller's intention to seek professional guidance;
 - iii. that the other employees, including the General Manager, HR Manager, Payroll Manager, and Finance Manager, were all individuals responsible for the

administration of payroll and related matters, and thus, they were required to be informed about the ongoing discussion; and

- iv. that the complainant was not being terminated but was simply informed that his fixed-term employment contract was not being renewed.
5. On the 18th August 2023, the Commissioner provided the complainant with the opportunity to rebut the arguments made by the controller. By means of a communication dated the 31st August 2023, the complainant submitted the following principal arguments:
- i. that the complainant expressed concerns regarding the consistent and unauthorised distribution of his personal email data over a period of nearly fourteen (14) months;
 - ii. the complainant never discussed involving legal representation and hence the controller's "*assumption in this regard is both unwarranted and misleading*";
 - iii. that the complainant made reference to the terms and conditions of his employment contract, originally signed in July 2021, with an addendum incorporated in June 2022, and noted that nowhere in these documents, nor in any subsequent correspondence, has there been an indication or authorisation for the controller to distribute his personal email address in a manner that involved a '*round robin*' approach;
 - iv. that the unauthorised disclosure persisted even after the complainant brought the matter to the attention of the HR Manager; and
 - v. that the controller's response "*appears to try and divert attention away from the original complaint which undermines the credibility of [the controller's] response and suggests a lack of seriousness in addressing the core issue at hand of the unauthorised distribution of my personal email address and many other current & former employees*".
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 15th September 2023, the controller submitted:
- i. that "*[i]n the first instance, I take exception to Mr [REDACTED]'s characterisation of my submission as an assumption that "is both unwarranted and misleading". As is clear from the emails I had copied to you, [the complainant] had demanded information to submit to his lawyer, and it was in this context that I had asked [the controller] to copy*

me with the pertinent information and indicate as such to [the complainant]. Such information would have been made known to me in any event, obviously, in order that my clients can be advised properly”;

- ii. that “[c]learly, therefore, there was nothing “unwarranted” about the submission. Insofar as concerns the comment about my submission being “misleading”, this is simply insolent and I need comment no further”; and
 - iii. that “[the complainant] goes on to allege that [the controller] tried to divert attention from the original complaint, attributes to it a lack of credibility and accuses it of a lack of seriousness. In my response on behalf of [the controller], I had stated their position on the matter of [the complainant’s] personal email and I do not propose to waste your time by reiterating this. I believe you will agree that the circumstances of the use of the email address under reference do not amount to a material breach of an individual’s protected rights”.
7. On the request of the Commissioner, on the 19th April 2024, the complainant provided a copy of the employment contract entered into with the controller.
 8. On the 19th April 2024, the Commissioner requested the controller to clarify the nature of the relationship between the controller and the complainant. Specifically, whether the complainant was an employee of the company, thus governed by Maltese employment law, or whether the complainant was retained by the controller as an external contractor. Additionally, the controller was asked to provide justification, particularly regarding the use of the complainant’s personal email address for work-related purposes.
 9. On the 23rd April 2024, the controller provided that the complainant was an employee of the company, employed since the 1st July 2021, and whose employment came to an end on the 23rd July 2023. Regarding the use of the employee’s personal email address, the controller clarified that personal email addresses were sometimes utilised, as not all employees were assigned a company-designated address. In this context, “non-company email addresses were used for convenience”.

LEGAL ANALYSIS AND DECISION

Controller’s Use of Complainant’s Personal Email for Work Communication

10. As an initial step, the Commissioner scrutinises the data protection complaint lodged by the complainant on the 5th July 2023, wherein he highlighted that his personal email address had

been regularly divulged to various members of the staff without his consent. After examining the facts of the case, the Commissioner establishes that the controller had indeed utilised the complainant's personal email address to communicate with him regarding work-related matters, while using the 'to' field. Therefore, his personal email address had been consistently disclosed to other employees without his consent.

11. Accordingly, the Commissioner notes that the complainant's email address contains his name and surname³, and therefore constitutes 'personal data' within the meaning of article 4(1)⁴ of the Regulation. In this context, recital 26 of the Regulation states that a person may still be identifiable after taking into account "*all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly*" [emphasis has been added].
12. The principle of fair and lawful processing in terms of article 5(1)(a) of the Regulation, which is one of the key data protection principles that constitutes the 'essence' of the fundamental right to data protection, requires that every data processing operation has a lawful ground for processing. Pursuant to the principle of accountability as set forth in article 5(2) of the Regulation, the controller shall be responsible for, and be able to demonstrate the lawfulness of the processing activity.
13. The Court of Justice of the European Union (the "CJEU") held that "[a]rticle 7 of Directive 95/46 sets out an exhaustive and restrictive list of cases in which the processing of personal data can be regarded as being lawful and that the Member States cannot add new principles relating to the lawfulness of the processing of personal data or impose additional requirements that have the effect of amending the scope of one of the six principles provided for in that article (see, to that effect, judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, paragraphs 30 and 32)"⁵. In a recent judgment, the CJEU reaffirmed that "*it must be pointed out that any processing of personal data ... must satisfy the conditions of lawfulness set by Article 6 of the GDPR*"⁶ [emphasis has been added].

³ This has been confirmed by the Court of Appeal in 'Doreen Camilleri vs Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data', Appeal No. 63/17.

⁴ Article 4(1) of the Regulation defines 'personal data' as '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'.

⁵ Case C-582/14, Patrick Breyer vs Bundesrepublik Deutschland, decided on the 19th October 2016, para. 57.

⁶ Case C-268/21, Norra Stockholm Bygg AV v Per Nycander AB, decided on the 2nd March 2023, para. 29.

14. It therefore follows that the processing of personal data is deemed lawful if it comes within one of the six grounds as mentioned in article 6(1) of the Regulation, which are as follows: (a) consent; (b) contract; (c) compliance with a legal obligation; (d) vital interest; (e) performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; and (f) legitimate interest. In the present case, the controller needed to demonstrate that the processing of the personal data pertaining to the complainant was based on at least one of these legal grounds.
15. During the investigation, the controller clarified that employee's personal email addresses were occasionally used for work-related communications, as not all employees had been allocated a company-designated address and explained that "*non-company email addresses were used for convenience*".

Unauthorised Disclosure to the Legal Advisor

16. The Commissioner assessed the complainant's allegation relating to a breach of data protection rights by the controller through the disclosure of personal data to an '*external body*'. In response, the Commissioner has carefully considered the submissions provided by the controller on the 8th August 2023, wherein it was noted that the only '*outside party*' mentioned was the company's legal advisor.
17. Consequently, the Commissioner reviewed the email dated the 30th June 2023, sent to the controller's external legal advisor and various internal recipients, including the General Manager, HR Manager, Payroll Manager and Finance Manager, all of whom are employees of the controller and directly involved in the administration of payroll and other related matters. Thus, it was deemed necessary to inform them about the developments pertaining to the employment matter in question.
18. The Commissioner concludes that the legal advisor was engaged by the controller in a professional capacity to provide legal services in connection with matters related to the conclusion of the employment relationship between the controller and the complainant. Given that the legal advisor was acting within the scope of his professional duty and was contractually retained by the controller, the allegation that the complainant's personal data has been divulged to an '*external body*' and consequently processed in an unlawful manner, is dismissed.

Based on the foregoing considerations, the Commissioner hereby decides that the controller failed to demonstrate that the processing of the complainant's personal email address for work-related matter is justified under one of the lawful bases outlined in article 6(1) of the Regulation. Therefore, the Commissioner concludes that the controller infringed article 6(1) of the Regulation.

In terms of article 58(2)(b) of the Regulation, the Commissioner is hereby serving the controller with a reprimand and warned that in the event of a similar infringement, the Commissioner shall take the appropriate corrective action.

Moreover, in accordance with the general industry practice, the Commissioner strongly recommends the controller to provide its employees with a company mailbox which should be used for the purposes of work-related communications. Furthermore, in accordance with article 24 of the Regulation, the controller should adopt and implement appropriate data protection policies governing the use the company's mailbox and inform all employees accordingly.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
(Signature)
Date: 2024.06.10
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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.