

vs

COMPLAINT

1. On the 7th March 2024, [REDACTED] through his legal counsel (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 [REDACTED] (the “**controller**”) failed to comply with his request to access his personal data.
2. As supporting documentation, the complainant provided a copy of the subject access request dated the 11th December 2023 and another correspondence with the controller dated the 21st February 2024. Additionally, the complainant submitted a copy of the replies provided by the controller dated the 4th January 2024 and the 6th March 2024. In its reply dated the 6th March 2024, the controller informed the complainant that it decided to partially restrict the information provided in terms of regulation 4(e) of the Restriction of the Data Protection (Obligations and Rights) Regulations, Subsidiary Legislation 586.09 (the “**Subsidiary Legislation 586.09**”).

INVESTIGATION

3. On the 26th March 2024, pursuant to the internal investigative procedure of this Office, the Commissioner requested the controller to put forward any information which is deemed relevant and necessary to demonstrate that the restriction invoked by the controller is necessary and

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.

proportionate. In particular, the Commissioner requested the controller provide any evidence to substantiate its case.

4. In its reply dated the 9th April 2024, the controller submitted the following principal arguments for the Commissioner to consider in the legal analysis of the case:

a. that *“the complaint relates to a DSAR made with the Company by the Complainant, through his legal counsel, ██████████ (dba “██████████”) acting on his behalf. Based on the reasons and factors outlined further on in these submissions, the Complainant’s DSAR was partially restricted by the Company, having invoked reg. 4(e) of the Regulations”*;

b. that *“below is also an overview of this law-firm currently acting for the Complainant, i.e. ██████████, including its past and recent track record with [the controller], and which provides further context for this restriction:*

- *██████████ is a law firm based in Austria which markets and offers litigation services specifically relating to re-claiming gambling losses. As advertised on its website*

“Have you had bad experiences with internet gambling providers in recent years, are you suffering from gambling addiction or have you lost enormous sums of money in illegal online gambling in Austria? After reviewing your facts and documents, we will take over your case and recover your losses” (emphasis added).

- *As part of their advertising, they also have a “FAQ” section on their website which is basically intended to induce players to engage their firm and institute litigation against casino operators active in Austria so as to reclaim their gambling losses. They assert that “gambling contracts with online casinos that do not have a license in Austria are therefore unlawful and illegal in Austria and are therefore ineffective”, even though this is a question that is still actually under judicial review before the Supreme Court. Notably, they also directly name [the controller] in this advertising, amongst other operators, thereby targeting the company for litigation by players:*

“In order to be able to legally offer gambling in an online casino, the provider needs a license in Austria. In Austria, the conduct of games of chance is reserved to the federal government (Section 3 GSpG; gambling monopoly), which can transfer this right to others as a concession (gambling license) (Section 14 Paragraph 1 GSpG). However, only win2day (Casino Austria AG) has such a license in Austria.

- *All other online casino providers (including providers such as [REDACTED] [REDACTED] [REDACTED] etc.) have foreign licenses, but no concession, in order to be able to offer games of chance in Austria. (These providers of casino betting have licenses in Malta, Gibraltar, etc.) Gambling contracts with online casinos that do not have a license in Austria are therefore unlawful and illegal in Austria and are therefore ineffective.*
- *Since the gambling contract is void, players' gambling losses can be reclaimed by online casinos, which the Supreme Court has also confirmed” (emphasis added).*
- *Prior to this, [the controller] has had previous experience/s with [REDACTED] [REDACTED], including cases where it acted for other players on DSARs and used the information from them to then formulate and file gambling losses claims. There is therefore a clear track record of this law-firm targeting [the controller] for player litigation and misusing DSARs as a tool for collecting evidence to assist it in formulating and filing eventual litigation directly against [the controller]. From all the information set out above, this latest DSAR was clearly intended to serve the same ends”;*

c. that *“the Company therefore deemed it justifiable and warranted to invoke reg. 4(e) of the Regulations on “legal claim(s) and for legal proceedings which may be instituted under any law” and on that basis, restricted the Complainant’s access to the information below given the clear indication that it was intended to be used for litigation and evidence collection:*

1. *List of all deposits and withdrawals since the registration of our client.*

2. Confirmation that our client had not made any sports bets.
 3. If our client has made sports bets, notification of the total sports betting losses.
 4. If this confirmation pursuant to point 3 is not possible, transmission of a list from which we can deduct the sports betting losses from the other gambling losses since the registration of our client (*Gambling History*):
- d. that “[w]ith reference to the communication received from your Office, the Company notes that it has been requested to “indicate whether there were, or there are, any ongoing proceedings, and to provide the necessary evidence”, presumably as its foundation for applying this restriction in reg. 4(e) of the Regulations. Respectfully though, the Company holds that the legislative intent of this restriction was not to limit its scope to only instituted or ongoing legal proceedings, but that it is also intended to be available in situations of potential (including threatened) legal claims and proceedings. In support of this as the proper legal interpretation, the Company submits the following:
- i. *Subsidiary Legislation 586.10 (referred to in these submissions as the Regulations) implements into Maltese law the provisions of article 23, GDPR, which authorises Member States, such as Malta, to introduce into their national law restriction(s), by way of a legislative measure, to “the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5” (thus also covering the right to access, which is found in article 15, GDPR).*
 - ii. *Any such restriction, as implemented into Member State law, must link to a condition included in article 23(1), GDPR. Amongst them, article 23(1)(j) provides for civil law claims as a ground for such restrictions and, as explained by Guidelines 10/2020 of the European Data Protection Board on restrictions under article 23, GDPR, adopted 13 October 2021 (the “EDPB Restriction Guidelines”), this provision “allows limitations to protect the individual interests of a (potential) litigant” (emphasis added, see paragraph 35, page 11). This, therefore, provides explicit confirmation of the need for restrictions to be available in order to protect the interests of potential litigants, and not only individuals who are parties to commenced litigation.*

- iii. Reg. 4(e) of the Regulations is linked to the condition set out in article 23(1)(j) on civil law claims. Notably though, it was implemented with a wider scope, covering “the establishment, exercise **or defence** of a legal claim and for legal proceedings”. Furthermore, in the Company’s opinion, the wording selected and ultimately adopted by the Maltese legislator for reg. 4(e) even contains a more deliberate indicator of this restriction being available in instances of potential litigation (and not only existing litigation), as follows: “for the establishment, exercise or defence of a legal claim and for legal proceedings **which may be instituted** under any law.” The decision to use the wording “which may be instituted” (as opposed to for example “...for legal proceedings instituted under any law”) must respectfully be viewed as a deliberate drafting and legislative choice on the part of the Maltese legislator. In accordance with the maxim “ubi lex voluit dixit, ubi noluit tacuit” (i.e., “when the law wills, it speaks, when it does not will, it is silent”, which is a favoured rule in Malta for the construction of legislative acts), the interpretation must be given that, if the legislator had intended to limit the availability and applicability of this restriction to only existing litigation, then it would have stipulated for this in the wording of reg. 4(e). Instead, the legislator took a different approach and, by expressly including this wording “which **may be** instituted” and positioning it in the provision as its qualifying language, it should be surmised that there was the intention to have potential litigation included within scope.
- iv. Accordingly, construing the scope of this restriction in reg. 4(e) to also apply to cases of potential claims and litigation (“**may be**”) would be in accordance with the literal and/or grammatical method of interpretation, which has consistently found effect in Malta and by the Maltese Courts and, as a rule of legal interpretation, establishes that the ordinary and natural meaning of the words in a statute should be given priority when interpreting the law. For such reason, the Company maintains that the words - “**may be instituted**” - play a decisive role in the interpretation of reg. 4(e) of the Regulations and should not be disregarded or otherwise overlooked. Relevantly as well, such an interpretation is also consistent and compatible with the EDPB Restriction Guidelines, which (as noted) explicitly acknowledge and confirm that the GDPR provides for “limitations to protect the individual interests of a (potential) litigant”.

- v. *Additionally, reference is also made to previous guidelines that were issued by the Office for the insurance business sector and which, with clear parallels to the matter at hand, had explained that: “the right of access **shall not be allowed** in circumstances where such right, if exercised, would be prejudicial to the rights and freedoms of the controller, for example in view of legal proceedings, **whether impending or commenced**, between the controller and the data subject” (emphasis added – “or”). Although the above guidelines were issued in 2006 and based on the previous Data Protection Directive, the context of this statement related to the restrictions in the former Maltese Data Protection Act (i.e. Chapter 440 of the laws of Malta). The restrictions that were provided for in Chapter 440 of the laws of Malta are, in substance, broadly the same as those now enacted in the Regulations. Accordingly, it would be surprising if an interest which was already recognised in Chapter 440 of the laws of Malta as being necessary to protect (i.e. **a controller’s right to refuse a right of access in view of potential legal proceedings**), and also endorsed as such by this same Office, were to now be completely set aside. Respectfully, this would be quite anomalous, especially when considering that the legislator had, for the purposes of these new Regulations, elected to enact an even more explicit restriction on legal claims than its predecessor in the former Data Protection Act (Chapter 440 of the laws of Malta);*
- e. *that “[t]aking account of the above, the Company submits that reg. 4(e) of the Regulations allows for restrictions to be applied by a controller to DSARs based on the ground of a potential legal claim and proceeding(s), and that holding otherwise would unduly narrow the scope and availability of this restriction, be prejudicial to the recognised interests of the controller and also find itself at odds with the provision’s legislative intent as evident from the drafting choices made by the Maltese legislator”;*
- f. *that “[i]n addition and without prejudice, it is also submitted that an interpretation which only allows for this restriction to be invoked where there are ongoing proceedings (i.e. commenced litigation) between the controller and the individual making the DSAR would, for all intents and purposes, render it futile. Particularly in the case of these player claims, which have engulfed operators such as the Company in recent years, access requests are being filed as a precursor to litigation and for the purpose of collecting information for the player, and more typically the law-firm*

representing that player, to then use to formulate a claimed amount, including by subtracting the player's total sports betting losses, and using this to also determine whether it is financially worthwhile to file formal litigation”;

- g. that “[w]here however ongoing proceedings are already in place, claimants would simply have no need to rely on the DSAR mechanism, as they could otherwise obtain the desired information through the courts and arguably more immediately. For example, in the case of Malta, this would simply involve filing a witness summons in the acts of the relevant proceedings, listing the documentation which the witness is being asked to produce during the next sitting. Upon issuance and service by the Court, this summons would have the effect of a binding order and it is questionable, if not unlikely, whether the legal claims restriction in reg. 4(e) could, in such circumstances, even provide a ground for overturning such a Court order given that its scope of application is specific to the GDPR provisions referred to by it. Separately, the point may also be made that allowing DSARs to be used as a tool to enable or otherwise facilitate pre-litigation information collection (i.e. as an “information gathering” exercise) would, by its effect and consequence, also circumvent civil rules of evidence, including procedural limitations and conditions applicable to evidence discovery. Lastly, such an interpretation could also run the risk of DSARs increasingly being misused as fishing expeditions”;
- h. that “[c]onsidering all this, it is thus imperative to provide for a safeguard that can equally be invoked in potential litigation scenarios (for example, to challenge access requests being used as a vehicle for litigation), which the Company believes is the legislative intent of reg. 4(e) of the Regulations”;
- i. that “[i]n conclusion, the Company submits that:

 - i. *the Complainant's DSAR was clearly made with the purpose (if not the sole purpose) to facilitate and formulate litigation against the Company, namely as an “evidence collecting” exercise, and the Company was thus correct and reasoned to make this assessment, including in view of the direct involvement of this law firm, [REDACTED] and the specific information sought in the DSAR;*

- ii. *in its reply, the Company invoked reg. 4(e) of the Regulations and restricted the Complainant's access to the information listed below in view of the clear litigation motives of the DSAR:*
 - 1. *List of all deposits and withdrawals since the registration of our client.*
 - 2. *Confirmation that our client had not made any sports bets.*
 - 3. *If our client has made sports bets, notification of the total sports betting losses.*
 - 4. *If this confirmation pursuant to point 3 is not possible, transmission of a list from which we can deduct the sports betting losses from the other gambling losses since the registration of our client (Gambling History); and*

- iii. *its use of reg. 4(e) of the Regulations, as a safeguard to protect its interests as a potential defendant to a legal claim and proceedings by the Complainant, was appropriate, proportionate, and necessary in the circumstances and, in its intended and proper construction, the restriction in reg. 4(e) is also available and applicable in scenarios of potential litigation and not only existing litigation (“...defence of a legal claim and for legal proceedings which may be instituted under any law”);*

- j. *that “[b]y virtue of Act XXI of 2023 (which enacted legislative amendments to the Gaming Act, Chapter 583 of the laws of Malta), the legislator has inter alia enshrined, as a principle of Maltese public policy, that actions instituted by a player against an MGA licensed operator (a “licensee”) shall not subsist where they seek to challenge the legality of the provision of gaming services in or from Malta and relate to an activity which the licensee is/was authorised to provide by virtue of its licence. In the same vein, it adds that any foreign judgment and/or decision based upon any such type of action shall be refused recognition and enforcement in Malta by the Maltese Courts. This has been laid down in law as an expressly stated principle of Maltese public policy and reads as follows:*

“56A. Notwithstanding any provision of the Code of Organization and Civil Procedure or of any other law, as a principle of public policy:

- (a) no action shall lie against a licence holder and, or current and, or former officers and, or key persons of a licence holder for matters relating to the provision of a gaming service, or against a player for the receipt of such gaming service, if such action:
- i. conflicts with or undermines the legality of the provision of gaming services in or from Malta by virtue of a licence issued by the Authority, or the legality of any legal or natural obligation resulting from the provision of such gaming services; and
 - ii. relates to an authorised activity which is lawful in terms of the Act and other applicable regulatory instruments; and
- (b) The Court shall refuse recognition and, or enforcement in Malta of any foreign judgment and, or decision given upon an action of the type mentioned in sub-article (a)";
- k. that "[f]rom his initial communication, the Complainant, who was a registered customer of the Company and had gambled in its online casinos, openly expressed that he was interested in pursuing the Company and that he would be willing to receive a settlement offer (email communication of 23.02.2023: "I have come across several sites that offer to reclaim lost money that was gambled away in online casinos. As I did not know that they did not have a valid licence in Austria and that these games of chance were illegal, **I am considering pursuing these providers**. If there is an out-of-court solution and they can offer me a settlement (offer), this would also be an option for me"). The Complainant's engagement of ██████████ to represent him, the filing of the DSAR (including the information specifically sought by it) and the terms of the judicial power of attorney given by him evidence a clear intention to file litigation against the Company and re-claim his gambling losses. Such an action is also specifically what article 56A (cited above) was enacted to serve as a safeguard against, including as a principle of public policy, and in such vein, it follows that enabling it would run counter to Maltese public policy";
- l. that "[i]n the exercise of its functions, the role of the Commissioner (as a public authority) performs a quasi-judicial function, which ranges from receiving complaints, conducting investigations, and ordering the production of evidence and the power to

issue decisions that have legally binding effect on the persons to whom they are directed. As is reasonable to expect, this also needs to take into account matters or principles of domestic public policy, which our Courts have described as embodying ethical and political principles whose observance and execution is indispensable for the existence of judicial order and the fulfilment of essential aims (see inter alia Paul Gauci f'ismu proprju u għan-nom Tas-Socjeta` E & G Properties Limited vs Sovrintendent tal-Patrimonju Kulturali, f'isem is-Sovrintendenza tal-Patrimonju Kulturali, given by the First Hall, Civil Court, dated 9th July 2019, reference details: Sworn Application 573 /2018 GM). Thus, with reference to the present context, the legislator has essentially set down in law that precluding such actions against Malta licensed operators is indispensable for the existence of judicial order in Malta and the fulfilment of its ethical and political aims. In fact, the legal bill promulgating these amendments to the Maltese Gaming Act had outlined the following as its object and reason: "to codify in law the longstanding public policy of Malta encouraging the establishment of gaming operators in Malta who offer the local and cross-border supply of their services in a manner compliant with local legislation, in an effort to encourage private enterprise in line with article 18 of the Constitution of Malta"; and

- m. *that "it is further submitted that the interpretation given to reg. 4(e) of the Regulations has to allow it to act as a safeguard and restriction to DSARs, filed by players of Malta licensees (such as the Complainant), that are intended to collect information for use in legal claims premised on challenging the legality of gaming services that were offered in or from Malta and based on a Malta license. Providing for a different interpretation, or merely allowing otherwise, could run the real risk of enabling and even progressing legal claims that have been held by statute to be contrary to Maltese public policy".*

5. The controller also submitted a copy of the necessity and proportionality test, which was conducted by the controller prior to deciding on invoking the restriction. The Commissioner noted that the necessity and proportionality test is an internal document of the controller and therefore, the document was solely used by the Commissioner for the purpose of investigating this complaint.

LEGAL ANALYSIS AND DECISION

6. During the course of the investigation, the Commissioner established that the complainant had exercised his right to access his personal data in terms of article 15 of the Regulation, by means

of a request dated the 11th December 2023. In the reply dated the 6th March 2024, the controller restricted the right of the complainant to access his personal data in the belief that the request is predominantly aimed to facilitate litigation. In this regard, the Commissioner sought to establish whether the restriction invoked by the controller pursuant to regulation 4(e) of the Restriction of the Subsidiary Legislation 586.09 applies to the present case, particularly, by considering the assessment conducted by the controller to restrict the right of the complainant.

Subject Access Request: Article 15 of the Regulation

7. Article 15 of the Regulation grants data subjects far-reaching rights of access in relation to the processing of their personal data. Its predominance is derived from article 8(2) of the Charter of Fundamental Rights of the European Union (the “**Charter**”), which explicitly refers to the right of access, by stating that “[e]veryone has the right of access to data which has been collected concerning him or her...”. This corresponds to the objective of the Regulation which is clearly outlined in recital 10 of the Regulation, that is, to ensure a consistent and high level of protection of natural persons within the European Union.
8. It has been repeatedly stated by the Court of Justice of the European Union (the “**CJEU**”) that this right is instrumental to the exercise of the other data subjects’ rights as set forth in the Regulation², mainly articles 16 to 19, 21, 22 and 82. Notwithstanding this, the exercise of the right of access is an individual’s right and is certainly not conditional upon the exercise of other rights³.
9. Article 15(1) and (3) of the Regulation gives the fundamental right to data subjects to obtain from the controllers: (i) confirmation as to whether or not personal data concerning them are being processed and, if so, to receive information about the processing activity, and (ii) to receive a copy of the personal data being processed.
10. The CJEU’s Advocate General Pitruzzella in his Opinion explained that article 15(1) of the Regulation “*gives specific expression to the right of access to personal data and related information, defining the precise subject matter of the right of access and the scope of*

² Case C-487/21, ‘*FF vs Österreichische Datenschutzbehörde*’, decided on the 4th May 2023: “*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.*” (para. 35).

³ European Data Protection Board, ‘*Guidelines 01/2022 on data subject rights - Right of access*’ (Version 2.0), adopted on the 28th March 2023 (para. 12).

application”, whereas article 15(3) of the Regulation “provides more details as to how that right is to be exercised, specifying in particular the form in which the controller must provide the data subject with personal data, that is to say, in the form of a copy and, therefore, a faithful reproduction of the data”⁴.

11. Given that the right of access is an expression of article 8(2) of the Charter, it is formulated in very broad terms and, as a result, the CJEU adopted a wide interpretation of this article, with specific reference to the recent judgments delivered in 2023⁵. This is naturally due to the fact that the right of access is the basis for guaranteeing the effective protection of the data subjects’ right to the protection of their data. To this end, the controller should seek to handle the request in such a manner to give the broadest effect to the right of access.
12. It is evident from the wording of article 15 of the Regulation, that the law does not require the data subject to justify or give any reasons for a request under the Regulation, and any presumptions, suspicious or hypothetical conclusions which the controller may consider or reach as to what the data subject’s reasons are or might be, should not affect the handling of that request as otherwise this would render the right of access futile and ineffective.
13. This is further supported by the interpretation provided by the European Data Protection Board (the “**EDPB**”) in its Guidelines 01/2022 published in March 2023, which reads as follows: “[c]ontrollers should not assess “why” the data subject is requesting access, but only “what” the data subject is requesting ... and whether they hold personal data relating to that individual... [F]or example, **the controller should not deny access on the grounds or the suspicion that the requested data could be used by the data subject to defend themselves in court in the event of a dismissal or a commercial dispute with the controller**”⁶ [emphasis has been added].

Restriction in terms of Subsidiary Legislation 586.09

14. Recital 4 of the Regulation provides that the right to the protection of personal data is not an absolute right, and it must be considered in relation to its function in society and be balanced

⁴ Case C-487/21, Opinion of Advocate General Pitruzzella, delivered on the 15th December 2022, (para. 48 and 49).

⁵ Case C-487/21, ‘*FF vs Österreichische Datenschutzbehörde*’, decided on the 4th May 2023, & and Case C-154/21, ‘*RW v Österreichische Post AG*’, decided on the 12th January 2023.

⁶ *Ibid* 4 (para. 13).

against other fundamental rights, in accordance with the principle of proportionality. This has been reaffirmed by the CJEU in the judgment of Facebook Ireland and Schrems⁷.

15. The fundamental right to the protection of personal data may be subject to some limitations pursuant to article 52(1)⁸ of the Charter. This therefore means that the limitations should be provided by law, respect the essence of the rights and freedoms, and be necessary and proportionate to genuinely meet objectives of general interest or the need to protect the rights and freedoms of others. Therefore, a restriction should not be extensive and intrusive in such a manner that it would void a fundamental right of its basic content.
16. Whereas the Regulation does not define the term '*restrictions*', the EDPB defines it "*as any limitation of scope of the obligations and rights provided for in Articles 12 to 22 and 34 GDPR as well as corresponding provisions of Article 5 in accordance with Article 23 GDPR*". The EDPB further provides that a "*restriction to an individual right has to safeguard important objectives, for instance, the protection of rights and freedoms of others or important objectives of general public interest of the Union or of a Member State which are listed in Article 23(1) GDPR. Therefore, restrictions of data subjects' rights can only occur when the listed interests are at stake and these restrictions aim at safeguarding such interests*"⁹ [emphasis has been added].
17. The scope of the obligation and right provided for in article 15 of the Regulation may be restricted by national legislation. To this effect, regulation 4(e) of Subsidiary Legislation 586.09 provides that "*[a]ny 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: (e) for the establishment, exercise or defence of a legal claim and for legal proceedings which may be instituted under any law*" [emphasis has been added].
18. Regulation 7 of Subsidiary Legislation 586.09 makes it abundantly clear that any restriction must be a "*necessary and proportionate measure*", which effectively means that an assessment needs to be undertaken by the controller on a case-by-case basis to determine whether such

⁷ Case C-311/18, '*Data Protection Commissioner vs Facebook Ireland and Maximillian Schrems*', decided on the 16th July 2020 (para. 172).

⁸ Article 52(1) of the Charter provides that: "*1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*"

⁹ European Data Protection Board, '*Guidelines 10/2020 on restrictions under Article 23 GDPR*' (Version 2.0), adopted on the 13th October 2021 (para. 8).

measure is indeed “*a necessary and proportionate measure*”, rather than merely refusing to comply with a request.

19. Pursuant to article 5(2) of the Regulation, the controller must be able to concretely demonstrate how the restriction is indeed necessary and if this part of the test is passed, the controller must proceed to show the element of proportionality. The case law of the CJEU emphasises that any limitation to the rights of the data subjects must pass a strict necessity test. In C-73/07, the CJEU held that “*derogations and limitations in relation to the protection of personal data ... must apply only insofar as is strictly necessary*”¹⁰ [emphasis has been added].
20. Thus, in his assessment, the Commissioner analysed the replies provided by the controller to the complainant, including the necessity and proportionality test conducted by the controller, wherein the right of the data subject was restricted in full pursuant to regulation 4(e) of Subsidiary Legislation 586.09.
21. The context within which the controller invoked the restriction could only be justified if the controller concretely demonstrates that **the restriction is indeed necessary to defend a legal claim and legal proceedings which may be instituted by the complainant under any law**. During the course of the investigation, the controller reiterated that the right of the data subject was being restricted on the basis that the “*request is predominantly aimed to facilitate litigation*”. The Commissioner does not consider this reason to be compliant with the objective of the restriction as set forth in regulation 4(e) of Subsidiary Legislation 586.09. The said regulation provides that the right of the data subject may only be restricted “*for ... defence of a legal claim and for legal proceedings*” [emphasis has been added]. Thus, the restriction shall only apply if it is necessary for the controller to defend an actual legal claim and legal proceedings which may subsequently be instituted under any law. Hence, the controller cannot invoke the restriction merely on the assumption that the data subject may, following the provision of the information, institute legal action against the controller. Consequently, the Commissioner concludes that the controller failed to provide evidence during the course of the investigation to effectively demonstrate that the complainant brought a legal claim against it, and therefore, the controller did not manage to prove that the restriction of a fundamental right is indeed necessary pursuant to regulation 4(e) of Subsidiary Legislation 586.09.
22. Without prejudice to the above, it must be emphasised that even in the eventuality that there is an actual legal claim and ensuing legal proceedings, for the restriction to apply, the controller

¹⁰ Case C-73/07, ‘*Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*’, decided on the 16th December 2008, (para. 56).

shall demonstrate that the application of the restriction is indeed a necessary and a proportionate measure.

On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller has failed to demonstrate how restricting the right of the complainant, at the time of receipt of the request, was indeed a necessary measure in terms of regulation 4(e) of Subsidiary Legislation 586.09. This therefore led to an infringement of article 15 of the Regulation.

In terms of article 58(2)(c) of the Regulation, the controller is hereby being ordered to comply with the request and provide the complainant with the information prescribed under article 15(1)(a) to (h) of the Regulation, and also with a “*copy of the personal data undergoing processing*” pursuant to article 15(3) thereof at the time of receipt of the request.

The controller shall comply with this order without undue delay and by no later than five (5) working days from the date of receipt of this legally binding decision and inform the Commissioner immediately thereafter of the action taken.

Non-compliance with this order shall lead to an administrative fine in terms of article 83(6) of the Regulation.

After considering the nature of the infringement, the controller is hereby being served with a reprimand pursuant to article 58(2)(b) of the Regulation and warned that, in the event of a further similar infringement, the appropriate corrective action shall be taken accordingly.

Ian
DEGUARA
(Signature)

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by Ian DEGUARA
(Signature)
Date: 2024.07.03
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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, 158, Information and Data Protection Appeals Tribunal, Merchants Street, Valletta’*¹¹.

¹¹ More details are available here: <https://idpc.org.mt/appeals-tribunal/>