Comment by noyb: The quotes in this letter are largely taken out of context. See our response published on noyb.eu.

An Coimisiún um Chosaint Sonraí
Data Protection Commission

Maximillian Schrems,
NOYB – European Centre for Digital Rights

By email only to:
[redacted]

14 October 2021

Our Reference: Inquiry C-18-5-5 (Facebook)

Dear Sir,

I refer to the above-referenced inquiry.

On Wednesday last, 6 October, the draft decision prepared by this office in respect of your client's complaint was submitted to the co-operation and consistency mechanism established under Chapter VII of the GDPR, along with copies of the submissions previously made to this office by your organisation and by Facebook.

You will of course be aware that, under relevant provisions of the GDPR, the DPC and CSAs (Concerned Supervisory Authorities) act as co-decision-makers, subject to a dispute resolution process by which any conflicting views between them may be referred for a binding decision of the EDPB.

The draft decision, which is manifestly confidential within the co-decision-making process in which it was prepared, was also made available to you and to Facebook under cover of letter dated 7 October 2021. This reflected your respective positions as complainant and respondent.

Having elected to submit its complaint to a co-decision-making process, and knowing the document to be confidential in the context just outlined, it is extraordinary that your organisation would take it upon itself to publish the draft decision on its website at a point when the co-decision-making process in question remains ongoing and when (for example) the CSAs will not yet have had an opportunity to formulate their views on the draft and/or communicate those views to the DPC.

This is particularly so in circumstances where:

1. In acknowledgement of the confidentiality attaching to inquiry materials within the inquiry process, you previously offered[1] to "sign any non-disclosure agreement ("NDA") or other agreement that would limit access to these documents to named individuals." Express reference was also made to the fact that this step would ensure "that any information is not made public or used out of this legal procedure …"

2. Consistent the position of this office in relation to the confidentiality attaching to inquiry materials, we wrote to you in the following terms when later releasing a copy of the draft inquiry report to you:

> *"The contents of the draft report, along with the appendices, should be treated with the strictly confidentiality at this point … to ensure the integrity of the inquiry process, particularly given that the contents of the materials relate to the subject of an open inquiry which remains under consideration by this Office."*[2]

3. Notwithstanding your previous acknowledgment of the confidentiality of inquiry materials, information obtained by you in the course of the inquiry was subsequently disclosed by you (by means of a number of tweets) in August 2019. (Notably, however, it was conceded within the body of one of the postings in question that the document to which reference was made was in fact confidential).

4. The events referenced in the immediately preceding paragraph prompted a response[3] from this office, in which, amongst other things:

   - the confidentiality attaching to inquiry materials was reiterated;
   - objection was made to the information published by you (on Twitter), for purposes unrelated to the NOYB's involvement in the ongoing inquiry;
   - you were asked to address the breach of confidence associated with such disclosures as a matter of urgency; and,
   - you were also asked to take immediate steps to ensure the confidentiality of inquiry materials shared with you and to take steps to prevent any further or other breaches of confidentiality by persons associated with NOYB.

[1] Your letter dated 27 February 2019

[2] Our letter to you of 28 June 2019

[3] See our letters to you of 16 August 2019 and 3 September 2019

5. When a further set of inquiry materials was made available to you on 20 September 2019, and in response to the earlier exchanges between us as referenced above, this office again reiterated that the materials in question were confidential and were being provided to NOYB "for the sole and limited purpose of allowing it to make submissions on the within inquiry." Our letter went on to say the following:

> *"In the interests of maintaining the integrity of this ongoing inquiry, documents provided to NOYB should be treated as confidential. Information contained in such documents, or about such documents, should not be publicly discussed by NOYB staff or representatives on social media, or otherwise published or disclosed."*

6. In a letter dated 4 October 2019, directed to Austrian DPA and copied to this office, NOYB next gave an undertaking to respect the confidentiality of inquiry materials, expressed in the following terms:

> *"We will therefore continue (on a voluntary basis) not to publish or communicate the material content of the file (**such as the "draft Decision**"), but external circumstances (such as the slow down of procedures, the previous meetings between DPC and Facebook, in which the system of circumvention of Article 6 (1) (a) of the GDPR have been met) are of course publicly available"* (emphasis added).

Whilst expressed to be given on a "voluntary" basis, the import and legal effect of the undertaking was clear: a binding commitment was given to the effect that neither you, nor your organisation, would publish or otherwise disclose inquiry materials to any third parties, to include, in particular, the draft decision.

7. For the record, this office has at all times relied, as it was entitled to rely, on the undertaking given. Additionally, it has adopted a position in correspondence with Facebook in which express reference was made to the undertaking given by you on your own behalf and on behalf of NOYB.

8. The issue of the confidentiality of inquiry materials arose again in further exchanges between us in May and June 2020. In particular, by email dated 4 May 2020, you sought to clarify the extent or scope of the confidentiality attaching to inquiry materials but without denying that the material in question was indeed confidential, and without seeking to resile from your earlier undertaking.

9. This office replied by letter dated 6 May 2020, in which it set out its position in some detail. The letter noted as follows:

> *"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."

10. For completeness, our letter of 6 May 2020 also addressed, directly, objections that had been voiced by you to the effect that the DPC was seeking to impose constraints on the exercise by you of your right to freedom of expression. In that regard, our letter noted that there was no question but that the fact of the delivery of the inquiry report could fairly and properly be the subject of public comment. Equally, we noted that, if and to the extent that you took issue with the duration of the investigative and/or decision-making processes, or the fact that the lead investigator had

expressed a view that some elements of the complaint did not appear to be well-founded, it was open to you to state that to be the case publicly. In that regard, our letter identified as a key point the fact that neither the inquiry report itself, nor any of the material shared between the parties in the course of the process up to that point, was to be disclosed for a purpose other than the purpose for which it had been made available to you in the first place.

11. On 25 May 2020, your organisation published an "open letter", directed to the CSAs, copying those authorities with certain of the inquiry materials exchanged between the parties up to that point. Amongst other things, the "open letter" acknowledged the undertaking previously given to this office to preserve the confidentiality of inquiry materials generally. (It appears that you took the view that the disclosure of material to the CSAs did not represent a breach of that undertaking having regard to the role of the CSAs in the context of the GDPR's co-decision-making processes).

12. In a separate email issued to this office on the same date, you again reiterated the "voluntary" undertaking previously given, setting out your position in the following terms:

> *"To not further delay these proceedings, we have voluntarily respected your request to keep documents by Facebook and the DPC confidential as outlined in your letter of 6 May 2020, despite the fact that there is no legal basis for such a demand."*

(For completeness, we should say at this point that your contention that the confidentiality required by this office has "no legal basis" is rejected, and has at all material times been rejected by this office. The legal basis relied on by this office had previously been notified to you, most obviously in our letter of 6 May 2020).

On the basis of the foregoing, it is clearly the case that:

I. Irrespective of whatever reservations you purport to hold in relation to the legal basis underpinning this office's position that inquiry materials must be treated as being confidential in order to preserve the integrity of the inquiry process as a whole, you and your organisation nonetheless voluntarily bound yourselves to respect the confidentiality of such materials.

II. Publication of the draft decision received by you on Thursday last, 7 October, represents a flagrant breach of that binding commitment.

The deliberate and calculated breach by you of your voluntary undertaking represents an unlawful and entirely improper interference in the GDPR-mandated processes by which the draft decision delivered by the DPC in respect of your complaint is being examined and considered by the CSAs.

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In the circumstances, we require you to remove the draft decision from your website forthwith, and to desist from any further or other publication or disclosure of same whilst the CSAs co-decision-making process remains ongoing. Please revert by return to confirm that all necessary steps have been taken to give effect to these requirements.

Pending receipt of such confirmation, this office reserves in full its position in relation to unauthorised disclosure of the draft report.

Yours sincerely,

[Sent electronically; bears no signature]

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[redacted]
[redacted]
Data Protection Commission