

Litigation Chamber

Decision on the merits 11/2019 of 25/11/2019

File number: DOS-2018-06502

Subject: Complaint against a candidate in the municipal elections for non-compliance with the principle of finality in the context of the sending of electoral propaganda letters

The Litigation Chamber of the Data Protection Authority, made up of Mr Hielke

Hijmans, chairman, and Messrs. Y. Pouillet and C. Boeraeve, members, who takes up the case in this composition;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the Data Protection), hereinafter GDPR;

Having regard to the law of 3 December 2017 establishing the Data Protection Authority (hereinafter LCA);

Having regard to the internal rules of the Data Protection Authority as approved by the

Chamber of Representatives on December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

Made the following decision regarding:

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I.

Feedback from the procedure

Having regard to the complaint filed on October 21, 2018 by X with the Data Protection Authority;

Having regard to the decision of November 29, 2018 of the Frontline Service of the Authority for the Protection of data declaring the complaint admissible and its transmission to the Litigation Chamber at this same date;

Having regard to the decision taken by the Litigation Chamber during its session of December 19, 2018 to request

an investigation by the inspection service pursuant to Articles 63.2° and 94, 1° LCA;□

Having regard to the referral from the Inspector General on the same date;□

Having regard to the report and minutes of the Inspector General's investigation sent to the Chamber on April 4, 2019□

Litigation whose findings are reproduced in this decision (see point III);□

Having regard to the decision taken by the Litigation Chamber during its meeting of May 15, 2019 to consider that□

the case was ready for substantive processing under Articles 95 § 1, 1° and 98 LCA;□

Having regard to the communication, on May 20, 2019, of the report and minutes of the investigation by the Inspector General□

to the parties and the invitation of the Litigation Chamber to the parties to put forward their arguments according to□

an established schedule;□

Considering the conclusions of the complainant, Mr. X, received on June 12, 2019;□

II.□

The facts and the subject of the complaint□

The plaintiff, Mr. X, is a resident of the municipality of□

Mr. Y is, at the material time, a candidate for the municipal elections of 2018 in He is an alderman□

outgoing for 12 years and veterinarian.□

In his complaint, Mr. X states that he received an electoral propaganda letter from□

Mr. Y, letter addressed to him at the address he lived at when he was a customer at this□

last in his capacity as a veterinarian. This letter mentions in particular the following:□

“Dear customer, dear customer, madam, sir,□

...□

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As six years ago, on the eve of the municipal elections, I am writing to ask you□

to put your trust in me. With the help of the college, I think I obtained a very□

positive in my aldermen.□

(...)□

Health: all the sterilization campaigns for stray cats in our municipality, this□

campaign is beginning to bear fruit. Premiums for sterilization and identification of
domestic cats (you can still benefit from it). Connecting physicians with a
fixed price medical structure. My approach is leading to the creation of a center
medical at...

Thank you for your trust.

Dr Y, veterinarian, alderman at ... for 12 years

Mr. X complains about the reuse by Mr. Y of his client file for electoral purposes. It
wants as proof that the address to which said mail is addressed to him is the one at which he resided from
time when she went to Mr. Y as a veterinarian. He says he has another address.
since and no longer been a client of Monsieur Y for more than 10 years.

III.

The Inspector General's investigation report and minutes

According to his investigation report and minutes, the Inspector General makes the following observations:

Finding 1: "In his reply letter [either in response to a request for information
of the Inspector General], Mr Y mentions that the register of electors and the list emanating from his
client file were used to send personalized campaign letters to clients and
other people. He writes "A posteriori, I recognize that I could not use my listing
"customer" given the GDPR which was put in place a few weeks before the mail "".

Finding 2: "The listing from Mr Y's customer file mentions with regard to the address
of the complainant "..." while the register of electors indicates "...".

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IV.

As for the competence of the APD, in particular of the Litigation Chamber

As to the competence of the Data Protection Authority, in particular the

Litigation Chamber□

Pursuant to Article 4 § 1 of the LCA, the Data Protection Authority is responsible for the□

control of compliance with the fundamental principles of the protection of personal data,□

under the Law of 3 December 2017 creating the Data Protection Authority□

(LCA) and laws containing provisions relating to the protection of the processing of personal data.□

personal character.□

Pursuant to Article 33 §1 of the LCA, the Litigation Chamber is the litigation body□

administration of the Authority. It is seized of the complaints that the Service de première ligne forwards to it in□

application of Article 62 § 1 LCA, i.e. admissible complaints provided that in accordance with Article□

60 paragraph 2 LCA, these complaints are written in one of the national languages; contain a statement□

of the facts and the indications necessary to identify the processing of personal data□

to which they relate and fall within the jurisdiction of the Data Protection Authority.□

In a judgment of October 23, 2019¹, the Court of Markets confirms in this respect that:□

“De bevoegdheid van de GBA strekt zich enkel uit tot het oordelen over een correct naleving van de□

AVG en de Belgische privacywetgeving zoals duidelijk omschreven in de GBA-wet”.□

[Translation: The competence of the DPA is limited only to pronouncing on the correct compliance with the□

GDPR and Belgian privacy legislation, as clearly specified in the APD law]².□

Consequently, the Data Protection Authority is not competent to rule on□

a possible violation of the internal rules of the Municipal Council (article 75-17) which would not be□

does not constitute a breach of data protection rules or the validity of a□

decision of inadmissibility of a request for citizen interpellation submitted by the complainant, two□

grievances invoked by the complainant under the conclusions he filed which do not relate to the□

compliance with the fundamental principles of the protection of personal data with regard to□

processing of personal data identified and as defined in Article 4 1) and 2) of the Regulation□

general on data protection (GDPR).□

¹ Hof van Beroep Brussel, sectie Marktenhof, 19de kamer A, kamer voor marktzaken, arrest dd. October 23, 2019.□

2 Free translation carried out by the Secretariat of the Data Protection Authority in the absence of an official translation. □

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v. □

On the reasons for the decision □

On the breach of the obligation to process the data in a manner compatible with the □

purposes for which they were collected □

In his capacity as data controller, Mr. Y is required to respect the principles of □

data protection and must be able to demonstrate that these are respected (principle of □

liability – section 5.2. GDPR). He must also implement all the measures □

necessary for this purpose (Article 24 of the GDPR). □

The purpose principle is a cornerstone of data protection. Dedicated since 1981 to □

Article 5 b) of the Convention for the protection of individuals with regard to automatic processing of □

personal data of the Council of Europe (ETS 108), it is set out in Article 6 § 1 b) of □

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection □

natural persons with regard to the processing of personal data and to the free □

circulation of this data as well as Article 4 § 1, 2° of the Law of 8 December 1992 relating to the □

protection of privacy with regard to the processing of personal data. When □

consecration of the right to data protection as a fundamental right by the Charter of □

fundamental rights in 2000, it was enunciated as a key element of this right. This principle has, in all □

logical, has been included in Article 5.1.b) of the GDPR under the Principles relating to the processing of data □

of a personal nature (Chapter II). □

Article 5 § 1 b) of the GDPR thus provides that: □

“1. Personal data must be: (...) b) collected for the purposes □

determined, explicit and legitimate, and not to be further processed in a manner □

incompatible with these purposes; further processing for archival purposes in the interest □

public, for scientific or historical research purposes or for statistical purposes is not
considered in accordance with Article 89 paragraph 1, as incompatible with the purposes
initials" (limitation of purposes).

In other words, this principle requires that data be collected for specific purposes,
explicit and legitimate, and not further processed in a manner inconsistent with these
purposes. Further processing of personal data for purposes other than the one(s)
for which this data was initially collected is only permitted if this
further processing is compatible with the purposes for which the personal data
were initially collected, taking into account the link between the purposes for which they were
collected and the purposes of the subsequent processing envisaged, the framework in which the personal data
personal have been collected, of the possible consequences of the further processing envisaged for the
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data subject and the existence of appropriate safeguards. A compatible purpose is by
example a purpose which the data subject can foresee or which can be considered as
compatible under a legal provision (see article 6.4. of the GDPR).

In its "Elections" note published in the early 2000s on its website and updated
following the entry into force of the GDPR³, the Data Protection Authority mentions that:
"However, political parties and their candidates in an election may be tempted to have
use of personal data collected in the context of other processing
whose primary purpose had nothing to do with electoral propaganda. It is also worth
for data extracted from public sector files (such as the National Registry,
civil service personnel file data, a list of people assisted by
a CPAS, data obtained in the exercise of an alderman's mandate, ...) that
for data from files in the private sector (customer file of a company, list of
members of an association, etc.)"

The note goes on to state:□

“With this in mind, it is therefore not permitted to reuse personal data□

recorded in the aforementioned files for the purpose of electoral propaganda. Such treatment□

is incompatible with the purposes for which this data was initially collected,□

which is punishable under Article 83.5 GDPR”.□

Any further incompatible use is prohibited except for two exceptions provided for in Article 6.4. from□

GDPR. Where the data subject has given consent to further processing for a□

distinct purpose or where the processing is based on a legal provision which constitutes a measure□

necessary and proportionate in a democratic society, in particular for the guarantee of purposes□

important in the public interest, the controller still has the possibility of processing□

subsequently such personal data for other purposes, whether compatible□

or not with the initial purposes.□

The Litigation Chamber specifies in this respect that the consent of the person concerned must□

relate to further processing for a distinct purpose and not constitute, where applicable, the basis□

legitimacy of the first treatment. In other words, it matters little in this regard whether the processing of□

3 Processing of personal data for the purpose of personalized mailings of electoral propaganda and respect for life□

privacy of citizens: fundamental principles,□

https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/Note_elections_RGPD.pdf□

...□

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initial data is itself based on consent. Either way, care must be taken that the□

data subject is informed of such other purposes and of his or her rights.4□

According to the reply letter he sent to the Inspector General (letter received on March 13, 2018□

by the latter), Mr. Y does not dispute having used the personal data of the customer file□

that he maintains in his capacity as a veterinarian to address to these clients (list of 654 people in total)□

a letter inviting them to vote for him in the municipal elections of October 2018. The Chamber□

Contentious takes note in this regard of the written statements it made by letter received on March 13, 2019□

during the Inspection as well as the terms used in the litigious electoral mail which begins□

by "Dear customer" and end with a signature that states his status as a veterinarian. the□

report of the Inspector General of April 4, 2019 also mentions this.□

As the Litigation Chamber decided in its decision 4/2019 of May 28, 2019⁵, this use□

subsequent processing of personal data is incompatible with the primary purpose of the processing, i.e. the□

maintenance of a customer file, and is not permitted by the GDPR.□

In conclusion, it follows from the above that by using a professional file constituted at the start□

personal data of clients the consultant as a veterinarian to send to these clients□

a letter in the context of the October municipal elections intended to invite them to vote for him,□

Mr. Y has processed the said personal data in a manner incompatible with the purpose□

initial collection of such data - even if it was lawful - and this, in disregard of Articles 5□

§ 1 b) and 6.4. of the GDPR.□

The Litigation Chamber generally recalls that any processing of personal data□

personal – including the initial collection but also the storage of the data collected□

in particular – must be based on one of the bases of lawfulness provided for in Article 6 of the GDPR. Rights,□

information, in particular, of the data subject as provided for in Chapter III of the GDPR must□

also be respected.□

In addition, the data cannot, pursuant to Article 5 § 1 e) of the GDPR, be stored under□

a form allowing the identification of the persons concerned for a period not exceeding□

that necessary with regard to the purposes for which they are processed.□

4 Processing of personal data for the purpose of personalized mailings of electoral propaganda and respect for life□

privacy of citizens: fundamental principles:□

https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/Note_elections_RGPD.pdf□

5 This decision has been published: <https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/BETG0>

2019ANO_FR.pdf□

...□

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VI.□

On corrective measures and sanctions□

Under the terms of Article 100 LCA, the Litigation Chamber has the power to:□

1. 1° close the complaint without further action;□

2. 2° order the dismissal;□

3. 3° order a suspension of the pronouncement;□

4° to propose a transaction;□

5° issue warnings or reprimands;□

6° order to comply with requests from the data subject to exercise these rights;□

(7) order that the person concerned be informed of the security problem;□

8° order the freezing, limitation or temporary or permanent prohibition of processing;□

9° order the processing to be brought into conformity;□

10° order the rectification, restriction or erasure of the data and the notification thereof□

data recipients;□

11° order the withdrawal of accreditation from certification bodies;□

12° to issue periodic penalty payments;□

13° to impose administrative fines;□

14° order the suspension of cross-border data flows to another State or an organization□

international;□

15° forward the file to the public prosecutor's office in Brussels, who informs it of the follow-up□

data on file;□

16° decide on a case-by-case basis to publish its decisions on the website of the Authority for the protection of□

data.□

As for the administrative fine that may be imposed pursuant to Articles 83 of the GDPR and the□

articles 100, 13° and 101 LCA, article 83 of the GDPR provides:□

“Article 83 GDPR□

1.□

Each supervisory authority shall ensure that the administrative fines imposed in□

under this article for breaches of this Regulation, referred to in paragraphs 4,□

5 and 6 are, in each case, effective, proportionate and dissuasive.□

2.□

Depending on the specific characteristics of each case, the administrative fines are□

imposed in addition to or instead of the measures referred to in point (2) of Article 58□

a) to h), and j). To decide whether to impose an administrative fine and to decide□

of the amount of the administrative fine, due account shall be taken, in each case,□

of the following elements:□

...□

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(a) the nature, gravity and duration of the breach, taking into account the nature, scope or□

the purpose of the processing concerned, as well as the number of data subjects affected□

and the level of damage they suffered;□

b) whether the breach was committed willfully or negligently;□

c) any action taken by the controller or processor to mitigate the□

damage suffered by the persons concerned;□

d) the degree of responsibility of the controller or processor, taking into account□

the technical and organizational measures they have implemented pursuant to Articles□

25 and 32;□

e) any relevant breach previously committed by the controller or the□

subcontracting;□

f) the degree of cooperation established with the supervisory authority with a view to remedying the breach□

and to mitigate any negative effects;□

(g) the categories of personal data affected by the breach;□

h) how the supervisory authority became aware of the breach, including whether, and□

the extent to which the controller or processor notified the breach;□

(i) where measures referred to in Article 58(2) have previously been ordered□

against the controller or processor concerned for the same purpose,□

compliance with these measures;□

(j) the application of codes of conduct approved under Article 40 or mechanisms□

certificates approved under section 42; and□

k) any other aggravating or mitigating circumstance applicable to the circumstances of□

the species, such as the financial advantages obtained or the losses avoided, directly or□

indirectly, as a result of the violation.□

As for the nature of the violation (article 83.2.a) of the GDPR), the Litigation Chamber recalled that the□

compliance with the purpose principle is an essential and founding principle of data protection. This□

principle, enshrined in Article 5 of the GDPR (Chapter II – Principles; Article 5 - principles relating to the□

processing of personal data) applies not only from the entry□

in application of the GDPR on May 24, 2018 but since the entry into force in 1993 of the Law of□

8 December 1992 relating to the processing of personal data which preceded it. The no-□

compliance with this fundamental principle is, according to the Litigation Chamber, constituting a breach□

serious.□

The Litigation Chamber notes that Mr. Y makes amends while indicating that the GDPR□

was set up a few weeks before it was sent. This last element, however, does not stand up to□

analysis. At the time of the events, compliance with the principle of finality had applied for more than 25□

years already.□

...□

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As for the intention on the part of Mr. Y, this is proven. He did not act negligently but deliberately used the list of his clients in his capacity as a veterinarian to contact them in the context of the municipal elections of October 2018 in ...

As for the purpose of the processing (art. 83.2.a) of the GDPR), the Litigation Chamber notes that it is to encourage mail recipients to vote for a particular candidate. If this is good given the purpose of any election campaign, respect for the laws in the context of it is particularly important. In this regard, the European Data Protection Board (EDPB) has recently recalled the importance of data protection rules in the electoral context by these terms: "compliance with data protection rules, including in the context of electoral activities and campaigns, is essential to the protection of democracy. It is also a means of preserving the confidence of citizens and the integrity of elections"⁶.

The quality of alderman of Mr. Y since 2006 would have, as underlined by the Litigation Chamber in its decision 04/2019 of 28 May 2019 already cited⁷, moreover had to be accompanied by a exemplary behavior with regard to compliance with legislation, including that of the protection data, especially in the electoral context. This quality of public representative already at the time of the facts is retained by the Litigation Chamber in the assessment of the seriousness of the breach. Mr. Y having also been elected since October 2018 as a councilor council, the Litigation Chamber also takes this element into account in the assessment of the effectiveness that any sanction must have under Article 83 of the GDPR.

The Litigation Chamber also considers that if the categories of personal data processed, (article 83.2. g) of the GDPR), (surname, first name and postal address) are not likely to carry an irreparable breach of the privacy and protection of the data of the recipients of these letters,

on the other hand, in the electoral context and having regard to the purpose of the processing already mentioned, the number

6 See. European Data Protection Board (EDPB), Statement 2/2019 on the use of personal data in the course of political campaigns (13 March 2019): "Compliance with data protection rules, including in the context of electoral activities and political campaigns, is essential to protect democracy. It is also a means to preserve the trust and confidence of citizens and the integrity

of elections”.□

7 Decision of the Disputes Chamber 04/2019 of 28 May 2019 states in this regard the following: “This [read respect for□ rules set by the GDPR] applies to any data controller and a fortiori to the holder of a public office such as a□ mayor. The citizen must have the certainty that the data which he entrusts to the holder of a public mandate in the exercise of□ its functions will not be used for other purposes, in violation of the law. What is more, this is a use for□ personal purposes of the holder of this mandate. We must be able to expect a mayor to be aware of the obligations□ arising from the GDPR or that he properly informs himself about it. The fact that the media are very attentive to the application of□ GDPR also matters. The Litigation Chamber considers that a mayor must lead by example when it comes to□ to obey the law”.□

...□

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of people concerned (654) - all the more so given the number of potential voters in a municipality□ like that of ... - is not negligible.□

Finally, the Litigation Chamber wonders about the explicit reference in the litigious letter to a□ bonus for the sterilization and identification of cats whose clients of Mr. Y could always□ benefit and which would invite, even indirectly, to a visit to the veterinarian which he could therefore□ withdraw a financial advantage (article 83.2.k) of the GDPR) .□

The Litigation Chamber specifies that the other criteria listed in Article 83.2. of the GDPR are, in□ this case, not likely to lead to an administrative fine of an amount other than that□ which it fixes under the terms of this decision.□

In conclusion, in view of the elements developed above specific to this case, the Chamber□

Litigation considers that the facts found and the breach established in Articles 5 § 1 b) and 6.4.□

of the GDPR, justify that as an effective, proportionate and dissuasive sanction as provided for in□

Article 83 of the GDPR and taking into account the assessment factors listed in Article 83.2. of the GDPR, a□ reprimand (article 100 § 1, 5° LCA), accompanied by an administrative fine of 5000□ euros (article 100 § 1, 13 and 101 LCA) be pronounced against Mr Y.□

For all the aforementioned reasons, and in order to remind all public officials of the right□
applicable to the protection of personal data and the prohibition on the use of data files□
citizens for purposes other and incompatible with the purposes for which they were□
initially collected, the Litigation Chamber considers it essential to make its decision public□
on the basis of article 100 § 1, 16° LCA, however omitting all the data that allow□
the direct identification of the parties. In doing so, the Data Protection Authority acts in accordance□
at the wish of the legislator provided for in Article 7, 2° of the Law of 5 May 2019 amending the Code of instruction□
Criminal Code and the Judicial Cde with regard to the publication of judgments and judgments, anticipating□
thus the entry into force of this provision (M.B. 16 May 2019).□

FOR THESE REASONS,□

The Litigation Chamber of the Data Protection Authority decides, after deliberation, to:□

-□

Issue a reprimand to Mr. Y on the basis of Article 100 § 1, 5°□

ACL;□

-□

Impose against Mr. Y an administrative fine in the amount of 5000□

euros pursuant to Articles 100 § 1, 13° and 101 LCA;□

...□

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- Make its decision public on the basis of Article 100 § 1, 16° LCA by publishing it on its□

website <https://www.autoriteprotectiondonnees.be/> omitting however any element□

allowing the direct identification of the parties.□

Under Article 108, § 1 LCA, this decision may be appealed to the Court of□

markets within 30 days of its notification, with the Authority for the protection of□

given as a defendant.□

Hielke Hijmans□

President of the Litigation Chamber□