Summary of Decision 20

IN THE MATTER OF:

Complainant { *A company in the real estate business Represented by its Manager }*

VERSUS

Respondent No. 1 {An ex-employee of Complainant *and wife of Respondent No 2}*

Respondent No. 2 {A real estate business run by husband of Respondent No. 1 *}*

A complaint was lodged on 31 January 2013 at the Data Protection Office under section 11 of the Data Protection Act against two Respondents as follows:-

(i) Respondent No. 1 , *is making illegal use of confidential information acquired without the prior authority of* Complainant *to favour the flourishing of* Respondent No. 2*'s business;*

(ii) Respondent No. 2*, is making illegal use of confidential information unlawfully acquired by* Respondent No. 1 *without the prior authority of* Complainant *to favour the flourishing of* his own *business."*

My office opened an inquiry and the complainant's claims were examined carefully. Respondents were requested to give their statements regarding the complaint. The latter requested for postponement of their declaration through their legal representative because of an interim order /injunction at the supreme court. On 6th October 2014 itself, the Respondents deposited a copy of the Supreme Court case which was won by Complainant and was thrashed out on 30 May 2014.Afterwards,the respondents have still refused to give their statements by invoking other points through their new attorney. This office, in

the meantime , have sought other evidences to confirm the allegations of complainant.

After thorough investigation carried out, the Data Protection Commissioner has decided as follows:-

I quote from **Opinion 8/2001 on the processing of personal data in the employment context at pages 4 and 14 of the European Union Article 29 Working Party:-**

"At page 4 (…)
data protection law does not operate in isolation from labour law and practice, and labour law and practice does not operate in isolation from data protection law.
At page 14
(…)
the developing use of information and communications technology in employment increases the extent of this interaction because employment practices rely more and more on the processing of personal data to which general data protection principles apply; not all problems that arise in the employment context and involve the processing of personal data are exclusively data protection ones; the interaction is necessary and valuable (...)"

The issue before the Data Protection Commissioner is to decide whether the list of client properties and corresponding pictures advertised on the website of Respondent No.2, operating under the name of respondent no.2, constitute personal data and in the affirmative whether as a result of their processing by respondents as data controllers, the commission of an offence has taken place with regard to unlawful disclosure under sections 24 and 29 of the DPA.

The issue before the Data Protection Commissioner is not to decide whether respondent no. 1 has acted in breach of her contract of employment dated 22 November 2010 which includes a "clause de non-concurrence" interdicting her from entertaining any professional activity related to property business with complainant's clients for a period of 2 years and within a particular geographical perimeter, after the unilateral termination of the contract by respondent no. 1, which has also been decided by the supreme court.

There is no dispute that pictures of properties belonging to clients including their contacts are personal data within the definition provided in section 2 of the Data Protection Act as these pictures directly relate to the assets of the identified owners, also clients of complainant. Given the local small context, it is relatively easy for the public also to identify the owners of the properties in lite although their contacts are not displayed on the websites. It is also clear that any person processing personal data falls within the definition of a 'data controller'. The question is - Is the processing lawful or unlawful? Disclosure of the personal information of clients of complainant without their consent is tantamount to a breach of the Data Protection Act as the disclosure is illegal unless exceptions under section 24 are applicable, which are not the case here, as respondents have not established so. The act of publication of the property pictures on the website of respondents or any other site amounts to unlawful disclosure of personal information to the public at large which is incompatible with the purposes for which the data were collected. I quote from Opinion 8/2001 on the processing of personal data in the employment context at page 18 of the European Union Article 29 Working Party:-

"(…) an employee, who uses personal data within the remit of the tasks the employer entrusted to him or her, is a recipient of data, as he or she uses the data in the name and under the instructions of the data controller, i.e the employer. If, however, the same employee decides to use the data, which he or

she is able to access as an employee, for his or her own purposes and sells them to another company, then the employee has acted outside his duties. He or she is no longer following the orders of the employer. The employee would need a legal basis for acquiring and selling the data. In this example, the employee certainly does not possess such a legal basis, so these actions are illegal."

Thus, it is clear from the above reasoning that respondent no. 1 has acted outside her duties and has no legal basis to process the personal data of the clients of complainant.

As regards the delay taken in finalising this case since 2013, this is partly explained by (1) the delay in gathering responses from respective parties, in this case respondents, which often prolonged the enquiry unnecessarily (2) because the office is then called upon to perform extra miles to find the evidence required, in the absence of any response from the concerned parties, which in the technical context are even more difficult to find than in a classical situation of theft for example and (3) in this particular case, a first point of law was also raised by the legal representative of respondents on 6 May 2013 as regards whether the Commissioner has jurisdiction to decide a case bearing the same facts of a supreme court civil case which was discussed by both counsels, concluded by respondents' new counsel on 23 January 2015 and I then decided that the connected supreme court injunction case is irrelevant for the purpose of deciding whether an offence has been committed under the DPA unless the issue adjudicated upon before the supreme court is the same data protection issue before the Data Protection Commissioner. A second point of law was raised by respondents' counsel on 13 October 2014 with regard to the status of respondent no. 2 as being a non-legal entity or an unincorporated body to which counsel for complainant replied on 23 January 2015 and a third and fourth points of law were raised by counsel for

respondents on 16 February 2015 on the investigation being time barred and on abuse of process to which counsel for complainant replied on 25 March 2015. The point raised by both parties that there has been delay in finalising this enquiry by the office is not justified the more so that other complex cases before this office has taken more or less the same time span. We should also not forget that this office conducts firstly enquiry and secondly gives a judgment which are a separate two-tier process and thus operates differently from a court of law or tribunal. The office is further not precluded nor restricted by the DPA from any time limits to conclude its investigations but always endeavours to complete its enquiries within a reasonable period of time. Nor does the fact of respondent no. 2 being an unincorporated body, preclude the office from conducting any investigation from it since the DPA does not provide to the contrary. The DPA caters for offences that may have been committed by natural or legal persons to the detriment of a living individual, in this case the clients. Therefore, the fact that the authorised data controller, namely complainant has lodged a case against an ex-employee and an unincorporated body, who are the parties to this case, is irrelevant for the purpose of determining whether personal information has been violated under section 24 of the DPA. Thus, what is required to be established is whether respondents are indeed authorised data controllers and what are the personal data involved and whether a breach of the DPA can be found. Some other collateral points of law were also raised by respondent's counsel and replied to by complainant's counsel and were found not to be applicable to the given context.

The case before the Data Protection Commissioner is to detect evidence to prove beyond reasonable doubt that respondent no. 1 has stolen personal information pertaining to the business of complainant during the performance of her office duties in order to benefit the business activities of

her husband and herself, an allegation she has rebutted. We were thus required to locate and confirm from 40 clients whether they have given any authorisation to the parties to this case to process their personal data. The evidence found has revealed that respondents had not obtained the consent of the data subjects, that is, the clients to process their personal information under section 24 of the DPA nor does the processing fall under any exception found under that section. Some data subjects have also questioned the right of complainant to use their personal property details by posting them on his website. It is indeed one of the most important principles in data protection that valid consent, as described under section 2 of the DPA, is required prior to any processing taking place which is the general rule. The complainant or respondents are not the owner of these personal information but the clients. Complainant, after having obtained proper consent from the clients for processing their personal data, then become the custodian of the information in their possession. As a custodian and data controller, complainant has many responsibilities as catered for under part IV of the DPA titled "obligations of data controllers" including the processing to be done in accordance with the rights of data subjects and appropriate security and organisational measures to be taken against unauthorised or unlawful processing of personal data. Should the required measures have been adopted, an employee would have been in a more difficult position to usurp such information. The employment agreement is a good example of an organisational measure but not sufficient as a security measure.

Examples of security measures at the workplace are:

- ***Password/identification systems for access to computerised employment records***
- ***Login and tracing of access and disclosures***
- ***Back up copies to be securely kept***

- ***Encryption of messages, in particular when the data is transferred outside the organisation***

The Data Protection Commissioner recommends that complainant adopts more protective security measures to reduce the probability that such incidents happen again.

Respondents have not cooperated with the enquiry by failing to fill in the audit questionnaire sent by this office since the site visit effected by our officers on 2 September 2013 and never provided their further statements on the alleged facts in breach of their correspondences dated 5 March 2013, 6 May 2013, 16 August 2013, 25 October 2013, 29 January 2014 and 28 August 2014, sent to this office, namely that they will provide their statements once the supreme court case has been thrashed out on 30 May 2014. Instead, their counsel raised further points in law which had to be thrashed out by this office before proceeding with the enquiry by way of letter dated 13 February 2015.

In view of the above points raised, the Data Protection Commissioner is of the view that the case has been proven beyond reasonable doubt by complainant that respondent no. 1 has acted in breach of sections 26(b) & 29(1) of the DPA for unlawfully disclosing personal data in her possession and both respondents have acted in breach of section 24(1) of the DPA for not seeking the valid consent of the clients before posting their information.

As regards complainant, since there is evidence on record to show that data subjects have signed a written agreement whereby authorisation has been given to respondent no. 2 to find potential tenants for their property, thereby obtaining their consent to market the properties in lite, the Data Protection Commissioner finds that the posting of the property images by respondent no. 2 were effected within the legal perimeters of the agreement.

The Data Protection Commissioner is thus referring the matter to the police for prosecution against respondents who had no legal right to usurp the role of a data controller under section 20 of the DPA for breaching sections 24(1), 26(b) & 29 (1) of the DPA.

Mrs Drudeisha Madhub

Data Protection Commissioner

Data Protection Office

28.04.15