

To the President and Members of the Court of Justice of the European Union

Case C-434/16

PETER NOWAK

APPELLANT

AND

DATA PROTECTION COMMISSIONER

RESPONDENT

WRITTEN OBSERVATIONS OF IRELAND

Submitted by Eileen Creedon, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8 acting as agent accepting service via e-Curia with an address for service at Embassy of Ireland, 28 Route D’Arlon, Luxembourg assisted by Aoife Carroll BL of the Bar of Ireland.

Ireland has the honour to submit written observations in these proceedings, the subject of a reference for a preliminary ruling from the Supreme Court of Ireland on 2nd August 2016.

Dated this 11th day of November 2016

1. INTRODUCTION

1.1. Ireland submits these written observations pursuant to Article 23 of the protocol of the Statute of the Court of Justice of the European Union.

1.2. The Supreme Court of Ireland (hereinafter ‘the referring Court’) has referred two questions to the Court of Justice of the European Union for preliminary ruling under Article 267 of the Treaty of the Functioning of the European Union. The Questions referred are

- i. Is information recorded in/as answers given by a candidate during a professional examination capable of being personal data within the meaning of Directive 95/46/EC?
- ii. If the answer to Question 1 is that all or some of such information maybe personal data within the meaning of the Directive, what factors are relevant in determining whether in any given case such script is personal data, and what weight should be given to such factors?

1.1. The facts underlying the proceedings that have given rise to the reference before this Court are set out in the order for reference from the referring Court. It is not necessary to recite those underlying facts in any great detail save as to note that in May 2010 Mr Nowak submitted a data access request under Section 4 of the Data Protection Acts, 1998-2003 seeking all “personal data” held by the Institute of Chartered Accountants of Ireland. On foot of that request, on 1st June 2010 17 items of data were released to Mr Nowak. However, as can be seen from the Order for Reference, the Institute of Chartered Accountants of Ireland declined to release “his examination script” on the grounds that same did not constitute “personal data” within the meaning of the Data Protection Acts 1998 - 2003. Mr Nowak was a trainee accountant who had been unsuccessful in passing the Strategic Finance and Management Accounting Exam on four different occasions. It is noted in the Order for Reference that this was an open book exam. While not precisely clear from the Order for Reference it can be presumed that the examination script not released under the scope of the data access request was the Strategic Finance and Management Accounting Examination in which Mr Nowak had been unsuccessful.

1.2. The Government of Ireland is not a party to the proceedings before the domestic courts, which have arisen by way of a challenge taken by Mr. Nowak to a decision of the Office of the Data Protection Commissioner, an independent office charged with the investigation of breaches of an enforcement of rights conferred by the Data Protection Act, 1998 – 2003, the domestic implementing legislation for Council Directive 95/46/EC.

2. LEGISLATIVE FRAMEWORK – THE RIGHT OF ACCESS TO DATA

2.1. By its questions the referring Court seeks to identify whether professional examinations come within the scope of the definition of personal data contained in the data protection directive and if they do, how it may be determined whether an examination script is personal data. The questions referred consider a net question of whether a particular item can come within the definition of personal data found in the Data Protection Directive such that the full benefits of the regulatory framework contained therein would be conferred on a data subject in respect of that information. By reason of the manner in which the questions are framed, it is appropriate to consider them together. In order to answer these questions, it is first necessary to consider the framework of the Data Protection Directive in order to understand the nature of the right that is protected and the reasons why such a right is protected.

2.2. Directive 95/46/EC of the European Parliament and of the Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter referred to as the Data Protection Directive) governs access to and the rules pertaining to the processing of personal data within the Union. While it provides the specific legislative framework which governs the processing of personal data, it must also be examined in the context of Article 8 of the Charter for Fundamental Rights of European Union which guarantees a right to the protection of personal data¹. It provides as follows;-

1. Everyone has the right to the protection of personal data concerning him or her.

¹ This is recognised in Recital 10 to the Directive

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by Law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

2.1 It is first necessary to consider the aims and objects of the Data Protection Directive before turning to the question of what can be considered to fall within the definition of 'personal data'. As can be seen from Article 1, the object of the Data Protection Directive is to ensure that Member States shall protect the right to privacy with respect to the processing of personal data, which is seen as part of the framework of fundamental rights and freedoms of natural persons. Article 1 further identifies the aim of ensuring that there is no restriction or prohibition on the free flow of personal data between Member States. The overall aims of the Data Protection Directive can also be seen in the Recitals, which place an emphasis on the balance between ensuring the free flow of personal data between Member States while also safeguarding the fundamental rights and freedoms of individuals. In particular, this can be seen from Recitals 2 and 3 to the Directive.

2.2 With this in mind, we turn to the nature of the rights protected by the Directive, the general nature of which are seen in Recital 25. It is clear from the Recitals that the Directive is primarily aimed towards the regulation of the processing of personal data and in that context, Recital 25 describes the nature of the rights conferred on individuals with regards to the data which is to be processed. Included in those rights are the right "*to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances*". The scope of these rights is further expanded upon in Recital 41, where the right of access to data is linked with a data subject being in a position to verify the accuracy of the data and the lawfulness of the processing of that data. The specific nature of the right of access to data is established by Article 12 of the Directive, which provides:

Member States shall guarantee every data subject the right to obtain from the controller:

- (a) *Without constraint at reasonable intervals and without excessive delay or expense:*
- *Confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,*
 - *Communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,*
 - *Knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1)*
- (b) *As appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;*
- (c) *Notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.*

2.3 From an examination of Article 12, it can be seen that the right of access to data is clearly linked to certain purposes with emphasis being placed on a data subject having a right to rectify, erase or block data the processing of which is not compatible with the Directive by reason of being either incomplete or inaccurate. It would therefore appear that the right of access to data is framed in a manner so as to ensure that a data subject has some manner of recourse in circumstances where either improper processing occurs or where such data is inaccurate for some reason².

3 WHETHER AN EXAMINATION SCRIPT IS PERSONAL DATA

3.1 Within that overall framework, it is necessary to consider the manner in which ‘personal data’ is interpreted. Personal data is defined in Article 2 as follows:-

Personal data shall mean any information relating to an identified or identifiable natural person (“Data Subject”) an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an

² See Case C-553/07, *Rijkeboer*

identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

3.2 The definition contained in Article 2 must also be considered in light of Recital 26 to the Directive, which identifies that the principles of protection must apply to “*any information concerning an identified or identifiable person*”. Recital 26 also indicates the manner in which it is possible to consider whether a person is identifiable and provides that the principles of protection ought not apply to data that has been rendered anonymous in such a way that the data subject is no longer identifiable. The wording used in Article 2 and Recital 26 is slightly different. While the Recital refers to information ‘*concerning*’ an identified or identifiable person the actual definition contained in Article 2 is framed as applying to information ‘*relating to*’. However, it would not appear that there is any substantive difference between this phraseology. If the Court considers there to be a substantive difference, then the language of Article 2 (‘*relating to*’) must apply.

3.3 Therefore, from the wording of the definition contained in Article 2, in order for information to be considered as personal data it must ‘*relate to*’ an identified or identifiable natural person. This was the approach of this Court in Case C-101/01 *Bodil Lindqvist* where it was held at Paragraph 51 that the term personal data covers:

any information relating to an identified or an identifiable natural person. The term undoubtedly covers the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies.

3.4 Similarly, in Case C-28/08 *Commission v. Bavarian Lager* this Court held, in interpreting Regulation (EC) No 45/2001, that:

An identifiable person is one who can be identified, directly or indirectly in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. Personal data would therefore include, for example, surname and forenames, postal addresses, email addresses, bank account numbers, credit

card numbers, social security number, telephone number or driving licence number.

3.5 In Case C-70/10 *Scarlett Extended SA v Societe Belge des Auturs, Compositeurs et Editeurs SCRL* it was determined that IP Addresses amounted to personal data “because they allow those users to be precisely identified”. Following on from the decision in *Scarlett Extended* this Court has recently determined that the dynamic IP Address registered by an online media services provider may constitute personal data “where the latter has the legal means which enable it to identify the data subject and additional data which the internet service provider has about that person”.

3.6 The cases in which this Court has considered what falls within the definition of personal data show that the information considered to be personal data falls within that category of information that would be considered to be about someone, namely information such as their name, telephone number, address and email address along with information that can precisely identify them. In other words there must be a precise link between the information contended to be personal data and the individual person in order for it to fall within the definition found in the Directive.

3.7 In considering whether certain information is personal data it is also important to consider the overall framework of the Data Protection Directive and the reasons why a right of access to data is granted, which was the approach of this Court in the joined cases C-141/12 and C-372/12 *YS v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Intergratie en Asiel v MS*. In those cases this Court considered whether an administrative document drafted before certain decisions were taken in respect of applications for residents permits could constitute personal data. The Court was of the view that the legal minute, which underpinned the administrative decision, could contain personal data but that it did not constitute personal data itself. This was also the view of Advocate General Sharpston, who stated:

“59. Legal analysis is the reasoning underlying the resolution of a question of law. The resolution itself might be in the form of advice, an opinion or a decision (and thus may, or may not, be legally binding). Apart from the facts on which it is based (some of which might be personal data), that analysis contains the explanation for the resolution. The explanation itself is not information relating to an identified or identifiable person. At most, it can be categorised as information about the interpretation and application of the pertinent law with regard to which the legal position of an individual is assessed and (possibly) decided. Personal data and other elements of fact may very well be inputs in the process leading to answering that question; but that does not make the legal analysis itself personal data

60. Moreover, a person is entitled to access his personal data because he has an interest in the protection of his fundamental rights and freedoms, in particular his right to privacy, when Member States process information that concerns him. Denying access to the data processed or to information about that process would render ineffective other parts of Directive 95/46. It might not be possible to verify, for example, whether personal data are processed only if necessary to perform a task in the exercise of official authority vested in the controller, or to obtain the rectification or erasure of that data. By contrast, legal analysis as such does not fall within the sphere of an individual’s right to privacy. There is therefore no reason to assume that the individual is himself uniquely qualified to verify and rectify it and ask that it be erased or blocked. Rather, it is for an independent judicial authority to review the decision for which that legal analysis was prepared.

3.8 Following on and accepting the analysis of the Advocate General, the Court continued³:

As regards those rights of the data subject, referred to in Directive 95/46, it must be noted that the protection of the fundamental right to respect for private life means, inter alia, that the person may be certain that the personal

³ See paragraphs 44 - 46

data concerning him are correct and that they are processed in a lawful manner. As is apparent from Recital 41 in the preamble to that Directive, it is in order to carry out the necessary checks that the data subject has, under Article 12(a) of the Directive, a right of access to the data relating to him which are being processed. That right of access is necessary, inter alia, to enable the data subject to obtain, depending on the circumstances, the rectification, erasure or blocking of his data by the controller and consequently to exercise the right set out in Article 12(b) of that Directive.

In contrast to the data relating to the applicant for a residence permit which is in the minute and which may constitute the factual basis of a legal analysis contained therein, such analysis, as the Netherlands and French Government have noted, is not itself liable to be the subject of a check of its accuracy by that applicant and a rectification under Article 12(b) of Directive 95/46.

In those circumstances, extending the right of access of the applicant from a residence permit to that legal analysis would not in fact serve the Directive's purpose of guaranteeing the protection of the applicants right to privacy with regard to the processing of data relating to him, but would serve the purpose of guaranteeing him a right of access to administrative documents, which is not however covered by Directive 95/46.

3.9 It is therefore the view of the Court that the purpose of the Directive must be respected and that the rights guaranteed by the Directive may only apply to personal data, properly defined. Those rights may not be used in order to extend the purpose of the Directive by enabling access to other information and/or documents that cannot properly be considered to be personal data. In essence, the Data Protection Directive does not confer a general right of access to information but rather confines that right to information relating to an identifiable person that is being or might be processed in the manner identified by the Directive.

3.10 Turning therefore to the question of whether examination scripts can fall within the definition of personal data. It is the position of Ireland that examination scripts do not contain personal data within the meaning of the Data Protection

Directive and therefore do not fall within the framework of rights governed by the Directive. Examination scripts, generally, do not contain information that relates to an identifiable or identified person and therefore cannot be considered to be personal data. Answers given in an examination script are manifestly different in nature to the type of information that has already been found by this Court to be personal data. It cannot be said that examination answers have any similarity to information such as names, addresses, or credit card information or the other types of information that has been found by this Court to constitute personal data. The extension of the definition of personal data to include information in the nature of answers given in examinations would constitute a significant departure from previous case law and would amount to a significant extension of the definition of personal data.

3.11 The Court has made clear that there is a distinction between data that falls within the definition of personal data and that which falls outside the definition. Even where information contains some element of personal information it may still fall outside the definition of personal data. In that regard, it is difficult to see how information provided in the context of an examination, and in particular in the context of an open book, technical examination, could be considered to relate to an individual even if (though highly unlikely) some personal data appeared on the examination script. The purpose of an examination is to enable a candidate display his or her knowledge about a particular subject. The information contained in those answers, and in particular in the context of an accountancy examination, are likely to be objectively verifiable factual matters or analysis based upon a factual premise on specific topics. This could not be considered to be information that relates to an individual and therefore must fall outside the definition of personal data.

3.12 Considering the question from the perspective of the approach of the Court in *YS*, it can be said that a data subject seeking a right of access to examination scripts does not require that right of access for the purposes of rectification, erasure or blocking of his data by the controller and therefore does not need a right of access in order to vindicate the right to establish by Article 12 of the Directive. A data subject seeking a right of access to an examination script may wish to learn what caused them to be unsuccessful in the examination but they will not have any entitlement to seek to

correct, erase or block the answers which they provided in the context of the examination and therefore could not be considered to have a right of access to that data. Indeed, seeking to correct, erase or block information that was provided during the course of an examination would undermine the purpose of the examination and the integrity of any examination system. Enabling access to data such as examination scripts would fall outside of the purpose of the Data Protection Directive and would therefore constitute an improper extension of the rights contained therein.

3.13 As already stated, the Government of Ireland is not a party to proceedings before the domestic courts and is therefore not privy to the arguments advanced by the parties save that reference is made to a number of arguments in the Order for Referral. In so far as reference is made in the Order of Reference to a number of arguments made by Mr. Nowak, it is proposed to briefly consider same.

3.14 There can be no basis on which it can be argued that the information contained in an examination script constitutes biometric data. It would appear that an argument of this nature is premised on the fact that the answers provided by him are handwritten. It is respectfully submitted that this would not make that information biometric data. Biometric data is not defined in the Data Protection Directive but a definition can be found in Regulations (EU) 2016/679 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 (the General Data Protection Regulation) which shall apply from 25 May 2018. That definition is:

“biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behaviour characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data.”

3.15 While the General Data Protection Regulation does not yet apply, it is respectfully submitted that the Court can take cognisance of the definition of biometric data contained therein. Handwriting does not come within that definition and nothing in that definition would change the analysis already undertaken in respect

of the scope of the concept of personal data. Further, the examination process is not an examination of handwriting but rather of the information contained within the answers to assess whether the individual has demonstrated sufficient knowledge to be successful in the examination. It is also noted that not all examinations will be carried out through the medium of handwriting. If the fact that an examination was handwritten was the determining factor for rendering certain data to be personal data, it would result in an inconsistent application of the principles of protection of personal data with those persons who are not able to complete examinations using handwriting being excluded from the scope of the Directive.

3.16 Similarly, the fact that answers to examination questions may include an individual's 'thought processes and judgment' and may 'reflect his intellect' is not sufficient to render such answers personal data in circumstances where those answers do not contain any information relating to that individual. Ireland relies on paragraph 55 of the Opinion of Advocate General Sharpston in *YS*, where she expresses the view that the phrase 'any information relating to an identified or identifiable natural person' should not be read so that it covers "*all of the communicable content in which factual elements relating to a data subject are embedded*". In the same vein, that phrase should not be extended to include data produced by an individual where the individual has purported to engage in some subjective analysis or thought process. The mere fact that an individual has engaged with the data does not transform it to be information relating to that person.

3.17 Finally, the fact that an examiner may have noted comments on an examination script cannot render that script as personal data within the meaning of the Data Protection Directive. That scenario is analogous to the situation pertaining in *YS*, where this Court has already considered that a legal analysis carried out on the basis of facts that may constitute personal data was not, itself, personal data. By way of analogy, any commentary by an examiner could not be considered to be personal data such that it would require a right of access to be granted in respect of the examination script.

3.18 Ireland therefore concludes that the Court should answer the first question in the negative and confirm that information recorded in/as answers during a professional examination is not capable of being personal data within the meaning of Directive 95/46/EC.

4 FACTORS TO BE CONSIDERED IN DETERMINING WHETHER AN EXAMINATION SCRIPT IS PERSONAL DATA

4.1 Ireland takes the view that the Court should conclude that examination scripts are not personal data and therefore there is no requirement for the Court to consider and/or answer the second question.

4.2 However, if the Court considers it necessary to provide an answer to the second question it is the view of Ireland that this should focus on the nature of the examination and whether any personal data and/or information is sought in the course of the examination or the questions comprising the examination. It is only in circumstances where personal data is specifically sought in the course of the examination for the purpose of assessment that an examination script could be considered to be personal data.

5 CONCLUSION

5.1 Having regard to the foregoing, Ireland believes the questions posed by the Supreme Court of Ireland should be answered in the following manner:

- (i) Information recorded in/as answers given by a candidate during a professional examination is not capable of being personal data within the meaning of Directive 95/46/EC
- (ii) If all or some of such information may be personal data within the meaning of the Directive, the factors that are relevant in determining whether such script is personal data is the nature of the examination and whether any personal data is specifically sought in particular questions for the purposes of assessment.

Dated the 11th day of November 2016

Signed: Tony Joyce

Agent for Ireland

On behalf of Eileen Creedon, Chief State Solicitor

Signed: Lorraine Williams

Agent for Ireland

On behalf of Eileen Creedon, Chief State Solicitor