

## COMPLAINT

1. On the 15<sup>th</sup> January 2024, [REDACTED] (the “**complainant**”) lodged a data protection complaint with the Information and Data Protection Commissioner (the “**Commissioner**”) in terms of article 77(1) of the General Data Protection Regulation<sup>1</sup>, alleging that the [REDACTED] (the “**controller**”) unlawfully restricted her right of access to personal data, including that of her minor son, [REDACTED] pursuant to regulation 4(e) of the Restriction of the Data Protection (Obligations and Rights) Regulations (the “**Subsidiary Legislation 586.09**”).
2. On the 20<sup>th</sup> November 2023, the complainant exercised her right of access in terms of article 15 of the Regulation and requested the controller to provide “*all Documents, Orders, Requests, Forms, Telephone messages, Notes and anything on paper (letters) or in email on record containing my data and my son’s data in the [REDACTED] from the 8<sup>th</sup> January 2022 until now*”.
3. On the 27<sup>th</sup> November 2023, the controller submitted that “[f]ollowing your request on what kind of data we have on you and your son, please note all documents in question were transmitted and made available to the French Court. We have reviewed your file and we can inform you that we have the following information:
  - ID Card/Residence
  - Birth Certificate of Child

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

- *Passport*
- *Medical Paper*
- *Talba ghall-Maghmudija*
- [REDACTED] *Application*
- [REDACTED] *Applications*
- *Photos of Child (she might be in some photos)*
- *Ryan Air Flights*
- *Messenger Chats*
- *Whatsapp of Messages*

4. On the 28<sup>th</sup> November 2023, the complainant informed the controller that she is not satisfied with the above reply. Accordingly, on the 30<sup>th</sup> November 2023, the controller replied that “[f]ollowing confirmation that was given by the Central Authority, it has come to our attention that currently there is an ongoing court case which you have appealed the decision of the 24<sup>th</sup> January 2023 to the “Cour de cassation” (French Supreme Court). Therefore, according to Subsidiary Legislation 586.09 Article 4, we cannot provide the data since this will affect the current appeal”.

## INVESTIGATION

5. Pursuant to the internal investigative procedure of this Office, the Commissioner provided the controller with a copy of the complaint and enabled the controller to submit any information which it deemed relevant and necessary to defend itself against the allegation raised by the complainant. In terms of article 58(1)(e) of the Regulation, the Commissioner requested the controller to provide the following information:
- a. to explain how the restriction invoked by the controller is indeed necessary “for the establishment, exercise or defence of a legal claim and for legal proceedings which may be instituted under any law”;
  - b. to provide evidence that there were ongoing court proceedings at the time of receipt of the subject access request submitted by the complainant; and
  - c. to indicate if a necessity and proportionality assessment was conducted prior to the decision of the controller to restrict the right of access, and if in the affirmative, to provide a copy of this assessment.

6. On the 21<sup>st</sup> March 2024, the controller submitted a number of documentation and provided the following salient arguments for the Commissioner to consider during the legal analysis of this case:
- a. that the [REDACTED] qua Central Authority is responsible to receive and acknowledge applications from any person in relation to child abduction cases among its other functions;
  - b. that, in early January 2022, [REDACTED] filed a request with the Malta Central Authority requesting the controller to assist him in relation to the abduction of his son and, as this was a case of cross-border abduction, the Malta Central Authority requested information from the French Central Authority;
  - c. that, in similar cases of abduction, in order that the child be returned to the left behind parent, the Malta Central Authority advises applicants to send all the relevant information, such as medical information, school attendance or nursery, copies of passport, photographs etc.;
  - d. that all the information mentioned in the preceding sub-paragraph is sent (in this case to the French Central Authority) to take action either under the 1980 Hague Convention or the Brussels II regulations for the return of the child to the left behind parent;
  - e. that in this case, the French authorities filed a court case for the return of the child to Malta, and during the whole proceedings, the French Central Authority informed the Malta Central Authority on the progress of the case;
  - f. that the French authorities on the 3<sup>rd</sup> May 2022 decided that the child should be returned to the left behind parent and during the whole course of the proceedings, the complainant was represented by her legal representative;
  - g. that the Court decided that the child was illegally retained by the mother and eventually the Court ordered the judgment to be enforced and the child was taken by the French authorities and handed over to the left behind parent;
  - h. that, in view of this judgment, the complainant lodged an appeal (and not as stated that she had no knowledge of these proceedings), and the case was heard before the Court

of Appeal and another decision was delivered on the 24<sup>th</sup> January 2023 that confirmed the first judgment;

- i. that, in light of the above, the controller closed the case, however, the French central authority informed the controller that the complainant had filed a further appeal before the Cour de Cassation;
  - j. that, during this period, the complainant made a request to have access to information which relates to court proceedings, and consequently, the controller denied the request on the basis that such information was submitted as evidence during the pending court proceedings;
  - k. that, at time of the request, the controller was not aware whether the French authorities might request their presence or confirmation on certain facts of the case;
  - l. that the complainant had made another request and this time she was informed that any documentation which received by third parties were all submitted to the Court case in question which the complainant had in France, and in view of these circumstances, the access to the information was denied on the same basis;
  - m. that it was on the 8<sup>th</sup> March 2024 that the French Central Authority informed the controller that a final decision was made by the Court de Cassation and rejected the claims of the complainant; and
  - n. that, therefore, the controller concluded that the right exercised by the complainant was being restricted on the basis of the following considerations: (i) that the information provided to the French Court was used as evidence by the left behind parent; (ii) that such information was provided by the left behind parent to the Central Authority for the purpose of returning the child to Malta; (iii) that at the time of receipt of the subject access request, there were pending court proceedings, and in fact, the final decision was reached by the Cour de Cassation on 6<sup>th</sup> March 2024; and (iv) that, at the time of the submissions provided to the Commissioner, there were also pending judicial proceedings in Malta and the controller proved crucial in the return of the minor.
7. Together with the written submissions, the controller submitted several documents, which include the following: (a) emails exchanged between the central authorities in relation to the judicial proceedings initiated in France; (b) emails exchanged between the controller and the

complainant in relation to the subject access request submitted by the complainant; (c) the decision [REDACTED] delivered by the Tribunal Judiciaire de Grasse dated the 17<sup>th</sup> January 2023; (d) the decision [REDACTED] delivered by the Cour d'Appel D'Aix-en-provence; and (e) the decision delivered by the Cour de Cassation on the 6<sup>th</sup> March 2024.

8. As part of the internal investigation procedure, the complainant was provided with the opportunity to rebut the arguments of the controller submitted in connection with this data protection complaint. However, the arguments provided by the complainant were focused on matters which were not relevant to the data protection complaint, and therefore, for the purpose of the investigation, the Commissioner decided not to take into account these submissions.

## LEGAL ANALYSIS AND DECISION

9. During the course of the investigation, the Commissioner established that the complainant had exercised her right to access her personal data, including that of her minor son, in terms of article 15 of the Regulation, by means of a request dated the 20<sup>th</sup> November 2023. The complainant requested the controller to submit “*all Documents, Orders, Requests, Forms, Telephone messages, Notes and anything on paper (letters) or in email on record containing my data and my son's data in the [REDACTED] from the 8<sup>th</sup> January 2022 until now*”. By means of an email dated the 27<sup>th</sup> November 2023, the controller informed the complainant about the categories of personal data processed in relation to her and her minor son in terms of article 15(1) of the Regulation. This was followed by a subsequent email dated the 30<sup>th</sup> November 2023, where the controller invoked a restriction in accordance with regulation 4(e) of the Restriction of the Data Protection (Obligations and Rights) Regulations, Subsidiary Legislation 586.09 (the “**Subsidiary Legislation 586.09**”) in relation to the request to receive a copy of the personal data processed by the controller.
10. The Commissioner emphasises that he will not enter into the merits of the judicial proceedings which were initiated by the French authorities in connection with the minor. The scope of the investigation was strictly limited to the monitoring of the application of the data protection legislation, and therefore, the Commissioner sought to determine whether the controller had a justified reason at law to partially restrict the right of access at the time of receipt of the request made by the complainant on the basis of regulation 4(e) of Subsidiary Legislation 586.09.

11. During the course of the investigation, the controller contended that the right of access exercised by the complainant was restricted on the basis that the request was made at a time when there were ongoing proceedings in relation to a case of a cross-border abduction that concerned the minor. In its submissions provided to this Office on the 21<sup>st</sup> March 2024, the controller submitted that the right of the complainant was being restricted on the basis: (i) that the information provided to the French Court was used as evidence by the left behind parent; (ii) that such information was provided by the left behind parent to the Central Authority for the purpose of returning the child to Malta; (iii) that at the time of receipt of the subject access request, there were pending court proceedings, and in fact, the final decision was reached by the Cour de Cassation on the 6<sup>th</sup> March 2024; and (iv) that, at the time of the submissions provided to the Commissioner, there were also pending judicial proceedings in Malta and the controller proved crucial in the return of the minor.

#### Restriction in terms of Subsidiary Legislation 586.09

12. 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 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 Schrems<sup>2</sup>.
13. The fundamental right to the protection of personal data may be subject to some limitations pursuant to article 52(1)<sup>3</sup> 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.
14. 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*

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<sup>2</sup> Case C-311/18, '*Data Protection Commissioner vs Facebook Ireland and Maximilian Schrems*', decided on the 16<sup>th</sup> July 2020 (para. 172).

<sup>3</sup> 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.*"

*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*"<sup>4</sup> [emphasis has been added].

15. 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].
16. 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 measure is indeed "a necessary and proportionate measure", rather than merely refusing to comply with a request.
17. 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"<sup>5</sup> [emphasis has been added].
18. In the present case, the Commissioner proceeded to assess the submissions of the controller, including the relevant supporting documentation, which were provided throughout the investigation of this data protection complaint. Without entering into the merits of these proceedings, the controller *qua* the Central Authority managed to effectively show that the personal data pertaining to the complainant and her son were disclosed to the French authorities to initiate the necessary proceedings in France. To this end, the Commissioner had taken note of the judgments delivered by the French Courts, particularly, the document provided by the controller entitled 'Document A – Email from the French Central Authority dated 8<sup>th</sup> March

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<sup>4</sup> European Data Protection Board, 'Guidelines 10:2020 on restrictions under Article 23 GDPR' (Version 2.0), adopted on the 13<sup>th</sup> October 2021 (para. 8).

<sup>5</sup> Case C-73/07, 'Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy', decided on the 16<sup>th</sup> December 2008, (para. 56).

2024 with the decision of the Cour de Cassation', which concretely demonstrate that proceedings were initiated in connection with the return of the child. Based on the evidence submitted by the controller, especially, the judgment of the Cour de Cassation dated the 6<sup>th</sup> March 2024, the Commissioner ascertained that at the time of receipt of the subject access request dated the 20<sup>th</sup> November 2023, there were ongoing judicial proceedings, and therefore, the controller *qua* the Central Authority was justified to restrict the access to a copy of personal data in relation to the complainant and the minor pursuant to regulation 4(e) of Subsidiary Legislation 586.09.

**On the basis of the foregoing considerations, the Commissioner is hereby deciding that the restriction invoked by the controller pursuant to regulation 4(e) of Subsidiary Legislation 568.09 was indeed a necessary and proportionate measure, and therefore, the complaint is being dismissed in its entirety.**

Ian  
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(Signature) Digitally signed  
by Ian DEGUARA  
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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 Appeals Tribunal, 158, Merchants Street, Valletta’*<sup>6</sup>.

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<sup>6</sup> More details are available here: <https://idpc.org.mt/appeals-tribunal/>