

Mr Maximillian Schrems,  
NOYB – European Center for Digital Rights  
Goldschlagstr. 172/4/2  
1140 Wien  
AUSTRIA

By email only to: [REDACTED]

6 May 2020

**Re: Investigation 18-5-5 (Facebook Ireland Limited)**

Dear Sir,

I acknowledge receipt of your email of 4 May 2020.

While the time period for the issuing of a reply was unreasonably short, we have no intention of allowing this latest exchange between us to distract the office from the task at hand. (In that regard, you are of course aware that the decision-making phase of the process is now underway). Hence, we have prepared this short-form response to close out matters between us.

This is a process in which an individual has submitted a complaint against a controller, Facebook Ireland Limited, alleging that Facebook has infringed particular provisions of the GDPR.

In handling the complaint, the DPC has elected to undertake a form of inquiry consistent with Part 6 of the Data Protection Act, 2018.

The output of the process will be an outcome to the complainant's complaint, comprising a decision containing findings. Additionally, and subject to those findings, one or more sanctions may be imposed if and to the extent that the Commissioner determines that the controller has infringed identified provisions of the GDPR.

The fact of the investigation is a matter of public record, confirmation of same having been published by the DPC (inter alia) in its Annual Report for 2018.

Exercising a specific statutory power expressly conferred on it by Section 149 of the 2018 Act, the Commissioner's decision (and a record of such corrective powers as may have been exercised, if any) will also be published by the DPC in due course.

The process to which the complainant and FB are presently party is to be distinguished from the DPC's "own volition" inquiry process where the DPC proceeds, not on the basis of a specific complaint (or with a view to securing an outcome directed to an identified complainant), but on the basis of concerns on the part of the DPC that, in its processing of personal data, a controller may be infringing one or more provisions of the GDPR.

By its nature, therefore, the complaints handling process is more obviously targeted at the rights, obligations and interests of a defined - and closed - set of participants, albeit that the outcome of the process may well impact on other data subjects also.

It is of course appropriate that, for the particular purposes of the present inquiry procedure, the complainant would be provided with access to material submitted by the controller in response to the complaint (being material to which, in the ordinary course, the complaint may not be in a position to secure access). While such access may, in certain circumstances, be the subject of some restriction (if, for example, the controller satisfies the DPC, by reference to objective criteria, that information contained within a particular submission is confidential), the general position is that material submitted by the controller to the DPC will be made available to the complainant for the specific purpose of ensuring that, in order to vindicate his or her right to fair procedures, the complainant would have sight of the controller's answers to the issues raised in the complaint and be in a position to respond to address those answers on their merits.

In the present case, all of the material submitted by Facebook in the course of the investigation to date has been disclosed to the complainant, with the exception of some limited redactions to which no objection was made.

As has been flagged on a number of occasions to date, such material was made available to the complainant and her representatives on the basis of an expectation that it would not be disclosed to any third party for any purpose extending beyond the present inquiry. The importance of this constraint lies in the fact that the open disclosure of material between the parties has contributed, in a substantial and very concrete way, to the fairness of the process to all parties. As a corollary, it is both necessary and appropriate that the parties would likewise respect the confidentiality of the process, with material being put into the public domain solely upon publication of the decision by the DPC upon the conclusion of the process. If it was otherwise, then it is unquestionably the case that the integrity of the process would be undermined.

It is also important to recall that the expectation that the parties would respect the confidentiality of the process while it remains ongoing has previously been the subject of correspondence between us. (It has also been the subject of correspondence with the controller). Whilst we have previously had occasion to take issue with the publication of material by you, it is nonetheless the case that, generally speaking, both NOYB and the complainant have respected the process now underway.

So far as you have sought confirmation of the legal basis upon which the expectation referred to rests, the position is that it arises by necessary implication having regard to, inter alia, Section 26 of the 2018 Act, the nature of the complaints handling processes as contemplated by Article 57 of the GDPR and Part 6 of the GDPR, and the parties' exchanges on (and understanding of) the issue as set out in their exchanges to date.

While the position set out in your letter of 4 May is not entirely clear, you seem to consider it open to NOYB to disclose any and all material received in the course of the present exercise to third parties, without restriction, and to deploy same for purposes other than the specific purpose for which it was made available to you. If that is indeed your position, we would caution, in the

strongest terms, against making any such disclosure at this juncture, the result of which would be to compromise the integrity of the process. Amongst other things, a real and substantial risk would arise that the controller would have recourse to legal process to seek to vindicate their expectation as to the confidentiality of the investigative and decision-making processes while they remain in train, thereby disrupting those processes to a very significant extent, and to no identified end.

We also note, however, that your position on the question of disclosure is made as Point #7 of seven points, with each of the other 6 points expressing objections to the inquiry report. While fully respecting the complainant's right to disagree with the inquiry report (albeit that those objections are not accepted), it is not at all clear how or on what basis such objections are said to give rise to an entitlement to publish inquiry materials at this point to the world at large. This is particularly so when, as you are well aware, no decision has been made to date in relation to the complainant's complaint, the report of 8 April 2020 reflecting the product of the inquiry undertaken by the lead investigator, with the decision-making role being one now to be discharged by the Commissioner. (It is also important to reiterate that you will be afforded an opportunity for input into the process before the Commissioner submits a draft decision to the Article 60 process).

We also note your stated concern that the right of the complainant to freedom of expression would be interfered with if she (or her representatives) cannot now proceed directly to publication. With respect, that position is not tenable. (The language used to express this point, to include the deployment of particular pejorative terms, is also gratuitous and unhelpful). As noted above, the fact of the inquiry has long since been put into the public domain. For the avoidance of doubt, the DPC accepts that there is no reason why the fact of the delivery of the inquiry report could not be the subject of public comment at this point. Equally, to the extent that the complainant takes issue with the duration of the investigative and/or decision-making processes, or the fact that the lead investigator has expressed a view that some elements of the complaint do not appear to be well-founded, it is fully accepted that it is open to her (or her representatives) to state this to be the case publicly. The key point in this regard is that neither the report, nor any of the material shared between the parties in the course of the process to date, is to be disclosed for a purpose other than the purpose for which such material was made available in the first place.

For completeness, you will be aware that, upon completion of the Commissioner's draft decision, same will be submitted to the Article 60 procedure. That is the context in which other DPAs will be afforded an opportunity to express views on the issues raised in the complaint. Materials should not be shared with other DPAs otherwise than in the context of the Article 60 procedure.

### Conclusion

We have no wish to become embroiled in unnecessary and fractious correspondence in relation to a process that remains live between us. Accordingly, bearing in mind the litigation recently threatened by your Irish solicitors, and the fact that no response has been received to our letter to Messrs Ahern Rudden Quigley of 11 March 2020, I would respectfully invite you to direct your attention to the decision-making process as it relates to the complainant's complaint, and in which I understand you will be afforded an opportunity to make further submissions in early course.

Yours sincerely,



Deputy Commissioner,  
Data Protection Commission