Information and Data Protection Commissioner

CDP/COMP/278/2024

[redacted]

vs

[redacted]

COMPLAINT

1. On the 4th July 2024, [redacted] on behalf of [redacted] (the "**complainant**") lodged a complaint with the Information and Data Protection Commissioner (the "**Commissioner**") pursuant to article 77(1) of the General Data Protection Regulation[1] (the "**Regulation**"), alleging that the Court Services Agency (the "**controller**") failed to comply with his request to exercise his right of erasure of personal data in respect of the content of the judgment [redacted][2] delivered by the [redacted], and which was subsequently published online on the website of the controller, namely www.ecourts.gov.mt.

2. The complainant submitted the following information in relation to his complaint:

   a. that, on the 2nd April 2024, the complainant requested the controller to exercise his right to erasure, however, on the 22nd April 2024, the controller refused the request on the basis that less than three (3) years had passed since the date of the judgment;

   b. that the primary reason for submitting the request is not to jeopardise the complainant's employment opportunities given that the complainant was convicted in October 2022, stemming from an incident that took place in February 2013, when the complainant was only seventeen (17) years old;

[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 (General Data Protection Regulation).

[2] [redacted], last accessed on the 16th December 2024.

c. that the judgment explicitly states that the complainant was struggling with drug dependence at the time, however, it also highlights the commendable efforts made by the complainant to overcome this challenge, noting his commitment to recovery and successful attainment of stable employment;

d. that today, the complainant is a devoted father who balances full-time employment with his academic pursuits, and in fact, the complainant has earned a diploma in Management and has successfully completed all the coursework required for a bachelor's degree in the same field, and is now awaiting graduation;

e. that the opportunities to seek a better job on the basis of his qualifications are thwarted by the fact that the first result given by an internet search engine to the query [redacted] is the judgment delivered in October 2022 that contains highly personal information that the employer has no right to know;

f. that while the published judgment accurately highlights the complainant's efforts, it is likely that its impact on potential employers will be negative;

g. that the mechanisms envisaged in our laws to regulate what an employer has the right to know about a prospective employee's record include the conduct certificate, and in this respect, article 5(b) of the Conduct Certificates Ordinance (Cap. 77 of the Laws of Malta) states that no conviction shall be entered in a (conduct certificate) ... if the person convicted of a crime was at the time of its commission still not eighteen (18) years of age;

h. that the judgment delivered by the Court directed that the conviction should not be included in the conduct certificate of the complainant;

i. that, therefore, the protection afforded by the law to underage offenders is being completely undone by a process that publishes highly personal information in relation to underage offenders without any consideration of what the law already provides by way of protection;

j. that, as regulated by the current guidelines, the lapse of time between the commission of the offence and the end of the three-year period cited by the controller as the reason for rejecting the request will be twelve years and ten months, and therefore, the complainant considers this time disproportionate, especially when taking into account

that this coincides with a period in his life where he may be in a position to pursue better employment opportunities in recognition of his efforts;

k. that in April 2023, the Government published a consultation (Public consultation on the reform 'Nagħtu t-Tieni Cans") about plans to further reduce the negative impact of the Conduct Certificate on the prospects of various categories of offenders, not limited to those who committed their offences when underage;

l. that the complainant is of the view that the public interest applies only to the generic facts of the case and not to the disclosure of his identity;

m. that the wording used by the controller in its refusal seems to suggest that this is a postponement rather than a rejection;

n. that the complainant also referred to procedures followed by search engines, namely Google and Bing, to remove specific entries from their results under the right to be forgotten requests, however, they state that the records of the Government play a vital role in keeping society informed of matters of public interest, and therefore, this means that any requests to search engines are not likely to be successful unless the complainant could show that he has at least challenged the Maltese governmental guidelines with justified reasons; and

o. that therefore, the complainant is lodging a complaint for the following reasons: (i) that the decision by the controller to continue publishing the court judgment for case [redacted] runs counter to the protection afforded by law towards underage offenders; (ii) that the duration between the commission of the offence and the readiness of the controller to review the decision is excessive and lacks justification; (iii) that the publication of the offender's identity serves no public benefit, particularly that the law protects individuals who committed offences while still minors; and (iv) that the controller is failing to adhere to its own established guidelines by failing to inform the complainant of his right to lodge a complaint with the Commissioner.

3. Together with the complaint, the complainant submitted the following supporting documentation:

a. a mandate of [redacted] authorising his [redacted] to lodge a data protection complaint on his behalf;

b. a copy of the identity card document of the complainant;

c. a copy of the request dated the 2nd April 2024, wherein the complainant requested the controller to erase his personal data on the basis of the following considerations:

"*Bil-prezenti il-klijent tieghi qieghed jitlob, a tenur tal-Legislazzjoni Sussidjarja 12.32 tal-Ligijiet ta' Malta, li din is-sentenza ma tibqghax aktar tidher fuq din il-website u dan ghas-segwenti ragunijiet:*

1. Illi l-kaz li ghalih dawn il-proceduri jirreferu jmur lura ghas-snin 2013 u dan meta l-klijent tieghi kien ghad kellu 17 il-sena;

2. Illi l-klijent tieghi huwa persuna kompletament riformata kif del resto jirrizulta mill-obiter tas-sentenza de quo li sahansitra applikat fil-konfront tieghu dak dispost fl-Artikolu 8(1) tal-Kap. 537

3. Illi ghaddew iktar minn tlett snin minn meta giet deciza is-sentenza tal-Qorti;

4. Illi ma sar ebda appell mill-Avukat Generali li zgur li jindika li l-partijiet kollha kienu sodisfatti bl-ezitu ta' dawn il-proceduri;

5. Illi m'hemmx htiega illi din is-sentenza tibqa' fuq is-sit elettroniku ghal ragunijiet ta' interess pubbliku u dana anke fid-dawl tal-fatt li kieku kienet fl-interess pubbliku, l-Avukat Generali kien ihejji appell;

6. Illi l-ispejjez tal-esperti gew debitament mhallsa u l-piena ta' inkarcerazzjoni sospizi giet ukoll skontata.

7. Illi mis-sentenza stess jirrizulta li l-ewwel Qorti applikat l-Artikolu 8(8) tal-Kap. 537 u certament il-fatt li din is-sentenza tinstab riportata fuq l-ecourts huwa kontro-sens"; and

d. a copy of the refusal of the controller dated the 22nd April 2024, which reads as follows: "*It-tlett snin mid-data tas-sentenza jghaddu f'Ottubru tal-2025, ghaldaqstant mitluba taghmel din it-talba wara li jiskadu t-tlett snin*".

INVESTIGATION

4. Pursuant to the internal investigative procedure of this Office, the Commissioner provided the controller with a copy of the complaint, including the supporting documentation, and enabled the controller to provide any information that it deemed relevant and necessary to defend itself against the allegation raised by the complainant. The Commissioner sent several emails to request the controller to provide its submissions, namely, the emails dated the 9th August 2024, the 26th August 2024 and the 9th September 2024.

Submissions of the controller

5. By means of a letter dated the 13th September 2024, the controller submitted the following information for the Commissioner to consider during the legal analysis of this case:

   a. that the request made by the complainant was refused on the ground that the three (3) year period since the date of the judgment has not yet elapsed;

   b. that the decision of the controller is based on the Guidelines on the Application of Legal Notice 456 of 2021 regarding the Online Publication of Court Judgments (Data Protection) Conferment of Functions Regulations (Subsidiary Legislation 12.32); and

   c. that according to these established Guidelines, a request generally requires a period of three (3) years to have elapsed since the date of the judgment for it to be considered, and in this case, the request was made just one year and six months after the judgment, and therefore, the request was refused.

Submissions of the complainant

6. Pursuant to the internal investigative procedure of this Office, the Commissioner provided the complainant with the final opportunity to provide its counterarguments. By means of a letter dated the 9th October 2024, the complainant submitted the following:

   a. that the response of the controller is based on the argument that it humbly followed the applicable Guidelines, however, the complaint is not based on whether the controller had followed the Guidelines, except for one important detail – that the controller did not inform the complainant that he could appeal its decision;

b. that the controller is following the Guidelines selectively and the controller did not even deign to comment on its failure to comply with paragraph 5 of the Guidelines, which states that: "*The person making the request shall also be informed that there is a right of appeal from the decision of the Chief Executive Officer of the Court Services Agency to the Commissioner for Information and Data Protection in case the request is rejected*"; and

c. that the complainant requested the Commissioner to direct the controller: (i) to erase the sentence for case [redacted] from the eCourts website or alternatively, at the very least, to anonymise the published information so that internet searches for the complainant, no longer result in the display of that sentence; and (ii) to ensure that the controller complies with its duty to inform the data subjects of their right to appeal as per its published Guidelines.

LEGAL ANALYSIS AND DECISION

7. For the purpose of this legal analysis, the Commissioner sought to examine: (a) whether there is a valid legal ground in terms of article 17(1)(a) to (f) of the Regulation to erase the personal data of the complainant in respect of the content of the court judgment [redacted] published online on the website of the controller, and (b) whether the controller complied with its requirement to inform the complainant about the right to lodge a complaint with the Commissioner in its reply dated the 22nd April 2024.

General Considerations

8. The Regulation is intended to ensure a high level of protection of personal data, however, the right to the protection of personal data is not an absolute right. Recital 4 of the Regulation states that this right must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality[3]. The Regulation respects all fundamental rights, which includes *inter alia*, the freedom of expression and information.

[3]C-268/21, Norra Stockholm Bygg AB vs Per Nycander AB, delivered on the 2nd March 2023: "*However, as recital 4 of the GDPR states, the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced, in accordance with the principle of proportionality, against other fundamental rights, such as the right to effective judicial protection, guaranteed in Article 47 of the Charter*" (para. 49).

9. Before delving into the merits of this complaint, the Commissioner emphasises that, in a democratic society, it is a widely accepted principle that the public should have access to judgments delivered by the Courts. whether they are of a civil or a criminal nature. Access to judgments is not only a legitimate expectation, but it is also essential for promoting transparency in the judicial process and empowering society as a whole to scrutinise judicial proceedings in the most effective manner. This is also in accordance with article 6(1) of the European Convention on Human Rights which states that "*judgments shall be pronounced publicly*". Similarly, article 23 of the Code of Organisation and Civil Procedure (Cap. 12 of the Laws of Malta) provides that "[t]*he judgment shall in all cases be delivered in public*". Thus, there is an incontrovertible obligation imposed on Malta to make publicly available the judgments delivered by its Courts.

10. In the present case, the Commissioner noted that all judgments of the Civil and Criminal Courts are published online on the website eCourts.gov.mt except for the judgments of the Family Court or where there is a prohibition on the publication in terms of the law or by a Court order. The controller emphasises that the right to a fair hearing requires that the judgments of the Court are delivered in public, and for this reason, the judgments of the Courts are being made accessible to the public pursuant to law[4].

Article 17(1)(a) to (f) of the Regulation

11. The Regulation establishes an exhaustive list of grounds which enable the erasure of personal data pertaining to the data subject:

> "*(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;*
>
> *(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;*
>
> *(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);*

[4] https://ecourts.gov.mt/onlineservices/RightToBeForgotten, last accessed on the 11th December 2024.

(d) the personal data have been unlawfully processed;

(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1)."

12. Recital 65, which corresponds to article 17(1) of the Regulation, provides the following:

> "*In particular, a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation. That right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet*".

13. Upon a closer examination of the grounds set forth in article 17(1)(a) to (f), read in light of recital 65 of the Regulation, the right to erasure applies in most situations where the controller should cease the processing activity on its own accord because the legal basis for that processing no longer exists. The obligation to erase personal data is not exclusively dependent on a request from a data subject and typically arises in situations where the controller is processing the personal data in violation of the principles of processing as set forth in article 5(1) of the Regulation. particularly, the principle of lawfulness, purpose-limitation, and storage limitation. This means that if the controller is lawfully processing personal data and has a legitimate need to retain that data, the right to erasure does not apply.

14. In the present case, the Commissioner examined the request dated the 2nd April 2024, wherein the complainant sought the exercise of the right of erasure of his personal data in respect of the content of a court judgment published online on the website of the controller. The complainant cited the following reasons for requesting the erasure of his personal data: (i) that the criminal proceedings in question date back to 2013, when the complainant was only seventeen (17) years old; (ii) that more than three (3) years have elapsed since the judgment was delivered; (iii) that no appeal was filed by any of the parties; (iv) that there is no public interest in

maintaining the online publication of the judgment, particularly as the Advocate General chose not to appeal the case; (v) that the judgment has already been fully executed; and (vi) that the Court applied article 8(8) of Cap. 537, indicating that it is unnecessary to keep the judgment publicly accessible on the website of the controller.

15. The Commissioner examined regulation 3 of the Online Publication of Court Judgments (Data Protection) Conferment of Functions Regulations, Subsidiary Legislation 12.32, which reads as follows:

> "*The Director General (Courts) shall, subject to the provisions of the Data Protection Act, have the function and power to determine whether a person* ***has valid grounds to exercise the right of erasure of personal data in respect of the content of a court judgment published online on the website of the Court Services Agency***" [emphasis has been added].

16. The words "*whether a person has valid grounds to exercise the right of erasure*" are interpreted by the Commissioner as referring to the legal grounds set forth in article 17(1)(a) to (f) of the Regulation. This therefore means that the erasure of personal data in respect of the content of a court judgment published online must be examined in light of the grounds set forth in article 17(1) of the Regulation.

17. By way of automatic exclusion, certain grounds mentioned in article 17(1) do not apply as the processing in the present case is not based on consent or legitimate interest. The processing activity is being conducted by a public authority, which means that article 6(1)(f) of the Regulation could not apply if the processing is being carried out in the performance of its tasks. Additionally, article 17(1)(f) of the Regulation must be excluded because the personal data of the complainant have not been collected in relation to the offer of information society services. This led the Commissioner to exclude *a priori* the applicability of the grounds specified in article 17(1)(b), 17(1)(c) and 17(1)(f) of the Regulation.

18. In his assessment, the Commissioner considered the Manni judgment, which provides that the keeping of a database by a public authority, which may be accessed by the general public could be deemed to be lawful on the basis of the following grounds:

> "*In that regard, as the Advocate General pointed out in point 52 of his Opinion, it should be noted that the processing of personal data by the authority responsible for keeping the register pursuant to Article 2(1)(d) and (j) and Article 3 of Directive 68/151 satisfies several grounds for legitimation provided*

for in Article 7 of Directive 95/46, namely those set out in subparagraph (c) thereof, relating to compliance with a legal obligation, subparagraph (e), relating to the exercise of official authority or the performance of a task carried out in the public interest ..."[5].

19. In the present case, the controller is a public authority, and the publication of the judgments is deemed to be a processing operation legitimised on the grounds of article 6(1)(c) and article 6(1)(e) of the Regulation. However, the element of unlawfulness under article 17(1)(d) of the Regulation encompasses not only where a legal basis for the processing is absent in terms of article 6(1) and article 9(2), but also scenarios where the processing does not adhere to other provisions of the Regulation. This is also reflected in recital 65, which states that the data must be erased "*where the processing of his or her personal data does not otherwise comply with this Regulation*", and further confirms that the processing must be considered unlawful if it does not comply with any of the provisions of the Regulation.

20. In fact, the Court of Justice of the European Union (the "**CJEU**") in the Google Spain case held that erasure should apply in case of an infringement of the principles of processing as held in article 5 of the Regulation:

> "*Under Article 6 of Directive 95/46 and without prejudice to specific provisions that the Member States may lay down in respect of processing for historical, statistical or scientific purposes, the controller has the task of ensuring that personal data are processed 'fairly and lawfully', that they are 'collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes', that they are 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed', that they are 'accurate and, where necessary, kept up to date' and, finally, that they are 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed'. In this context, the controller must take every reasonable step to ensure that data which do not meet the requirements of that provision are erased or rectified*"[6].

21. This is also tied to the ground set forth in article 17(1)(a) of the Regulation, which provides that the data must be erased if "*no longer necessary in relation to the purposes for which they*

[5] Case C-398/15, delivered on the 9th March 2017, paragraph 42.
[6] Case C-131/12, delivered on the 13th May 2014, paragraph 72.

were collected or otherwise processed". This ground reflects the principles of purpose limitation and storage limitation. The CJEU explained that the erasure should be conducted where the following situations applies:

> "*It follows, as the Court has held previously, that even initially lawful processing of data may over time become incompatible with the GDPR where those data are no longer necessary in the light of the purposes for which they were collected or further processed and those data must be deleted once those purposes have been achieved*"[7].

22. The Commissioner noted that the aspect of necessity is linked to the purpose of the processing and must be weighed against other conflicting interests and rights, such as public interest and transparency of the judicial process. It can be observed that most of the judgments inevitably result in some degree of distress to individuals, especially for those individuals who are convicted of criminal offences. Nonetheless, this negative impact alone does not serve as a valid ground for the erasure of personal data.

23. The Commissioner assessed the reasons provided by the complainant regarding the necessity for the erasure of the online publication. The complainant argued that, given the Advocate General's decision not to appeal the judgment and the fact that the judgment has already been executed, there is no longer a compelling public interest in maintaining the online accessibility of the judgment. However, the Commissioner considered that the necessity of the online publication arises from the purposes of the processing. In this context, the considerations of public interest and the importance of transparency in the judicial process take precedence, as they are essential components of a democratic society.

24. While the removal of the original source of the publication does not fall under any of the legal grounds set forth in article 17(1)(a) to (f) of the Regulation, the Commissioner has taken into account the specific circumstances of this case which merit striking an appropriate balance between the interests of the complainant and the general interests of society. In this case, the Commissioner noted that the offence committed by the complainant occurred more than twelve years ago, when he was still a minor. Since that time, the complainant has successfully overcome his drug dependence and made significant positive changes in his life.

25. In his deliberations, the Commissioner acknowledged that the Court had ruled that the complainant's criminal conviction should not be considered when issuing the conduct

[7] Case C-446/21, Schrems vs Meta Platforms Ireland Ltd, paragraph 56.

certificate under the Conduct Certificates Ordinance (Cap.77 of the Laws of Malta). This order was issued in accordance with article 8(8) of the Drug Dependence (Treatment Not Imprisonment) Act (Cap. 537 of the Laws of Malta). The Court held as follows:

> *"Il-Qorti tordna wkoll illi dan ir-reat m'għandux jittieħed in konsiderazzjoni għall-finijiet tal-ħruġ ta' ċertifikat tal-kondotta skont l-Ordinanza dwar iċ-Ċertifikati tal-Kondotta u dan fid-dawl tad-dettami tas-subartikolu (8) għal-artikolu 8 tal-Kapitolu 537 tal-Liġijiet ta' Malta."*

26. The Commissioner further noted that allowing a search of the complainant's name and surname on search engines to yield the published judgment would run contrary to the intention of the Court and the objectives pursued by Cap. 537. The continued visibility of the criminal conviction of the complainant in search engine results serves as a barrier to enable him to advance his career and unfairly perpetuates the consequences of his past mistakes. It is crucial to allow individuals like the complainant to rebuild their lives and move forward without the permanent stigma attached to his criminal conviction. Given the transformation of the complainant and the positive strives he made which were also acknowledged by the Court, the Commissioner believes it is essential to strike the right balance by allowing the judgment to remain publicly accessible on the controller's website, while simultaneously implementing a technical measure to prevent search engines from indexing the page and displaying it in their search results.

The Reply of the Controller

27. As part of the investigation of the complaint, the Commissioner noted that the controller refused the request of the complainant on the basis that the three (3) year timeframe from the date of the judgment has not yet elapsed. However, the Commissioner respectfully submits that the decision of the controller to erase personal data after a specified timeframe, contingent upon certain conditions and at the request of the data subject, is derived from guidelines that have no legal effect. In the absence of a legislation that outlines a specific timeframe for data erasure, the decision of the controller to erase data after the lapse of three (3) years on the request of the data subject, is not compliant with any of the grounds set forth in article 17(1)(a) to (f) of the Regulation. The right to erasure of personal data should strictly apply where there is an applicable ground that permits the erasure of the data, specifically where the processing of the personal data does not comply with the Regulation.

28. The Commissioner proceeded to examine the second part of the complaint where the complainant alleged that the controller did not inform the complainant of his right to lodge a complaint with the supervisory authority in its reply dated the 22nd April 2024. Accordingly, the Commissioner assessed the reply of the controller and could indeed confirm that the reply lacked the information in relation to the right to lodge a complaint with a supervisory authority and to seek the appropriate judicial remedy. The Commissioner noted that article 12(4) of the Regulation obliges the controller to provide the following information when it decides not to take action on the request of the data subject:

> "*If the controller does not take action on the request of the data subject, the controller shall inform the data subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and* ***on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy***" [emphasis has been added].

On the basis of the foregoing considerations, the Commissioner is hereby deciding that there is no valid legal ground in terms of article 17(1)(a) to (f) of the Regulation that enables the erasure of the personal data pertaining to the complainant in respect of the content of the judgmen[redacted] published online on the website of the controller. However, the Commissioner is of the view that the appropriate balance should be reached between the conflicting interests, and therefore, the Commissioner is ordering the controller to introduce a *'no-index'* metatag to the content head HTML of the online page subject to the judgment [redacted], in a manner to block search engines from indexing such page and make it appear in search results.

The controller is requested to comply with this order within twenty (20) days from receipt of this legally binding decision and inform the Commissioner of the action taken immediately thereafter. Failure to comply with the Commissioner's order shall make the controller liable to the appropriate enforcement action, which may include an administrative fine.

In addition, the Commissioner is hereby deciding that the reply of the controller dated the 22nd April 2024 lacked the information about the possibility of lodging a complaint with the supervisory authority and seeking a judicial remedy, and therefore, the controller infringed article 12(4) of the Regulation.

By virtue of article 58(2)(b) of the Regulation, the Commissioner is hereby serving the controller with a reprimand for failing to comply with article 12(4) of the Regulation and the controller is

being warned that in the event of a repetitive infringement, the Commissioner shall take the appropriate corrective action.

Ian DEGUARA (Signature)

Digitally signed by Ian DEGUARA (Signature)
Date: 2024.12.16 13:04:13 +01'00'

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*"[8].

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.

[8] Further information may be accessed here: https://idpc.org.mt/appeals-tribunal/