

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2013 / 765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

SUPPLEMENTAL AFFIDAVIT OF BILLY HAWKES

I, **BILLY HAWKES**, of Canal House, Station Road, Portarlinton in the County of Laois, aged 18 years and upwards, **MAKE OATH** and say as follows:-

1. I am the Data Protection Commissioner. I make this affidavit on my own behalf from facts within my own knowledge, save where otherwise appears, and where so otherwise appearing I believe the same to be true and accurate.
2. I make this affidavit by way of reply to a limited number of points averred to by the Applicant in an affidavit delivered in unsworn format on 15 January 2014 ("the Applicant's Second Affidavit"). The Applicant's Second Affidavit in turn replies to an affidavit previously sworn by me herein on 16 December 2013 ("my First Affidavit").
3. As at the date of swearing hereof, a sworn copy of the Applicant's Second Affidavit has not yet been filed and served.

The net issue in dispute in these proceedings

4. I say and believe that it now appears to be common case between the parties that a single net issue falls to be determined in the

context of the within proceedings, i.e. whether, as a matter of law, I was correct in forming the opinion that I should not investigate the Applicant's complaint in respect of Facebook Ireland Limited and 'PRISM', as submitted to my office on 25 June 2013, on grounds that the complaint was bound to fail in circumstances where, having regard to European Commission Decision D2000/520/EC, I was (and remain) statutorily bound to accept that a transfer of subscriber data to the United States by Facebook Ireland Limited, undertaken under the 'Safe Harbour' framework, is lawful.

5. I say and believe (and am so advised) that much of the Applicant's Second Affidavit addresses matters that are not relevant to that net issue or that should more properly be dealt with by way of legal submission at trial. That being so, I do not consider it either necessary or appropriate to reply to all of the matters averred to by the Applicant in his Second Affidavit. My failure to address any particular averment made by the Applicant should not, however, be taken as indicating that I accept the accuracy, merit or relevance of same.

Transfer of Subscriber Data to the United States

6. I say and believe that both parties appear to accept that data relating to Facebook subscribers resident in the European Economic Area is transferred to and held on servers located in the United States. In circumstances where there is no dispute between the parties on this particular issue, I say and believe that there is no basis for the Applicant's demand (as articulated at paragraph 6 of his Second Affidavit) that I should "disclose now in these proceedings the source of [my] knowledge that "some or all" of such data is transferred to the United States and ... exhibit whatever material [I am] relying upon in that respect ..."

Previous Audit of Facebook

7. The audit referred to paragraph 12 of the Applicant's Second Affidavit was completed upon the finalisation of a report by my office on **21 December 2011**. A further review was undertaken in 2012, leading to the publication of a second report on **21 September 2012**. Both reports were made publicly available by means of publication on my office's web-site.

8. As will be apparent, both the audit exercise, and the reports produced by my office in relation thereto, pre-date the Applicant's complaint herein. As noted above, that complaint was submitted on **25 June 2013**.
9. For completeness, I say that the audit exercise did not address the matters that were later the subject of the Applicant's complaint of 25 June 2013. For the avoidance of doubt, I further say and believe that the audit exercise was not relied upon as a basis for my opinion that no investigation was required in respect of the Applicant's complaint herein; nor do I seek to rely on the audit exercise or reports for the purposes of the determination of any disputed issue of fact in the within proceedings.
10. In all of these circumstances, and having regard to the net issue to be determined herein as identified at paragraph 4 above, I say and believe (and am so advised) that there is no basis upon which the Applicant can properly demand that "such audit should be exhibited before this Honourable Court" (paragraph 8 of the Applicant's Second Affidavit).

Discussions with Facebook Ireland prior to 25 June 2013

11. I say that the discussions referred to at paragraph 15 of my first affidavit pre-dated receipt of the Applicant's complaint of 25 June 2013 and, for the avoidance of doubt, did not bear upon the forming of the opinion at issue in these proceedings. Reference was made to the discussions in my first affidavit solely for reasons of transparency.

Demand for production of documents

12. As acknowledged by the Applicant at paragraph 11 of his affidavit, "the question of whether the Respondent was correct in concluding that my Complaint was 'frivolous and vexatious' is primarily a matter of law and a matter for legal submission." That being the case, and having regard to the clear and unambiguous averments made at paragraphs 24 and 25 of my first affidavit to the effect that material received from Facebook was not taken into account by me when forming my opinion that the Applicant's complaint would not be the subject of an investigation, I say and believe (and am so advised) that there is no basis upon which the Applicant may demand production of "all communications between [the Commissioner] and Facebook Ireland ... regardless

of whether same are alleged to have been relied upon or otherwise.”

Alleged delay in notification of my Opinion

13. At paragraph 18 of his second affidavit, the Applicant expresses “unease and concern” in relation to the passage of time between the date on which Facebook was informed of the opinion now in issue (i.e. 9 July 2013) and the date on which he was notified of same (i.e. 23 July 2013).
14. At paragraph 27 of my first affidavit, I explained the very simple reason for the short period of delay in the issuing of the letter of 23 July 2013 to the Applicant, i.e. the fact that the Senior Compliance Officer within my office who was handling the matter under my direction was on leave (from 1 July 2013 to 15 July 2013). A letter directed to the Applicant was prepared on her return and duly issued to the Applicant on 23 July 2013.
15. Having regard to the facts as averred to in the immediately preceding paragraph, and at paragraph 27 of my first affidavit, I say and believe that the Applicant’s purported “unease and concern” is entirely unsustainable.

Conclusion and Prayer

16. For all of the reasons set out herein, and in my first affidavit, I pray this Honourable Court to refuse the reliefs sought by the Applicant herein.



SWORN by the said **BILLY HAWKES**
this 27 day of January, 2014
at Fitzwilton House, Wilton Place, Dublin 2

in the City/County of Dublin
before me a Practising Solicitor



PRACTISING SOLICITOR

This affidavit is filed on behalf of the Plaintiff by Philip Lee Solicitors, 7/8 Wilton Terrace, Dublin 2. Filed this day of January, 2014

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Applicant

-and-

**DATA PROTECTION
COMMISSIONER**

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