

In the matter of the General Data Protection Regulation

DPC Complaint Reference: [REDACTED]

IMI Reference: [REDACTED]

In the matter of a complaint, lodged by [REDACTED] with Commission Nationale de l'Informatique et des Libertés pursuant to Article 77 of the General Data Protection Regulation, concerning Fitbit International Limited

Record of Amicable Resolution of the complaint and its consequent withdrawal pursuant to Section 109(3) of the Data Protection Act, 2018

Further to the requirements of EDPB Guidelines 06/2022 on the practical implementation of amicable settlements Version 2.0 (adopted on 12 May 2022)

**RECORD OF AMICABLE RESOLUTION FOR THE
PURPOSE OF EDPB GUIDELINES 06/2022 ON THE
PRACTICAL IMPLEMENTATION OF AMICABLE
SETTLEMENTS VERSION 2.0 (ADOPTED ON 12 MAY
2022)**

Dated the 7th day of October 2022



Data Protection Commission
21 Fitzwilliam Square South
Dublin 2, Ireland

Background

1. On 13 August 2020, [REDACTED] (“the **Data Subject**”) lodged a complaint pursuant to Article 77 GDPR with the Commission Nationale de l'Informatique et des Libertés (“the **Recipient SA**”) concerning Fitbit International Limited (“the **Respondent**”).
2. In circumstances where the Data Protection Commission (“the **DPC**”) was deemed to be the competent authority for the purpose of Article 56(1) GDPR, the Recipient SA transferred the complaint to the DPC on 23 February 2021.

The Complaint

3. The details of the complaint were as follows:
 - a. The Data Subject was the owner of a Fitbit connected watch on which she kept track of her menstrual cycle. The Data Subject asserted that she systematically received advertisements on her Facebook account for female hygiene products during her menstrual cycle. Given the apparent precision of the timing of the advertisements that she was receiving, the Data Subject expressed the apprehension that Fitbit was transferring information concerning her menstrual cycle to Facebook, despite the Data Subject having all privacy settings on the Fitbit account set to private.
 - b. The Data Subject first contacted the Respondent on 25 February 2019, requesting that her personal data not be shared with third parties, including Facebook. The Data Subject contacted the Respondent again on 13 January 2021, this time enquiring into the data processing policies of the Respondent.
 - c. As the Data Subject was not satisfied with the responses received from the Respondent regarding the concerns raised, the Data Subject lodged a complaint with their supervisory authority.

Action taken by the DPC

4. The DPC, pursuant to Section 109(4) of the Data Protection Act, 2018 (“the **2018 Act**”), is required, as a preliminary matter, to assess the likelihood of the parties to the complaint reaching, within a reasonable time, an amicable resolution of the subject-matter of the complaint. Where the DPC considers that there is a reasonable likelihood of such an amicable resolution being concluded between the parties, it is empowered, by Section 109(2) of the 2018 Act, to take such steps as it considers appropriate to arrange or facilitate such an amicable resolution.
5. Following a preliminary examination of the material referred to it by the Recipient SA, the DPC considered that there was a reasonable likelihood of the parties concerned reaching, within a reasonable time, an amicable resolution of the subject matter of the complaint. The DPC’s experience is that complaints of this nature are particularly suitable for amicable resolution in circumstances where there is an obvious solution to the dispute, if the respondent is willing to engage in the process. In this regard, the DPC had regard to:

- a. The relationship between the Data Subject and Respondent (being, in this case, an individual consumer and a service provider); and
 - b. The nature of the complaint (in this case, a query from a Data Subject concerning the alleged unlawful sharing of their personal data with a third party).
6. While not relevant to the assessment that the DPC is required to carry out pursuant to Section 109(4) of the 2018 Act, the DPC also had regard to EDPB Guidelines 06/2022 on the practical implementation of amicable settlements Version 2.0, adopted on 12 May 2022 (“**Document 06/2022**”), and considered that:
- a. the possible conclusion of the complaint by way of amicable resolution would not hamper the ability of the supervisory authorities to maintain the high level of protection that the GDPR seeks to create; and that
 - b. such a conclusion, in this case, would likely carry advantages for the Data Subject, whose rights under the GDPR would be vindicated swiftly, as well as for the controller, who would be provided the opportunity to bring its behaviour into compliance with the GDPR.

Amicable Resolution

7. The DPC engaged with both the Data Subject (via the Recipient SA) and Respondent in relation to the subject matter of the complaint. Further to that engagement, the Respondent provided the following information in respect of this complaint;
- a. The Respondent provided further clarity in their correspondence, and explicitly confirmed that it had not shared the menstrual health data of the Data Subject with Facebook or with any advertising or social media service.
 - b. The Respondent further acknowledged that female health data constitutes special category data under the GDPR, and confirmed that it only processes such data in accordance with explicit user consent.
8. On 16 June 2021, the Respondent provided an initial response to the DPC, which could be shared with the Data Subject, to alleviate any concerns regarding her conjecture that her health data had been transferred to third parties, such as Facebook. In this correspondence, the Respondent acknowledged that it considered menstrual health data as a special category of data under the GDPR, and that it processes such information subject to, and in accordance with, user consent. The Respondent further noted that the Data Subject did not allege that she had been shown any Fitbit ads on Facebook, and it was thus not in a position to determine why she was seeing the ads referred to in her complaint on Facebook, which it considered was due to the actions of third parties other than Fitbit.

9. In a letter issued to the Data Subject on 26 August 2021 via the Recipient SA, the DPC requested confirmation from the Data Subject on whether the response provided by the Respondent was sufficient to amicably resolve their complaint. By way of reply, in correspondence received by the DPC on 13 January 2022, the Data Subject requested that the DPC continue to investigate the matter further with the Respondent. In particular, the Data Subject again raised the matter of the alleged sharing of her health data with third parties, to which she did not consent, and asserted that there was no functionality in the Fitbit application to withdraw or give consent to the processing of this data.
10. The DPC thus contacted the Respondent further in relation to the complaint, and on 3 March 2022, the Respondent provided a further response to the DPC in relation to the matter. In its correspondence, the Respondent reiterated the fact that health data is not shared with third parties, as provided in Article 4(10) GDPR, and confirmed that menstrual health data is only processed based on explicit user consent. The Respondent also provided detailed instructions that could be shared with the Data Subject as to how user's may withdraw consent to the processing of menstrual health data in the application and erase their data at any time.
11. On 15 March 2022, the DPC wrote to the Data Subject, via the Recipient SA. In its correspondence to the Data Subject, the DPC requested that the Data Subject notify it, within a specified timeframe, if they were not satisfied with the information provided by the Respondent, so that the DPC could take further action. The Recipient SA confirmed that they issued this update to the Data Subject on 11 April 2022 and on 29 June 2022, the Recipient SA confirmed that no response had been received from the Data Subject.
12. On 28 July 2022, and in light of the foregoing, the DPC wrote to the Recipient SA noting that the DPC considered the complaint to have been amicably resolved and withdrawn in accordance with section 109(3) of the Act and that it would conclude the case and inform the Respondent.
13. In circumstances where the subject matter of the complaint has been amicably resolved, in full, the complaint, by virtue of Section 109(3) of the 2018 Act, is deemed to have been withdrawn by the Data Subject.

Confirmation of Outcome

14. For the purpose of Document 06/2022, the DPC confirms that:
 - a. The complaint, in its entirety, has been amicably resolved between the parties concerned;
 - b. The agreed resolution is such that the object of the complaint no longer exists; and
 - c. Having consulted with the supervisory authorities concerned on the information set out above, as required by Document 06/2022 the DPC has now closed off its file in this matter.

15. If dissatisfied with the outcome recorded herein, the parties have the right to an effective remedy by way of an application for judicial review, by the Irish High Court, of the process applied by the DPC in the context of the within complaint.

Signed for and on behalf of the DPC:

A handwritten signature in black ink that reads "Tom Delaney". The signature is written in a cursive style with a long, sweeping underline.

Deputy Commissioner
Data Protection Commission