

This is a summary of the decision of the Commissioner

The Data Protection Office received a complaint under section 6 of the Data Protection Act 2017 from three Complainants against Respondent alleging that:

“Respondent has on a particular date acted in breach of sections 23 and 24 of the Data Protection Act 2017 by publishing and sending onto a public mailing list, an investigation report, which has been produced by gathering information from staff members of Respondent.

Staff members of Respondent have previously been participating in an investigation being carried out by a law chambers during a particular month and year. However, staff members never authorised for the use of that information to be published to the public.

A letter of objection from staff members was sent to the Chairman of Respondent via the CEO OF Respondent.

In spite of their objections, Respondent has violated their rights by publishing the report without their consent. Furthermore, Respondent has violated the Data Protection Act in so much as the purpose for which information was collected has changed.”

Together with their declarations, Complainants have provided the following documents:

1. a copy of the letter of objection sent to the Chairman of Respondent,
2. an email sent by the chairman to the community email address regarding the Respondent Investigation Committee Report and
3. a copy of the redacted report on the investigation into allegations of bullying, harassment and violation of the Respondent non- disclosure agreement.

Following the statements provided by Complainants, the Data Protection Office (DPO) wrote to Respondent for clarifications on the above allegation made.

The Office received a reply from Respondent as follows:

1. Respondent received a complaint from a staff member, containing allegations of ‘bullying, harassment and violation of Respondent’s non-disclosure agreement.’ The complaint was made public by an unknown party, on the same day.
2. Respondent Board of Directors requested the Respondent Governance Committee to commission an independent investigation. The Governance

Committee subsequently appointed a law Chambers to form part of the independent investigation committee.

3. The gathering of information was effected by the independent investigation committee. Staff members who volunteered or agreed to depone before the investigative committee did so on their own volition and Respondent never interfered with that process.
4. Respondent Board of Directors received a first version of the investigation report on a particular date. The Board considered that the report was not suitable for publication, and commissioned a second version with additional redactions.
5. The Board considered publishing the second version of the report and instructed the chief executive officer to inform relevant staff.
6. Respondent acknowledges that a letter of objection bearing the signatures (but not the names) of a few members of staff was sent to the Chairman through the chief executive officer on a particular date. Additional objections were sent by certain staff members via email. Also, the chief executive officer sought and received verbal advice from the DPO that the second version of the report should not be published.
7. The Chairman of the Board sent a letter to staff, stating, inter alia, that "Based on your concern, the Board delayed the publication of the report for further consideration in a manner that avoids compromise on the report outcome while ensuring that your privacy is protected to the extent applicable."
8. In response to the concerns from staff and advice from the DPO, the Board decided not to publish the second version of the report.
9. The Board commissioned a third version of the report, and gave specific instructions that this version should be "suitable for publication", and conformant with "data protection, confidentiality, privacy and other applicable laws".
10. Acting in good faith that the third version of the report has been prepared in accordance with instructions, and was therefore suitable for publication, the Board published the third version.
11. Respondent further submitted that since the report that was published (the third version) is not the same as the one to which staff had objected (which was the second version), it is not accurate to say that the report was published 'in spite of their objections'.
12. Respondent acts on behalf of the ... community and it has a fundamental duty to keep the community informed. It does so via mailing lists- e.g. members 'mailing list, community mailing list. This is the reason why the third version of the report was published on Respondent's website and reported on these mailing lists."

The office contacted Complainants on whether they wish to go through an amicable resolution with Respondent. They informed this office that they would not go through an amicable resolution.

The DPO wrote to Complainants to request them to provide further statements on the following:

1. Which clause of the redacted report on the investigation into allegations of bullying, harassment and violation of the Respondent Non-Disclosure Agreement has disclosed their personal data? Please clarify.
2. How any of the disclosed information has been detrimental to them?

Complainant No.1 came to this office and submitted the following documents:

1. the complaint which has been leaked onto the community mailing list (a public mailing list).
2. Email of objections dated sent to the CEO by all the Complainants.

The Complainant stated that all names, positions, departments are mentioned in the complaint that has been leaked out. He further stated that the published report can be easily referred to this document and thus persons can be easily identified.

The DPO received the replies of Complainants where they mentioned that the disclosed information provided opinions and judgments in various situations they were involved in, in line with their duties and responsibilities as the position occupied by them at Respondent. They also stated that although the report did not mention them by name, it was clear to any reader to figure out who the report was referring to.

By way of a letter, this office informed Respondent on the further declarations made by Complainants and was requested to provide clarifications on the statements and on the queries provided in the letter.

Respondent informed this office amongst other points that:

It is submitted that Respondent is covered by Section 28(1)(b)(ii) of the Data Protection Act 2017 (read together with Art 6 of GDPR), in as much as it was discharging its legal obligation, as an employer, under the Employment Rights Act 2008.

The Office wrote to Respondent to request the latter to elaborate under which specific clause of the Employment Rights Act 2008 Respondent falls under and to elaborate on its application in this context.

Respondent in its reply mentioned that the preparation and the eventual publication of the "third report" are consequently covered by Section 28(1)(b) (ii) of the Data Protection Act 2017. Furthermore, Respondent provided a copy of its disciplinary code where it is mentioned that sexual harassment once established is amenable to dismissal. Respondent further stated as dismissal could be one of the sanctions which could potentially be envisaged (as per Respondent Disciplinary Code) then it was mandatory for the company to follow the prescription of Section 38(2) of the Employment Rights Act 2008 (ERiA).

In addition, Respondent submitted that it was for the legitimate interests of Respondent as an employer that the publication of the third report was warranted within the ambit of subsection 28(1) (b) (vii) for the purposes of the Investigation Committee.

Subsequently, Complainants were informed on the reply of Respondent and were also informed that that based on the enquiry conducted, it is observed that:

1. The third report published did not mention the names of individuals (employees).
2. As submitted by Respondent, the lawful grounds for conducting the independent investigation and publishing the report was not based on consent but on the following:
 - a. Section 28 (1) (b) (ii) of the Data Protection Act 2017 - for compliance with any legal obligation to which the controller is subject i.e. Section 38 (2) of the Employment Rights Act 2008 (ERiA).
 - b. It was for the legitimate interests of Respondent as an employer that the publication of the third report was warranted within the ambit of subsection 28(1)(b)(vii) of the Data Protection Act 2017 for the purposes of the Investigation Committee.
3. No concrete evidence has been submitted to substantiate how the published report has been detrimental to you under the Data Protection Act 2017.

Complainant No.1 came to this office to submit a letter with his views and to request this office to review its observations with regards to the submissions made by the Respondent. He also informed this office that he maintained his complaint against Respondent.

This DPO has gone through the clauses where the position of Complainant No.1 was referred to in the redacted report on investigation into allegations of bullying, harassment and violation of the Respondent non-disclosure agreement and is of the view that the clauses do not constitute a detrimental effect to a person and was mentioned as part of a procedure. It is also observed that the clause which stipulates that there is a lack of leadership skills within Respondent, is a general clause and is not referring to HR Management at Respondent.

Furthermore, the DPO has also observed that no adverse action was taken against Complainants by Respondent after the publication of the said report. Thus, there is no concrete evidence to substantiate how the published report has been detrimental to them under the Data Protection Act 2017.

By way of an email Complainant No.1 stated that he will withdraw his complaint against Respondent under the below conditions:

1. *That Respondent recognises (without prejudice) that the action of publishing the said report to the community whereas staff members have formally objected to its publication was ethically wrong;*
2. *That Respondent engages to be more prudent in future instances requiring publishing of information to the community where staff members have been involved.*

Consequently, the DPO issued a letter to Respondent to provide their views on the content of the email sent by Complainant No.1.

No further issues were submitted by Complainants No.2 and No.3.

The office received a reply from Respondent stating that:

- “1. *They stand legally advised that the Complainant should contact the company and confirm his/her intention to withdraw the complaint.*
2. *The terms and conditions thereof will have to be agreed and a joint document signed to give effect to the intention of the parties*
3. *Once done, the document witnessing the agreement between the parties will be submitted to the Data Protection Office.”*

Subsequently, the DPO issued a letter to Complainant No.1 to inform him on the reply provided by Respondent and he was also requested to inform this office on whether or not he will contact Respondent accordingly.

Complainant No.1 informed this office that he is withdrawing his complaint against Respondent with immediate effect. He further stated that he did not wish to pursue this issue anymore and that he is convinced that Respondent would be more prudent in the future in dealing with employee matters.

The Data Protection Commissioner has decided as follows:-

After a careful scrutiny of the evidence tendered before me, I am of the view that the published investigation report does not amount to an unlawful disclosure of personal data under section 42 of the Data Protection Act 2017 (DPA) being given the fact that the inferences made in the report which could allegedly be associated with Complainants stemmed out from the investigation carried out. The balance clearly weighs in favour of Respondent given that no adverse action has been taken by Respondent against Complainants after the publication which, if was the case, would have potentially caused any hardship or prejudice to the Complainants.

The anonymisation of personal data as reflected in the report sufficiently protected the data subjects involved and thus any possible indirect identification did not aim to cause any prejudice to the persons involved. This office is thus of the view that for an offence to be found under the DPA, cogent and strong evidence of harm and prejudice should be adduced to rebut the legal obligation of conducting an investigation by the Employer and his legitimate interests regarding the publication of the said report at stake. Complainant's withdrawal of the complaint is thus warranted in those circumstances. No breach of the DPA is thus found committed.