DECISION IN THE COMPLAINT MADE BY MS PAMELA HAMER TO THE GDPR SUPERVISORY JUDGE

Introduction

[1] On 24 February 2023, a communication was sent to the Lord President's Private Office by Ms Hamer complaining that there had been a breach of her personal data by Sheriff James MacDonald at Falkirk Sheriff Court. The breach was said to have arisen in light of the content of an email which had been sent, on his instruction, to Stirling University Students' Union on 7 February 2022. Ms Hamer contended that the sheriff had acted in an unlawful manner leading to a number of adverse consequences for her. She wished these matters to be acknowledged and to be apologised for. She also wished to be compensated for what she described as the significant loss and damage caused.

The background

[2] Ms Hamer was the complainer in a summary trial which took place at Falkirk Sheriff Court in January 2022. Both she and her partner gave evidence. The accused, Ms Janice Mains, was acquitted. The sheriff gave a very brief oral explanation for the decision which he had arrived at when announcing his verdict.

[3] On 1 February 2022 Ms Lynn Maher, an Advocacy and Inclusion Development Coordinator at Stirling University Students' Union, contacted Falkirk Sheriff Court on Ms Mains behalf seeking a summary of what the sheriff had said in court. She explained that Ms Mains was attempting to access such information in order to be able to return to her nursing studies after having been suspended pending the trial. Ms Maher was initially informed that there were no records kept in the court beyond a minute noting that the accused had been found not guilty.

[4] On 3 February Ms Maher again communicated with the Sheriff Court explaining that Ms Mains was the subject of a fitness to practice investigation and required to provide evidence of the case. Two statements from the communications sent by Ms Maher that day are of relevance:

> "It has certainly given us insight into what defendants – especially those found not guilty can expect – from our Scottish Court systems. Hopefully our student will find a way to evidence what the Sheriff said about the witnesses but it does seem that for something so important it would be reasonable for any defendant to expect to see some written record of the decision made and what it was based on."
>
> "The Sheriff's ex tempore judgement is what the University are seeking and in particular his consideration of the witnesses in his decision making."

[5] That same day the office manager at Falkirk Sheriff Court then contacted Sheriff MacDonald by email explaining the request and its purpose. The sheriff replied to her by email stating:

> "I did not pronounce an overly long ex tempore judgement. I found the complainer less than reliable or credible in her account. I found that her description had not been entirely supported by her partner's account. I did not accept in fact that the events had occurred in the common close as described by the complainer. I accepted the complainer's partner's evidence to the effect that the complainer had entered the close after the accused. This is the converse of what the complainer had described."

[6] On 7 February the Office Manager at Falkirk Sheriff Court emailed Ms Maher explaining that she had reverted back to the sheriff who had given the comments set out above, which she then set out word for word. It is the content of this email which Ms Hamer contends unlawfully breached her data protection rights.

Subsequent developments

[7] On 1 April Ms Hamer made a Freedom of Information request seeking information concerning the case, including any correspondence regarding the verdict of not guilty. The Office Manager at Falkirk Sheriff Court responded by explaining that the information sought was subject to exemptions from disclosure under sections 37 and 38 of the Freedom of Information (Scotland) Act 2002.

[8] On 13 April Ms Hamer wrote again to the Office Manager explaining that she wished the matter investigated further. In this email she explained that she was now the subject of a complaint made to her employers by Ms Mains who was relying on the content of the email sent to Ms Maher. Ms Hamer requested that the matter be investigated to establish who sent the email, and why, as she considered it to be defamatory. The Office Manager intimated that she would now treat the matter as a complaint rather than a Freedom of Information request. She also provided Ms Hamer with information as to how to complain about the decision of the sheriff should she wish to do so.

[9] After subsequent correspondence, the decision in relation to Ms Hamer's complaint was communicated to her by letter dated 28 November. In relation to the email setting out the sheriff's views it was explained that the request made on Ms Mains' behalf had been passed to the sheriff since SCTS had no record containing the information she wished. It was explained that the sheriff decided to provide the information sought which was confirmation of what he had stated in court. Accordingly, Ms Hamer's complaint in relation to this matter was not upheld, there had been no data breach on the part of

SCTS. Her complaint was upheld in part however. It was concluded that she ought to have been provided with a copy of the email sent to Ms Maher at the Students' Union when she first asked for this as she would have been entitled to access her own personal information such as was held within the email in terms of her own GDPR access rights.

The present complaint

[10] The information contained in the email transmitted to Ms Maher contained personal data relating to Ms Hamer within the meaning of section 3(2) of the Data Protection Act 2018 (DPA). The transmission of that information falls to be viewed as processing within the meaning of section 3(4). As explained in the letter of 28 November, the decision to provide the email was made by the sheriff and SCTS was simply the facilitator providing the information as sheriffs are not able to communicate with parties to court actions. The processing therefore falls to be viewed as judicial processing.

[11] The judicial processing concerned does not fall within the scope of Part 3 DPA ("Law enforcement processing"). Section 29 sets out the processing to which Part 3 applies. The communication under discussion does not fall within the scope of this section. Accordingly, the processing under discussion falls to be considered as "General processing" as governed by Part 2 DPA. The lawfulness of such processing is governed by Article 6(1) of the GDPR and section 8 DPA, the relevant provisions of which are:

> Article 6 GDPR
>
> 1. Processing shall be lawful only if and to the extent that at least one of the following applies:
>
> (e) processing is necessary for the performance of a task carried out in the public interest or in the interest of official authority vested in the controller;
>
> Section 8 DPA
>
> Lawfulness of processing: public interest etc
>
> In Article 6(1) of the GDPR (lawfulness of processing), the reference in point (e) to processing of personal data that is necessary for the performance of a task carried out in the public interest or in the exercise of the controller's official authority includes processing of personal data that is necessary for –
>
> (a) The administration of justice,

[12] For the purposes of the present complaint these provisions require to be considered in the context of judicial proceedings and any rights or obligations associated with that process. In hearing and determining the

outcome of a criminal trial a sheriff is bound to ensure that the proceedings comply with the requirements of Article 6 of the European Convention on Human Rights (the Right to a fair trial). One of the procedural requirements of the general requirement of fairness provided for by Article 6(1) is the requirement for courts to adequately state the reasons on which their judgments are based (see eg – *Moreira Ferreira v Portugal (no.2)* [GC] 2017 para. 84). Put another way, the parties to any case, which plainly includes the accused person, are entitled to be informed of the reasons for the decision arrived at.

[13] In the case brought against Ms Mains Sheriff MacDonald gave brief oral reasons for his decision at the conclusion of the trial. These were delivered in open court and available to be noted by anyone present, including representatives of the media who would then have been free to publish the comments made. There would have been nothing to prevent Sheriff MacDonald from issuing his decision in writing, should he have chosen to do so, or in a mixture of oral and written form. Many other decisions of the courts are issued in writing and are then published on the SCTS website and, depending on the nature and importance of the case, in legal publications which are freely available. Many of such decisions will explain why a particular witness was or was not found to be either credible or reliable.

[14] Providing reasons for a decision is plainly a lawful function undertaken by a judicial office holder which is necessary for the administration of justice. It is an exercise based on the rule of law propounded in Article 6 ECHR. Such an exercise, however undertaken, would constitute lawful processing if it included the transmission, disclosure or otherwise making available personal data.

[15] In the present case that is the exercise which the sheriff undertook in open court. That process cannot become unlawful by subsequently being reduced to writing. It was a matter for Sheriff MacDonald to determine whether or not to provide a written note of the reasons for his decision to the representatives of the former accused person in addition to having stated them in court. He no doubt took account of the explanation for the request in arriving at his decision. This process of judicial assessment and determination is sufficient to meet the test of necessity mentioned in Article 6(1)(e) of the GDPR and section 8(a) DPA.

[16] Ms Hamer has stated at various points that the information contained in the email is incorrect or defamatory. These propositions are misconceived. The content of the email correctly stated the assessment of the evidence which the sheriff had arrived at. She has also set out her opinion that since no written record was kept no written record should have been given. However, the test which has to be applied to the complaint is whether the processing of personal data was lawful according to the provisions referred to. For the reasons given above I am satisfied that it was.

Decision

[17] The complaint is not upheld.