

CDP/COMP/254/2024

vs

## COMPLAINT

1. On the 21<sup>st</sup> June 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> (the “**Regulation**”), alleging that the [REDACTED] (the “**controller**”) unlawfully processed information in relation to her trade union membership.
2. The complainant submitted the following information in relation to her complaint:
  - a. that the complainant is employed as a ‘Learning Support Educator’ with the [REDACTED] within the [REDACTED] [REDACTED] and works at the [REDACTED] [REDACTED], which falls under the remit of the said [REDACTED]
  - b. that, in March 2024, the complainant was summoned to a meeting in the Office of the Head of School and there were also present other individuals;
  - c. that during the said meeting, the Head of School asked the complainant “*Inti membru tal- [REDACTED]*” and the complainant replied in the affirmative, and then the Head of School requested the complainant “*tini l-ID Card Number tieghek ghax ha jkolli nibghat email biex nirregistrak [REDACTED] peress illi ha timxi mad-direttivi tal- [REDACTED]*”.

<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).

- d. that the complainant was not given any further information as to who was keeping the requested information relating to her membership of the [REDACTED] [REDACTED], where and how such information was kept, precisely for which purpose and for how long such information was kept, except that it was somehow being registered or recorded at the [REDACTED], and
- e. that the complainant does not believe that her consent for the processing of her trade union membership by the controller was obtained in accordance with the law, and consequently, the processing was unlawful, unfair and not transparent.

## INVESTIGATION

- 3. Pursuant to the internal investigative procedure of this Office, the Commissioner sent a copy of the complaint to the controller and enabled the controller to provide any information which it deemed relevant and necessary to defend itself against the allegation raised by the complainant. On the 8<sup>th</sup> August 2024, the controller submitted the following arguments for the Commissioner to consider during the legal analysis of this complaint:
  - a. that the act of questioning itself does not constitute processing of personal data;
  - b. that the educational institution does not keep any record of the information revealing trade union membership of its educators and if the complainant felt intimidated by the Head of School, the complainant should have followed other internal procedures to address her complaint;
  - c. that, without prejudice to the foregoing, if any processing of special category of personal data by the school ever took place, it was based on the explicit consent of the complainant pursuant to article 9(2)(a) of the Regulation; and
  - d. that the school where the complainant was deployed already held basic personal information in relation to the complainant, namely, the ID card number, home address and contact number, and therefore, there would be no data protection issue if the Head of School had requested the complainant's ID card number as the school already had this information on file.

4. Pursuant to the internal investigative procedure of this Office, the Commissioner provided the complainant with the opportunity to rebut the arguments submitted by the controller. In view of the fact that the controller stated that “*an act of questioning does not in itself tantamount to personal data processing*”, the Commissioner requested the complainant to substantiate her claim and provide any evidence which she may have to effectively demonstrate that the controller processed her personal data within the meaning of article 4(2) of the Regulation.
5. On the 20<sup>th</sup> September 2024, the complainant submitted the following salient arguments:
  - a. that irrespective whether the Head of School was following the instructions of the [REDACTED] or acting on her own initiative, there can be no doubt that questioning of the complainant about her trade unionistic affiliation did take place;
  - b. that the context of the said questioning was a formal meeting during working hours and the meeting was called by the Head of School for which other members of the management of the school, namely the Assistant Head of School and the Inclusion Coordinator were also present;
  - c. that the questioning about trade unionistic affiliation took place in a most formal environment, where the complainant was essentially facing all of her immediate direct line of management and replies were being demanded of her;
  - d. that in view of the fact that the questioning was carried out by the Head of School acting in her official capacity and in the presence of her other line managers, such questioning has to be treated as a formal act of collection of personal data and this is because data collection, per se, forms part of data processing as per article 4(2) of the Regulation;
  - e. that the complainant sustained that at no point was she informed or even given the slightest impression that the said meeting or the request for information regarding her trade unionistic affiliation could be refused, and on the contrary, the extreme formality of proceedings clearly indicated otherwise;
  - f. that the complainant was requested to provide her identity card number in conjunction with the request of her trade unionistic affiliation and this is notwithstanding the fact

that as per the submissions of the controller, the identity card number was already in the school's possession;

- g. that the complainant reiterates that she replied to the question about her trade unionistic affiliation because she felt intimidated to do so by the whole formality surrounding the meeting and in fear that the refusal would be met with repercussions, and therefore, the complainant reiterated that her disclosure was made under duress which could not be construed to constitute a valid consent; and
- h. that the complainant was not given specific information as to why and how information relating to her trade unionistic affiliation was going to be used and that she was merely informed that the information provided would be passed on to the [REDACTED]

- 6. The Commissioner provided the controller with the final opportunity to provide its submissions in relation to the counterarguments presented by the complainant. By means of an email dated the 14<sup>th</sup> October 2024, the controller submitted that the complainant had failed to present any evidence to substantiate her allegation, and therefore, the controller relies on the submissions previously made during the course of the investigation.

## **LEGAL ANALYSIS AND DECISION**

- 7. As a preliminary step of the investigation, the Commissioner assessed the subject-matter of the complaint, wherein the complainant alleged that she verbally disclosed her trade union membership during a work-related meeting at the request of the Head of School, and consequently, the complainant contended that the controller unlawfully processed her personal data.
- 8. For the purpose of this legal analysis, the Commissioner sought to determine whether the verbal disclosure of information by the complainant concerning her trade union membership qualifies as 'processing' within the meaning of article 4(2) of the Regulation, read in light of article 2(1) thereof.
- 9. The Commissioner examined the submissions of the controller where it argued that the act of questioning itself does not constitute 'processing' for the purpose of the Regulation. The controller maintained that it neither collected nor disclosed, nor engaged in any other form of processing in relation to information pertaining to the complainant's trade union membership.

However, conversely, the complainant argued that the questioning conducted by the Head of School in her official capacity in the presence of other line managers, should be regarded as a formal act of collection of personal data, and this is because collection, *per se*, forms part of processing in terms of article 4(2) of the Regulation.

10. To this end, the Commissioner assessed the definition of ‘processing’ as defined in article 4(2) of the Regulation, which reads as follows: *“any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”*.
11. The definition of ‘processing’ should not be considered in isolation, rather it should be read in light of the material scope of the Regulation as set forth in article 2(1), which sets out the applicability of the Regulation. Article 2(1) of the Regulation states that the provisions apply *“to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system”*.
12. Recital 15 of the Regulation further provides that: *“The protection of natural persons should apply to the processing of personal data by automated means, as well as to manual processing, if the personal data are contained or are intended to be contained in a filing system. Files or sets of files, as well as their cover pages, which are not structured according to specific criteria should not fall within the scope of this Regulation.”*
13. The Commissioner considered a recent judgment delivered by the Court of Justice of the European Union (the “CJEU”), which examined the definition of ‘processing’:  
  
*“In that regard, it is clear from the wording of that provision [article 4(2) of the Regulation] and from recital 15 of the GDPR that that regulation applies both to automatic processing of personal data and to the manual processing of such data, so that the scope of the protection that that regulation confers on data subjects does not depend on the techniques used and avoids the serious risk of that protection being circumvented. However, it is also clear that that regulation applies to the manual processing of personal data only where the data processed ‘form part of a filing system or are intended to form part of a filing system’”<sup>2</sup> [emphasis has been added].*

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<sup>2</sup> Case C-740/22, paragraph 34.

14. Based on the foregoing, the Commissioner noted that collection is indeed considered to be an activity, however, it could only constitute 'processing' if it is conducted by automated means, referring to processing using computer or digital technologies, or executed manually without the use of computing devices. However, manual processing would only fall within the material scope of the Regulation if two cumulative conditions are fulfilled, namely that the personal data must be contained - or intended to be contained - in a filing system and that the filing system must be structured according to specific criteria. Article 4(6) of the Regulation defines 'filing' as *"any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis"*.
15. Therefore, the sole verbal disclosure by the complainant of her trade union membership does not constitute 'processing' for the purpose of the Regulation. For the verbal disclosure of the complainant to qualify as 'processing' under article 4(2) of the Regulation, the information must either be recorded and, or stored in some form by the controller, whether through automated means or manually as part of a structured filing system.
16. The Commissioner conducted a parallel investigation to determine whether the [REDACTED] requested information pertaining to the complainant's trade union membership or received such information from the controller. This is in view that the Head of School allegedly requested the complainant *"tini l-ID Card Number tieghek ghax ha jkolli nibghat email biex nirregistrak [REDACTED] peress illi ha timxi mad-direttivi [REDACTED]"*. The [REDACTED] strongly refuted this claim, stating that it had neither requested the controller to disclose information in relation to the complainant's trade union membership nor received any such information from the controller.

**In light of the foregoing considerations, the Commissioner is hereby dismissing the complaint in its entirety on the ground that the alleged sole verbal disclosure by the complainant of her trade union membership upon the request of the Head of School does not constitute 'processing' within the meaning of article 4(2) of the Regulation, read in light of article 2(1) thereof.**

Ian  
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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 (Chapter 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*”<sup>3</sup>.

An appeal to the Information and Data Protection Appeals Tribunal shall be addressed to:

The Secretary  
Information and Data Protection Appeals Tribunal  
158, Merchants Street  
Valletta.

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<sup>3</sup> Further information may be accessed here: <https://idpc.org.mt/appeals-tribunal/>