



Information and Data Protection Commissioner

CDP/COMP/154/2024

vs

COMPLAINT

1. On the 17th April 2024, [REDACTED] (the “complainant”) lodged a complaint with the Information and Data Protection Commissioner (the “Commissioner”) in terms of article 77(1) of the General Data Protection Regulation¹ (the “Regulation”), alleging that [REDACTED] (the “controller”) unlawfully disclosed information in relation to him to third parties. The complainant submitted the following information surrounding his complaint:
 - a. that earlier this year, the complainant was connected with a company, [REDACTED] through a recruitment agency, namely [REDACTED] that was represented by a Senior Consultant;
 - b. that the Senior Consultant introduced the complainant to the controller, with whom the complainant had meetings facilitated by the Human Resources representative of the controller;
 - c. that prior to the meeting held on the 8th April 2024, the Human Resources representative requested the consent of the complainant to contact a reference of his choice, and he provided four (4) contacts and explicit consent via an email dated the 7th April 2024;
 - d. that following the meeting, on the 9th April 2024, the complainant was informed by the recruitment agency that the controller contacted individuals not on the list which the complainant provided by means of an email dated the 7th April 2024, and background checks about him were conducted without his prior consent;

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.

- e. that the complainant has never given his consent to the controller to contact the managing director of [REDACTED] when he had joined his former employer back in the 1990s;
 - f. that the Senior Consultant of the recruitment agency relayed to the complainant that the controller received negative feedback from these unconsented contacts and confirmed that the references he provided to the controller by means of an email dated the 7th April 2024 were not contacted by the controller; and
 - g. that the complainant has evidence that the notion of 'negative feedback' allegedly received and thereafter circulated by the controller to [REDACTED] is defamatory, and these circumstances cause significant reputational harm and put in jeopardy his over twenty (20) years of professional experience.
2. The complainant further submitted screenshots of the messages exchanged between the complainant and the recruiter on LinkedIn. The message dated the 9th April 2024 reads as follows:
- "Morning [REDACTED] Hope all is well. [REDACTED] called me today with an update on your application.*
- She said the interview went well from their side too however during the interview you gave consent for them to call some ex-board members at [REDACTED] who worked very closely with you during your time there.*
- [REDACTED] followed up on this and got quite negative feedback from the 1st person she called. She called two other boardmembers just to make sure the 1st person's feedback was not a one-off but the feedback was unfortunately consistently negative" [emphasis has been added].*
3. On the 26th April 2024, the Commissioner requested the complainant to submit a copy of the email dated the 7th April 2024, wherein the complainant stated that *"I provided four contacts and explicit consent via email on April 7"*. On the same day, the complainant submitted the email he sent to the controller on the 7th April 2024, together with the list of references.
4. Furthermore, on the 29th April 2024, the complainant submitted a number of *"screen-shots from my email inbox, Whatsapp and LinkedIn showing that none of the contacts I shared with the [REDACTED] were contacted or there was any exchange re: my reference between the parties. This means, that none on the list of references I gave to [REDACTED] with my consent were involved in the matter"*.

INVESTIGATION

Submissions of the controller

5. Pursuant to the internal investigative procedure of this Office, the Commissioner sent a copy of the complaint, including the supporting documentation, and gave the controller the opportunity to provide any information which it deemed relevant and necessary to defend itself against the allegation raised by the complainant. On the 17th June 2024, the controller submitted the following salient arguments:
- a. that the recruitment process involving the complainant was meticulously conducted in accordance with the established procedures of the controller and legal obligations, and it is imperative to recognise the sequence of events as they unfolded: (a) that the CV of the complainant was initially submitted through [REDACTED] on the 9th February 2024; and (b) several interviews were conducted, including psychometric assessments, and references were diligently sought;
 - b. that following the third interview, the controller consulted with a technical employee within [REDACTED] whose field of expertise closely aligned with the requirements of the position;
 - c. that when the candidates' name was brought up during the discussion, the internal technical professional who is part of [REDACTED] did not recommend proceeding with the candidate based on prior interactions with him and in light of this valuable insight, the controller gave precedence to the informed opinion of the internal technical specialist, which was pivotal in the decision-making process of the controller;
 - d. that, consequently, the controller placed greater emphasis on the evaluation provided by the technical expert rather than solely relying on the references submitted by the complainant to assess the candidate's appropriateness for the role;
 - e. that following the negative feedback from the internal technical employee, the communication of this feedback was relayed by the HR representative to the Senior Consultant of the recruitment agency during a telephonic conversation, however, it is important to clarify that the information provided to the complainant by the recruiter is

inaccurate, as the decision-making process was primarily based on the input and evaluation provided by the internal technical expert;

- f. that in addressing the concerns raised by the complainant regarding potential reputational harm and jeopardising his extensive experience, it is important to highlight that the discussion regarding the candidate was conducted internally within [REDACTED] involving key stakeholders and technical experts; and
 - g. that this internal consultation ensures a comprehensive assessment of the candidate's suitability for the role based on professional expertise and informed judgment, and, therefore, based on the thorough and transparent approach followed in this instance, such perceived risks to reputational integrity and professional standing are considered unfounded and not applicable in this context.
6. Following a request made by the Commissioner in terms of article 58(1)(e) of the Regulation, the controller submitted a copy of the controller's recruitment process and flowchart.

Submissions of the complainant

7. The complainant was provided with the opportunity to rebut the arguments raised by the controller. On the 18th June 2024, the complainant provided the Commissioner with the following arguments to consider during the legal analysis of this case:
- a. that the information which the complainant has received in written form from [REDACTED] is clear and contradicts what the controller is stating and the controller's assertion that *"the information provided to [REDACTED] by [REDACTED] [the recruiter] (from screenshots provided in the complaint) is inaccurate"* is false;
 - b. that the message sent by the recruiter is very specific, mentioning three (3) individuals, not one, and clearly identifying whom the controller approached, and the recruiter explicitly stated that the controller contacted individuals not included in the list of names provided;
 - c. that the discrepancy between the written communications from [REDACTED] and the statements from [REDACTED] is significant, indicating this is not a mere misunderstanding;

- d. that the controller is implying that [REDACTED] through the recruiter, lied about the events, and this situation which harms his reputation and causes him stress, also jeopardises the reputation of third parties, including former directors of [REDACTED] and the company itself; and
- e. that the complainant participated in three interviews with the [REDACTED] for a technical role, and the first interview was with the Group's HR, the second with the CEO and HR, and the third with the Chairperson of the Group, a Board Member, the CEO and HR, and at no point in these proceedings was the [REDACTED] "internal technical professional" present for the interviews and one would expect that if such a highly trusted profile exists, he/she would have been present for the interviews.

Further submissions of the controller

- 8. On the same day, the Commissioner provided the controller with a copy of the submissions of the complainant and enabled the controller to rebut his arguments. In addition, the Commissioner requested the controller to clearly indicate if the controller had contacted ex-board members at [REDACTED] or any other individual who is not mentioned in the list of professional references sent by the complainant to the HR representative of the controller on the 7th April 2024.
- 9. On the 27th June 2024, the controller submitted the following salient arguments for the Commissioner to consider during the legal analysis of this case:
 - a. that, during the third interview, the complainant was duly informed that the controller would discuss his candidacy with their technical expert due to the weight and importance of the role;
 - b. that, during the interview, the complainant provided explicit consent for the controller to contact a former member of [REDACTED] identified as a mutual link between himself and the interviewers, and this consent was confirmed in the recruiter's message to the complainant on the 9th April 2024, and could also be corroborated by the Chairperson of the Group, the Board Member, the CEO and the HR, who were all present;
 - c. that [REDACTED] is a company listed on the complainant's curriculum vitae and reaching out to individuals mentioned in his curriculum vitae is a balanced approach given the role's significance;

- d. that, as part of the controller's due diligence, it is essential to verify the information provided on a candidate's curriculum vitae and this information is shared by the candidate voluntarily and plays a significant role in the decision-making process regarding his suitability for the position, and therefore, contacting individuals at [REDACTED] was a justified as a necessary step in ensuring the integrity and effectiveness of the recruitment process;
 - e. that the decision not to proceed further was based solely on the internal expert's feedback and the controller clarified that the internal technical professional's feedback was a critical part of the decision-making process, and the professional's absence during the third interview was due to him being abroad, a situation communicated to the complainant during the third interview;
 - f. that if it is determined by the Commissioner that an infringement occurred, it is a result of the recruitment's agency, which exceeded the scope of the company's instructions and disclosed reference information to the candidate without the company's consent and, more critically, disseminated inaccurate and false information;
 - g. that in relation to the core issue of the complaint, the controller reiterated that it did not infringe the provisions of the Regulation, and the consent of the complainant was obtained during the third interview to speak to a former [REDACTED] member, and the company relied on information the complainant voluntarily shared through his curriculum vitae and interview; and
 - h. that, in addition to the above, the controller has a legitimate interest in conducting thorough background checks and reference verifications for recruitment purposes and this exercise is critical to ensuring that the company hires qualified and suitable candidates, thereby safeguarding the company's operations and interests.
10. In connection with the information provided by the controller in the preceding paragraph, on the 15th July 2024, the Commissioner sought further clarifications, and in terms of article 58(1)(e) of the Regulation, the controller was requested to provide the following information:
- a. in the submissions, the controller mentioned that '[REDACTED] provided explicit consent for us to contact a former member of [REDACTED]', and therefore, the Commissioner

requested the controller to state how it obtained the consent of the complainant and to provide the necessary supporting evidence; and

- b. in the submissions, the controller stated that the company has “*legitimate interests in conducting thorough background checks and reference verifications for recruitment purposes*”, and accordingly, the Commissioner requested the controller to provide a copy of the legitimate interest assessment if this was conducted before the processing activity, and to clearly indicate, in terms of the settled case-law of the Court of Justice of the European Union, how the controller fulfilled the following three (3) cumulative criteria: (i) the existence of a legitimate interest justifying processing; (ii) the necessity of the processing for the realisation of the legitimate interest; and (iii) the prevalence of that interest over the rights and interests of the data subject, which calls for a balancing of interest.

11. By means of an email dated the 23rd July 2024, the controller provided the following clarifications and explanations in relation to the legal basis it relied upon to disclose the personal data of the complainant to the third party:

Consent

- a. that the complainant verbally provided consent during the interview process for the controller to contact a former member of [REDACTED] and this verbal consent could be corroborated by all the interview participants who were present at the time;
- b. that, as supporting evidence, the controller referred to the Whatsapp message sent by recruiter to the complainant on the 9th April 2024 at 11:39AM that confirms that the complainant consented to this disclosure of his personal data;
- c. that, additionally, the controller reached out to individuals at [REDACTED] because they were listed in the employment history section of the complainant’s curriculum vitae, which he voluntarily provided to the controller, and this, therefore, indicates his implied consent to verify the information provided;
- d. that whilst consent was not documented in writing, the verbal consent provided by the complainant during the interview, supported by the WhatsApp message from the recruiter and the information provided in the curriculum vitae indicate the complainant’s agreement to contact his previous employer;

Legitimate Interest

- e. that, at time of the request of the Commissioner, the controller did not conduct a formal legitimate interest assessment for this processing activity, and this will be remedied going forward;
- f. that, however, as a company, the controller follows the policies on data protection and at the time of deciding on obtaining references, the controller did consider the data protection implications in line with their procedures;
- g. that the purpose of processing a candidate's data includes assessing the suitability of the candidate for a specific role, verifying qualifications and experience, and conducting reference checks, and this interest is legitimate as it pertains to the effective operation and success of the company;
- h. that hiring competent and trustworthy employees is essential for maintaining business standards, productivity, and security, and therefore, processing personal data of job applicants, including collecting and checking references, is essential to evaluate the qualifications, experience, and suitability of candidates for specific roles;
- i. that the controller considered an alternative, such as not verifying reference but this was deemed insufficient, and this could lead to hiring unsuitable candidates, thereby compromising the quality of hires and potentially impacting business operations negatively; and
- j. the legitimate interest in conducting thorough and reliable recruitment processes outweighs the limited impact on the applicant's rights, and the safeguards in place ensure that the processing is proportionate and respects the applicants' privacy.

Final comment of the complainant

12. By means of an email dated the 30th July 2024, the complainant reiterated his position that *"I never gave verbal consent to the [REDACTED] to contact anyone at [REDACTED] or anywhere. I only gave consent for those names I had mentioned in writing"*.

LEGAL ANALYSIS AND DECISION

13. The Commissioner proceeded to examine whether the controller, the prospective employer, had a valid legal basis in terms of article 6(1) of the Regulation, to contact the former employer of the complainant at recruitment stage, who was not mentioned in the list of professional references sent by the complainant to the human resources representative of the controller, for the purpose of verifying his suitability for a specific role within the organisation of the controller.
14. As part of the investigation of this complaint, the controller confirmed that the personal data of the complainant were disclosed to the former employer of the complainant, namely, [REDACTED]. In its submissions, the controller provided that *"contacting individuals at [REDACTED] was a justified and necessary step in ensuring the integrity and effectiveness of our recruitment process"*. The controller argued that the processing of the personal data pertaining to the complainant is lawful in terms of article 6(1)(a) and article 6(1)(f) of the Regulation.

Article 6(1)(a) of the Regulation

15. Article 6(1)(a) of the Regulation states that the processing is lawful if *"the data subject has given consent to the processing of his or her personal data for one or more specific purposes"*. Article 4(11) of the Regulation defines consent as *"any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"*.
16. Article 7 of the Regulation sets the conditions for consent to be valid and stipulates that *"where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data"*. This echoes the principle of accountability as set forth in article 5(2) of the Regulation, which states that the controller shall be responsible for, and be able to demonstrate compliance with the provisions of the Regulation. This means that the onus rests upon the controller to demonstrate that the complainant has consented to the processing of his personal data.
17. The principle of accountability is also reflected in recital 42 of the Regulation, which provides that *"[w]here processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation. In particular*

in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware of the fact that and the extent to which consent is given”.

18. The European Data Protection Board (the “EDPB”) in its recent Opinion² delivered in April 2024 emphasises that the controller should be in a position to demonstrate that the data subject has consented to the processing of his or her personal data, and that the consent fulfills all the conditions of a valid consent. The EDPB elucidates that:

“Of particular importance in this regard is the principle of accountability in Article 5(2) GDPR, which states that the controller is responsible for and must be able to demonstrate its compliance with the other principles of Article 5 GDPR. In relation to consent, Article 7(1) explicitly states that the controller must be able to demonstrate that the data subjects have consented to the processing where they rely on consent as a legal basis. As the CJEU pointed out in the Bundeskartellamt judgment, the controller must be able to demonstrate that the data subject’s consent was freely given in light of the circumstances of the processing situation, and that all other conditions for valid consent were met.”

19. To this end, the Commissioner proceeded to examine the submissions of the controller dated the 19th June 2024 and provided to this Office on the 27th June 2024, wherein the controller argued that “during the interview, [REDACTED] provided explicit consent for us to contact a former member of [REDACTED] identified as a mutual link between himself and the interviewers. This consent was confirmed in [REDACTED] [the recruiter] message to [REDACTED] on April 9th and can also be corroborated by the Chairman of the Group, the Board member, the CEO and HR, who were all present. [REDACTED] is a company listed on [REDACTED] CV and reaching out to individuals there was a balanced approach given the role’s significance”.
20. During the course of the investigation, the Commissioner requested further clarifications in relation to the manner how the controller perceived that the complainant was consenting to the processing of his personal data. In particular, the Commissioner requested the controller to substantiate this by providing any evidence which could concretely demonstrate that the complainant consented to the disclosure of his personal data to the third party. By means of an email dated the 23rd July 2024, the controller submitted that consent was provided orally and could be corroborated by all the interview participants who were present at the time. As

² Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, adopted on 17th April 2024.

supporting evidence, the controller submitted that the “*recruiter confirmed this verbal consent in a WhatsApp message to [REDACTED] on April 9 at 11:39 AM. This message serves as a supporting record of the verbal consent provided by [REDACTED]*”.

21. Accordingly, the Commissioner examined the WhatsApp message sent by the recruiter to the complainant on the 9th April 2024, which reads as follows:

APR 9

[REDACTED] 11:39 AM

Morning [REDACTED] Hope all is well. [REDACTED] called me today with an update on your application.

She said the interview went well from their side too however during the interview you gave consent for them to call some ex-board members [REDACTED] who worked very closely with you during your time there.

[REDACTED] followed up on this and got quite negative feedback from the 1st person she called. She called two other boardmembers just to make sure the 1st person's feedback was not a one-off but the feedback was unfortunately consistently negative.

22. In addition, the controller submitted that “*we reached out to individuals at [REDACTED] because they were listed in the employment history section of [REDACTED] which he voluntarily provided to us. This indicates his implied consent for us to verify the information provided. While the consent was not documented in writing, the verbal consent during the interview, supported by the WhatsApp message from the recruiter and the information provided in the CV, indicate [REDACTED] agreement to contact his previous employer*”.
23. The Commissioner refers to recital 32 of the Regulation, which further provides that “[c]onsent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement” [emphasis has been added]. This demonstrates that consent may be obtained orally, however, in terms of the principle of accountability, it still remains the responsibility of the controller to concretely demonstrate that all the conditions for valid consent were met when consent was obtained from the data subject.

24. One of the conditions of a valid consent is that the controller should obtain either a statement from the data subject or else a clear affirmative act, which means that the consent must always be given through an active motion or a declaration. To this end, the EDPB in its ‘Guidelines 05/2020 on consent under Regulation 2016/679’³ explains what constitutes a valid consent provided verbally:

“Article 4(11) GDPR builds on this definition, by clarifying that valid consent requires an unambiguous indication by means of a statement or by a clear affirmative action. A “clear affirmative act” means that the data subject must have taken a deliberate action to consent to the particular processing. Recital 32 sets out additional guidance on this. Consent can be collected through a written or (a recorded) oral statement, including by electronic means.” [emphasis has been added].

25. The distinct character of ‘consent’ as a valid legal basis in terms of article 6(1)(a) of the Regulation is that the data subject exercises complete control over the processing of his personal data, and the controller should respect that freedom of choice at all times. For this reason, the law imposes stringent conditions of consent that must be fulfilled by the controller. This leads to the setting up of a high standard that must be attained by the controller in order to ensure that the data subject provides valid consent in terms of the requirements of the law. Therefore, before the controller relies on consent, it needs to ensure that it has a very clear understanding of the concept of consent and how it could be obtained in a valid manner and how it could effectively demonstrate that the data subject has consented to the processing of his personal data.

26. Given that the law sets a high threshold as to how consent should be proven, the EDPB acknowledges that it may be difficult for a controller to comply with article 7(1) of the Regulation when consent is obtained orally. To this extent, the EDPB states that:

“In theory, the use of oral statements can also be sufficiently express to obtain valid explicit consent, however, it may be difficult to prove for the controller that all conditions for valid explicit consent were met when the statement was recorded”⁴.

³ Version 1.1, adopted on the 4th May 2020, paragraph 77.

⁴ Ibid 3, paragraph 94.

27. When the Commissioner requested the controller to demonstrate that the complainant consented to the processing operation and to submit supporting evidence, the controller referred to the Whatsapp message³ sent by the recruiter to the complainant. The Regulation introduces a requirement for the controller to make the necessary arrangements to ensure compliance with article 7(1) of the Regulation, namely, a record that the data subject consented to the processing operation. The EDPB further provides that:

“It is up to the controller to prove that valid consent was obtained from the data subject. The GDPR does not prescribe exactly how this must be done. However, the controller must be able to prove that a data subject in a given case has consented. As long as a data processing activity in question lasts, the obligation to demonstrate consent exists. After the processing activity ends, proof of consent should be kept no longer than strictly necessary for compliance with a legal obligation or for the establishment, exercise or defence of legal claims, in accordance with Article 17(3)(b) and (e).

For instance, the controller may keep a record of consent statements received, so he can show how consent was obtained, when consent was obtained and the information provided to the data subject at the time shall be demonstrable. The controller shall also be able to show that the data subject was informed and the controller’s workflow met all relevant criteria for a valid consent. The rationale behind this obligation in the GDPR is that controllers must be accountable with regard to obtaining valid consent from data subjects and the consent mechanisms they have put in place.” [emphasis has been added].

28. Thus, the Commissioner proceeded to assess the submissions of the controller and noted that the only evidence which the controller managed to provide during the course of the investigation is merely a WhatsApp message sent by a person who does not even form part of its organisation. Also, the credibility of this individual was questioned by the controller itself, when in the submissions dated the 19th June 2024 and provided to this Office on the 27th June 2024, the controller held that the “recruitment agency disclosed reference information to the candidate [the complainant] without the company’s consent and, more critically, disseminated inaccurate and false information” [emphasis has been added]. Therefore, this WhatsApp message sent by the recruiter does not meet the threshold required by law to demonstrate that the complainant has indeed consented to the processing of his personal data.

³ Vide paragraph 21 of the decision.

29. Furthermore, the Commissioner refers to the submissions of the controller, where it argued that “we reached out to the individuals at [REDACTED] because they were listed in the employment history section of [REDACTED] CV, which he voluntarily provided to us. This indicates his implied consent to use to verify the information provided” [emphasis has been added]. The Commissioner clarifies that consent in terms of the Regulation can never be implied, and therefore, this is an incorrect interpretation of the law. This is also confirmed by the EPDB, which provides that implied consent is inept:

“Likewise as the GDPR requires a “statement or a clear affirmative action”, all presumed consents that were based on a more implied form of action by the data subject (e.g. a pre-ticked opt-in box) will also not be apt to the GDPR standard of consent”⁶ [emphasis has been added].

30. This led the Commissioner to conclude that the controller failed to concretely demonstrate by means of any recorded or a documented statement that the data subject has consented to the disclosure of his personal data to third parties in terms of the requirement held in article 5(2) and article 7(1) of the Regulation.

Article 6(1)(f) of the Regulation

31. In its submissions, the controller also stated that the processing is based on legitimate interest pursuant to article 6(1)(f) of the Regulation. The controller held that it has a legitimate interest “in conducting thorough background checks and reference verifications for recruitment purposes ... This due diligence is critical to ensuring that the company hires qualified and suitable candidates, thereby safeguarding the company’s operations and interests”.

32. During the course of the investigation, the Commissioner referred to the settled case-law of the Court of Justice of the European Union⁷ in relation to the assessment that should be conducted by the controller when relying on legitimate interest as a legal basis to legitimise the processing activity. The Commissioner requested the controller to indicate how the processing activity fulfills the following three (3) cumulative criteria: (i) the existence of a legitimate interest justifying the processing activity; (ii) the necessity of the processing for the realisation of the legitimate interest; and (iii) the prevalence of that interest over the rights and

⁶ Ibid 3, paragraph 168.

⁷ Case C-13/16, Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde vs Rīgas pašvaldības SIA “Rīgas satiksme”, decided on the 4th May 2017 and Case C-708/18, TK vs Asociația de Proprietari bloc M5A-ScaraA, decided on the 11th December 2019.

interest of the data subject, which calls for a balancing exercise. Furthermore, the Commissioner requested the controller to submit a copy of the legitimate interest assessment, if this has been conducted prior to the processing operation.

33. By means of an email dated the 15th July 2024, the controller submitted that a formal legitimate interest assessment was not conducted and “[t]his will be remedied going further”. However, the controller outlined the following:

The Legitimate Interest pursued by the controller – Article 6(1)(f) of the Regulation	
The Legitimate Interest Pursued	<i>“The purpose of processing a candidate’s data includes assessing the suitability of candidates for specific roles, verifying qualifications and experience, and conducting reference checks. This interest is legitimate as it pertains to the effective operation and success of the company. Hiring competent and trustworthy employees is essential for maintaining business standards, productivity, and security”.</i>
The necessity of the processing for the realisation of the legitimate interest	<i>“Processing personal data of job applicants, including collecting and checking references, is essential to evaluate the qualifications, experience, and suitability of candidates for specific roles. Alternatives such as not verifying references were considered but found insufficient”.</i>
The prevalence of that interest over the rights and interest of the data subject, which calls for a balancing exercise.	<i>“The legitimate interest in conducting thorough and reliable recruitment processes outweighs the limited impact on the applicants’ rights. The safeguards in place ensure that the processing is proportionate and respects the applicants’ privacy”.</i>

34. The Commissioner notes that the controller invoked both consent and legitimate interest as the legal bases of the processing activity. Consent, by its very nature, is incompatible with the legal basis of legitimate interest as set forth in article 6(1)(f) of the Regulation. Article 7(3) of the Regulation states that the “data subject shall have the right to withdraw his or her consent at any time”. This means that if the data subject withdraws his consent and the controller

continues to process that personal data on the basis of legitimate interest, this would constitute an infringement of article 7(3) of the Regulation. Hence, the controller could not switch from the legal basis of consent to legitimate interest, as a fallback position. The EDPB also considers this to be an unfair practice adopted by a controller. In fact, in its Guidelines 05/2020, the EDPB provides that:

"It is important to note here that if a controller chooses to rely on consent for any part of the processing, they must be prepared to respect that choice and stop that part of the processing if an individual withdraws consent. Sending out the message that data will be processed on the basis of consent, while actually some other lawful basis is relied on, would be fundamentally unfair to individuals."

In other words, the controller cannot swap from consent to other lawful bases. For example, it is not allowed to retrospectively utilise the legitimate interest basis in order to justify processing, where problems have been encountered with the validity of consent. Because of the requirement to disclose the lawful basis, which the controller is relying upon at the time of collection of personal data, controllers must have decided in advance collection what the applicable lawful basis is."⁸ [emphasis has been added].

Therefore, in such case, the Commissioner could not accept that the controller legitimises the processing operation on two lawful bases which are completely incompatible.

35. Without prejudice to the preceding paragraph, the Commissioner has serious reservation about the manner how the legitimate interest assessment was conducted by the controller. First and foremost, as a general remark, the Commissioner emphasises that when the controller relies on legitimate interest as the basis of its processing operations, it should document its legitimate interest assessment prior to the processing operation pursuant to the principle of accountability as set forth in article 5(2) of the Regulation. Secondly, the controller failed to indicate how disclosing the personal data of the complainant to a previous employer meets the reasonable expectation of the complainant, in particular, after considering that the controller failed to contact any of the four (4) references, which the complainant provided to the controller for the purpose of verifying his suitability, by means of an email dated the 7th April 2024. Therefore, the controller failed to demonstrate the necessity and proportionality of the processing activity.

⁸ Ibid. 3, paragraphs 122 and 123.



On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller failed to effectively demonstrate that the complainant consented to the disclosure of his personal data to the third party or that the processing is lawful in terms of any other legal basis mention in article 6(1) of the Regulation, and therefore, this constitutes an infringement of article 5(2), article 6(1) and article 7(1) of the Regulation.

By virtue of article 58(2)(b) of the Regulation, the controller is hereby being served with a reprimand.

Ian
DEGUARA
(Signature)

Digitally signed
by Ian DEGUARA
(Signature)
Date: 2024.08.09
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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.