

██████████
vs
██

COMPLAINT

1. On the 2nd September 2024, ██████████ (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 ██████████ ██████████² (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 25th June 2024. Additionally, the complainant submitted a copy of the reply provided by the controller on the 30th August 2024. In this reply, 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 19th September 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, for the Commissioner to consider in the legal analysis of the case. In particular,

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 ██████████ having its registered address at ██████████
██████████.

the Commissioner requested the controller to indicate whether there is a legal claim and any legal proceedings and to provide the necessary evidence.

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

- i. that “[i]n this correspondence [the controller] was fully transparent that; (i) this restriction was invoked further to a Proportionality and Necessity Test undertaken; AND (ii) That the restriction was invoked as a temporary measure; AND (iii) That until the restriction is maintained, the personal data shall remain subject to appropriate technical and organisational measures and will not be used for purposes other than that which was originally intended. (iv) That [the controller’s] assessment was that invoking the restriction will not lead to erroneous profiling, reduced human dignity, or compromise his privacy, nor will it restrict [him] from proceeding with his legal claim in the appropriate forum” [emphasis added by the controller];
- ii. that “[i]n fact, in that same correspondence, [the controller] also explained to the Complainant that the restriction was being invoked because [the controller] “has reason to understand that your request is being made pursuant to a legal claim that you have against our organisation””;
- iii. that “[h]e was also explicitly asked as follows “If you believe this assessment is incorrect and you have no legal claims against us, please confirm this in writing, and we may reconsider the restriction”;
- iv. that “[a]s a matter of fact the Complainant did not respond to this Correspondence with any confirmation that the assessment was incorrect, or that he had no legal claims”
- v. that “[a]t no point the Complainant respond, let alone deny [the controller’s] understanding that he has a legal claim against [the controller]. [The controller] also notes that the Complainant does not deny this in his complaint logged with your Office - and neither does make any reference to [the controller’s] correspondence on this matter, let alone provide an explanation for failing to respond or follow up on it”;

- vi. that “[t]he complainant’s DSAR was to receive ‘an overview of all the deposits I have made into my account since opening that account’. This is a very specific request which clearly is not intended for a data subject ‘to be aware of, and verify, the lawfulness of the processing’ as is required by Article 15 GDPR read with Recital 63”. All this leaves absolutely no doubt that the Complainant has legal claims against [the controller] and therefore, [the controller] was fully entitled to invoke the restriction, which based on its internal Necessity and Proportionality Test is indeed strictly necessary, and proportionate, permitting a “fair trial” in those cases”;
- vii. that “[w]hen replying to the DSAR in question, [the controller] invoked a restriction on the basis of a Necessity and Proportionality Test, as permitted by Subsidiary Law 586.09 of the Laws of Malta, which allows for restrictions to be invoked for the establishment, exercise or defence of a legal claim and for legal proceedings which may be instituted under any law. [The controller] is of the strong opinion that such restrictions may be invoked also in the event of potential legal claims which may come to be (but which have not yet been) instituted”;
- viii. that “[i]n this case, the Complainant was explicitly asked to inform [the controller] if its understanding that he has a legal complaint was somehow incorrect, in which case [the controller] would take this into account in its assessment. In absence of any clarification/denial, it is evident that the Complainant has a legal claim against [the controller] and that the Complainant is seeking to bypass the normal course of legally established norms of procedure by arm twisting [the controller] into disclosing its evidence outside of the overarching scrutiny of the Courts in terms of law. With regard to this and with reference to the background as further set out in the Necessity and Proportionality Test, [the controller] has clearly been entitled to invoke the restriction at hand when replying to the DSAR”;
- ix. that “[a]s further set out in the Necessity and Proportionality Test, [the controller] considers that invoking this restriction is legitimate and proportionate, for it is a temporary measure which does not lead to unlawful or unfair processing of personal data, nor does it reduce the Complainant’s human dignity, or compromise his privacy, nor does it restrict the Complainant from proceeding with all and any legal claims which he may have, as in fact he has indeed proceeded”;

- x. that “[a]part from the fact that the Complainant should be able to collate the information requested from other sources also, such as financial institutions, the Complainant has the right to submit (and subpoena) evidence for the purposes of his legal claim, within and subject to the oversight of the competent Court, and subject to rules of procedure. The temporary restriction invoked by [the controller] does not limit those procedures”;

- xi. that “[the controller] insists on this point because, as has occurred in other Jurisdictions, these type of player claims are being treated overly summarily, in breach of operator’s rights to a fair hearing. If a player submits a claim to the Courts with a mere extract of losses, or transaction history, this results in a risk that the Courts determine the matter summarily, without considering the operators’ views, counter-evidence, and/or legal arguments on the claim. It is known that some foreign Courts have decided these type of claims within ‘minutes’, which [the controller] (and other operators) consider to be unfair. What [the controller] wants to ensure is that it is permitted a fair chance to defend itself against the legal claim in fair level playing field, where evidence is collated and submitted within the procedural norms and rules. In jurisdictions where there is no regulated form of pre-trial disclosure, this is all the more pertinent - such that by arm-twisting [the controller] into disclosing this evidence the Complainant is effectively abusing of his right to file a DSAR in that the Complainant is perusing the right beyond its proper limits, causing harm to [the controller]”;

- xii. that “[t]his DSAR request cannot be seen in isolation. It is one of several thousand DSARs being filed by former customers of [the controller] (and of other Malta - licensed gaming companies), with the prime objective of arm twisting [the controller] (and the operators) to disclose evidence which forms the basis of a legal claim for the complainant (or litigation funders who buy out such claims) and which evidence is also necessary for the defence against such a claim by [the controller] (and other operators). It is nothing but a concerted effort by litigation funders, to undermine the legitimate and duly regulated business of Maltese igaming operators, and more so to undermine and cause detriment to Malta, and its regulatory regime, which was founded on the very fundamental yet basic EU Freedoms of establishment and freedom to provide services within the EU”; and

- xiii. that “[the controller] *undoubtedly has a legitimate basis to defend itself against these legal claims, for it places its business at risk, as well as the jurisdiction (Malta) in which it chose to set up its business and to offer its services from. Surely, Article 23 of the GDPR contemplates the possibility for Member States to introduce restrictions for situations such as these, which are also in the public interest of the Member State. [The controller] is conscious of the fact that the Maltese Government and the Malta Gaming Authority are actively promoting and pursuing this, Malta’s “public order”, whereby it’s legal opinions have been published, as well as interventions in Court proceedings filed by Maltese operators, whereby the recognition and enforcement of judgements from other jurisdictions are being resisted on the basis of Malta’s public order”.*
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.
6. On the 22nd October 2024, the Commissioner provided the complainant with the opportunity to rebut the arguments submitted by the controller. Accordingly, on the 24th October 2024, the complainant submitted:

“I am currently not involved in any legal proceedings against [the controller]. I have only sought legal advice and know that [the controller] is not acting in accordance with the law. All I want is a complete overview of my disruptions and transactions that I made with [the controller] using my account [...] at that time. [The controller] has so far refused to send me this overview and has indicated that they suspect I have legal proceedings against them. Once again, this is not the case”.

LEGAL ANALYSIS AND DECISION

7. 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 25th June 2024. In the reply dated the 30th August 2024, the controller partially 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 partially restrict the right of the complainant.

Subject Access Request: Article 15 of the Regulation

8. 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.
9. 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 Regulation³, 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 rights⁴.
10. 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.
11. 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 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*

³ Case C-487/21, ‘*FF vs Österreichische Datenschutz-behörde*’, 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).

⁴ 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).

subject with personal data, that is to say, in the form of a copy and, therefore, a faithful reproduction of the data”⁵.

12. 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 2023⁶. 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.
13. 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.
14. 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”⁷ [emphasis has been added].*

Restriction in terms of Subsidiary Legislation 586.09

15. 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 Schrems⁸.

⁵ Case C-487/21, Opinion of Advocate General Pitruzzella, delivered on the 15th December 2022, (para. 48 and 49).

⁶ 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.

⁷ Ibid 4 (para. 13).

⁸ Case C-311/18, ‘Data Protection Commissioner vs Facebook Ireland and Maximilian Schrems’, decided on the 16th July 2020 (para. 172).

16. The fundamental right to the protection of personal data may be subject to some limitations pursuant to article 52(1)⁹ 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.
17. 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*”¹⁰ [emphasis has been added].
18. 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].
19. 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.
20. 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

⁹ 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.”

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

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”*¹¹ [emphasis has been added].

21. 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 partially restricted pursuant to regulation 4(e) of Subsidiary Legislation 586.09.
22. 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 to allow the controller *“to temporarily withhold certain information to prevent potential future litigation if specific conditions are met”*. 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.
23. 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 shall demonstrate that the application of the restriction is indeed a necessary and a proportionate measure.

¹¹ Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, decided on the 16th December 2008, (para. 56).

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 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 twenty (20) 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
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Date: 2024.11.25
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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*’¹².

¹² More details are available on this Office’s website at the following hyperlink: <https://idpc.org.mt/appeals-tribunal/>