

GZ: DSB-D123.959/0019-DSB/2019 of November 18, 2019□

[Note editor: Names and companies, legal forms and product names,□

Addresses (incl. URLs, IP and email addresses), file numbers (and the like), etc., as well as□

their initials and abbreviations may be abbreviated for reasons of pseudonymization□

and/or changed. Obvious spelling, grammar and punctuation errors□

have been corrected.]□

NOTICE□

S P R U C H□

The data protection authority decides on the data protection complaint of A*** Consulting□

AG (complainant) of December 21, 2018 against Mag. Gerhard N***□

(Respondent) for violation of the right to secrecy as follows:□

- The complaint is dismissed as unsubstantiated .□

Legal basis: Sections 1 (1) and (2) and 24 (1) and (5) of the□

Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended; Art. 4 Z 1 and Z 7 as well as Art. 5□

Para. 1 of Regulation (EU) 2016/679 (General Data Protection Regulation - GDPR), OJ.□

No. L 119 of 05/04/2016, p. 1.□

REASON□

A. Submissions of the parties and course of the proceedings□

1. With the submission of December 21, 2018 and the clarifying statement of□

On January 14, 2019, the applicant alleged a violation of the right to□

Confidentiality. In summary, the Respondent is with the Appellant□

until his summary dismissal in February 2018. After his□

dismissal, the complainant received an email on March 8, 2018 that□

"someone" tried to log into the ***filehosting account with the email address□

n***@a***consulting.com. The complainant had to fear□

that it was a hacker attack and therefore have to gain access to□

prevent, assign a new password. The complainant was up to this□

Neither the existence nor the content of the ***filehosting was known at the time. When reviewing□

However, the folder structure has shown that in this ***filehosting extensive□

Data from projects and orders from customers of the complainant on the part of the□

Respondent had been saved. Neither was the complainant□

known who initiated this request at ***filehosting. Only after the□

Conversely, the Respondent filed a complaint against the Appellant□

GZ: DSB-D123.838, the complainant had become aware that□

it was the Respondent who tried to access the *** filehosting account□

n***@a***consulting.com.□

Apparently, the attempt did not stop there, since the Respondent□

own information both the "access to the account on a private account" as well as□

changed the password. The Respondent was therefore inadmissible□

access to the complainant's data secrets. Although after the□

Notification from ***filehosting on March 8, 2018 that the access data has been changed□

is unclear whether and how much data of the respondent in the period up to the revocation□

illegally downloaded or possibly used. As a result, he□

Respondent tried several times at *** filehosting, under the pretext that it was□

a "private" *** file hosting, the release of the account and thus access to□

*** to receive file hosting.□

2. With a statement dated February 3, 2019, the Respondent brought□

summarized, that the complaint was based on mere assumptions. be□

there is no evidence that operating and□

are trade secrets. Rather, the complainant has his private□

***filehosting account hacked. As far as he knows, only trivial ones are on the folders□

Documents such as international comparative studies, harmless reports or presentations.□

The documents would contain only summaries of information which
be available online at any time. According to the Respondent's recollection
Projects affected that were completed several years ago.
In addition, according to the terms of use and the terms and conditions of ***filehosting
User contract concluded between ***filehosting and a person, not with a
E-mail address. The account was opened by the respondent as a private individual
been told that it is not a business account. The complainant has one
committed data theft and identity theft. Furthermore, it should be noted that
almost all of the complainant's former employees have a private account
*** would also have used file hosting for company-related communication with clients, what
was also known to the complainant. The respondent was nine years old
authorized officer of the complainant. The private use of his laptop or
his email address was always approved or tolerated. In addition, be the
Claim to assertion (meaning: the right to secrecy) is already time-barred. in the
The framework of the employment contract between the complainant and the respondent
agreed that mutual claims from the employment relationship and those related to
Connection are forfeited if not received within three months of the due date
be made in writing to the other party. The respondent appealed
Convolute of documents, including a record of the oral hearing at
ASG Vienna pending legal dispute between complainant and respondent
(File number *5 Cga *31/18h).

3. With a statement dated April 4, 2019, the Respondent submitted a supplementary
Written statement of the court proceedings pending at the ASG Vienna (file number
*5 Cga *31/18h) before. Proceeding from this, it is evident that the complainant of the
Transmission problems of documents that arose due to the file size,
knew. Furthermore, it is evident that the complainant knew that

Employee company data by way of a *** file hosting account to the customer□

would make available.□

4. In a statement dated April 29, 2019, the complainant summarized□

submits that the Respondent himself confirmed that he was in the *** file hosting, the□

Company data contained, had entered. He also admitted after his release in□

to have entered the *** file hosting. The *** file hosting is under a business e-mail□

address was created without the knowledge of the complainant and contains more than 80%□

official data. At no time before March 8, 2019 did the complainant□

Had knowledge of the *** filehosting account. Furthermore, the emails from ***filehosting are not□

to the private email address of the respondent, but to his business email□

Address owned by the complainant. A data or□

Identity theft did not occur. With regard to the objection of the statute of limitations□

to state that the Respondent overlooks the fact that the clause from□

Employment contract relates to claims arising from the employment relationship. The complainant□

also submitted a record of the oral hearing of the pending at the ASG Vienna□

Legal dispute between the complainant and the respondent (file number□

*5 Cga *31/18h) before.□

5. The DPA held an oral hearing on June 7, 2019□

Presence of the complainant (represented by Dr. Walter P***) and the□

Respondent through. The hearing was part of the proceedings□

carried out for ZI. DSB-D123.838. In the above procedure, it is the other way around□

a complaint by Mag. Gerhard N*** against A*** Consulting AG. Since the same□

The facts of the case are affected, the results of the oral hearing are also□

present procedure for ZI. DSB-D123.959. The record of the oral□

The hearing is attached to the file and has been sent to all parties involved.□

6. In its statement of July 3, 2019, the complainant submitted a copy of a□

*** filehosting email dated March 8, 2018, which was submitted as part of the hearing on

June 7, 2019.

7. The DPA conducted another oral on September 12, 2019

Hearing in the presence of the complainant (again represented by Dr. Walter

P***) and the Respondent. During the oral hearing,

Checked the ***filehosting account n***@a***consulting.com. The protocol

of the oral hearing is attached to the file and has been sent to all those involved.

8. With a statement dated September 29, 2019, the Respondent brought

summarized, that according to the employment contract from 2005, it was forbidden for him

had been, during and after termination of the employment relationship files to private

purposes to use, copy or take away in any other way. However, the

Use and retention of copies in written and electronic form for

Operations have been granted if he used this data abroad for official purposes

needed, even after the termination of the employment relationship. As in

the inspection was found to be the files contained on the *** filehosting

all needed for external official purposes. Furthermore, there is

***File hosting account mostly from private files of the respondent. the

Complainant illegally looked into the *** file hosting account.

Namely, the complainant had files that were not clearly professional files

are recognizable, are not allowed to look at.

9. In a statement dated October 17, 2019, the complainant brought

summarized that in the context of inspection the folders with suspected private

content of the respondent had been examined less precisely than the folders with

Company and business secrets of the complainant. It is clearly documented

that the *** file hosting was predominantly used for official purposes and that

Respondent only has one private folder on the *** filehosting. Further

could be determined during the inspection that the Respondent□
in violation of the service instructions of January 29, 2018 both before and after□
after his release on February 23, 2018. In addition, the□
Respondent stated that some folders were not created by him. It□
the question arises whether the Respondent unlawfully informed other persons□
granted access to trade and business secrets.□
The database in the *** file hosting has changed since March 8, 2018. At that time□
it contained 1.25 GB of data, now 1.54 GB of data. This□
Changes were not made by the complainant, otherwise the□
Complainant from *** filehosting would not have received a message that the account for□
October 22, 2019 will be closed due to inactivity. It is also noticeable that the folders□
that several users had been "tidier" than those that only the□
Respondent had access. There are also many differences in relation to that□
actual result of the inspection and the allegations of the respondent□
present. There would be considerable contradictions in the statements of the□
Respondent before the data protection authority and before the ASG Vienna. So have□
he claims before the data protection authority that he has entered *** file hosting several times□
be, before the ASG Vienna, however, that he forgot the access data for *** file hosting□
because he only uses it once a year on an ad hoc basis. The Respondent has□
Trade and business secrets of his former employer after dismissal□
want to transfer to a private account. The opinions are several□
Documents (including two attachments with company data and another log of the□
oral hearing before the ASG Vienna on file number *5 Cga *31/18h).□

B. Subject of Complaint□

Based on the submissions of the appellant, it follows that□
The subject of the complaint is whether the respondent is the complainant□

thereby violated the right to secrecy by providing personal data□

of the complainant to the ***filehosting account n***@a***consulting.com□

uploaded and posted both before and after his release on February 23, 2018□

accessed this data.□

In this context, it must also be clarified whether the Respondent□

*** personal data of the complainant in the file hosting account□

The course of the employment relationship, but also after the dismissal on February 23, 2018□

used inappropriately.□

C. Findings of Facts□

1. The Respondent was employed by the Appellant for about 13 years.□

On February 23, 2018, the respondent was dismissed by the□

complainant. Due to this dismissal, there is currently a procedure at ASG Vienna□

pending.□

The respondent has in the course of the upright employment relationship with the□

Complainant a free *** filehosting basic account with the email address□

n***@a***consulting.com created.□

Evidence assessment: The findings made are based on the input of the□

Complainant of December 21, 2018, on the statement of the□

Respondent of February 3, 2019 and on the statements of the Respondent□

as part of the oral hearing on June 7, 2019 and are therefore undisputed.□

2. ***filehosting is a cloud web service that stores files in a□

Cloud storage can be uploaded. This cloud web service is provided by ***filehosting,□

LLC. offered. With the access data for a *** file hosting account, it is possible to□

device-independent via the web application www.***filehosting.com. Next□

In addition to the free basic account, there is also the option of purchasing a paid one□

***Create a filehosting business account.□

***filehosting makes it possible to create multiple folders and subfolders. Furthermore, it will □

Allows multiple users to have access to this folder and its contents □

("Folder Sharing"). As part of a *** file hosting account, different □

Folders are created with different access permissions. The creator of a □

(shared) folder is called the owner. The owner can others □

Give users the role of Editor or Viewer. As a processor, there is □

Possibility to add, edit and delete files in the respective folder. When □

Viewer is only able to view and to files in the respective folder □

Leave a Comment. □

***filehosting itself has no fundamental influence on the content that a user □

uploads. In very specific cases, such as violations of copyright, retains □

However, according to the terms of use, ***filehosting reserves the right to delete content □

or to deactivate the ***filehosting account. □

Evidence assessment: The findings made are based on an ex officio □

Research at https://www.***filehosting.com/ and on official knowledge. □

3. The respondent has both in the course of the upright employment relationship □

his private files as well as the complainant's business files in folders □

uploaded, accessed via the ***filehosting account n***@a***consulting.com □

can be. □

Evidence assessment: The statement made is based on the results of the inspection □

the *** file hosting account n***@a***consulting.com, which the data protection authority in □

The presence of the complainant's representative, Dr. Walter P*** and des □

Respondent was carried out on September 12, 2019 and is therefore undisputed. □

4. The ***filehosting account is named "Gerhard N****" as a private account □

listed. The storage space is occupied with 1.54 GB of 2 GB. □

The following folders are located in the named ***filehosting account: Philipp K***, **TR, **TR- □

New Development, own presentations in preparation, Min***, Photos, Public, UE_**,□

Management-I, ***PricingPolicy, Test, PL **, Audit and PL ** Settlement Ä***.□

The "Philipp K****" folder does not contain any of the complainant's company data, but□

private photos and videos of the respondent. The folder has a size of 1.31 GB.□

The folder "***TR" contains the subfolder "****land". This was made by Oskar V***,□

a former employee of the complainant. It is a matter of□

Documents relating to one of the complainant's projects. The folder is for the□

Respondent released in the role of viewer.□

A report by the complainant is contained in the "***TR-NewDevelopment" folder.□

My presentations in preparation folder is empty.□

There are two subfolders in the Min*** folder. The first subfolder is not□

released and contains documents on one of the complainant's projects. The second□

Subfolder contains balance sheets and annual accounts of the telephone company "****KOM". the□

Documents in the second folder were provided by the complainant.□

The Photos folder is empty.□

The Public folder is empty.□

In the "UE_***" folder there is a "Technical Proposal" subfolder. The folder is for□

Alfons Z***, an employee of the complainant, and for Dr. Walter P***, dem□

Board of the complainant released in the role of processor.□

The ***Management-I*** folder is empty.□

The "****PricingPolicy" folder contains around 20-25 documents for a project□

included complainant. These are reports for customers of the□

Complainant created by the respondent as an employee. The□

Modification date of the files is listed as 2013.□

A document from the complainant is contained in the "Test" folder. It is a matter of□

a presentation on fiber optic networks ("****initiative"). The folder is not for others□

people released.

In the "PL ** Audit" folder there are two subfolders, "Tender Channel" and "Protocols-

writing" included. These are the complainant's documents. The folder

was created by Oskar V*** as the owner. The folder was for the respondent,

Theodor H*** and Udo St***, a business partner of the complainant.

The "Planer" subfolder is located in the "PL ** Settlement Ä***" folder. With regard to this

Folders, several people are listed in the role of the viewer, including the

Respondent and Dr. Walter P***.

Based on this, the following folder structure results:

folder name

contents

Philip K***

Respondent's private files

**TR

business files of

complainant

**TR New Development

business files of

complainant

Own presentations in preparation

empty

minutes***

Photos

Public

UE_**

business files of

complainant□

empty□

empty□

business files of□

complainant□

Management I□

empty□

***Pricing Policy□

business files of□

complainant□

test□

PL** Audit□

business files of□

complainant□

business files of□

complainant□

PL** Settlement Ä***□

business files of□

complainant□

Evidence assessment: The statements made are based on the results of the□

Check out the ***filehosting account n***@a***consulting.com, which is provided by the□

Data Protection Authority in the presence of the complainant's representative, Dr. Walter P***,□

and the Respondent was carried out on September 12, 2019.□

5. The Respondent has in his position as project manager using□

***filehosting shared the business files with the complainant's customers.□

In the course of the ongoing employment relationship, the Respondent has the□

business files of the complainant, which are on the mentioned ***filehosting□

Account were uploaded, only used to communicate with customers of the□

share complainant.□

The Respondent has referred to the complainant's business files□

of his dismissal on February 23, 2018 and this also not from the□

mentioned ***filehosting account.□

Evidence assessment: The findings made are based on the statements of the representative□

the complainant, Dr. Walter P***, as well as the respondent within the framework of□

oral hearing on June 7, 2019 and on the results of the inspection of the□

filehosting account n@a***consulting.com dated September 12, 2019.□

First of all, it should be noted that the use of *** file hosting in the company of□

Complainant (at least in the period of the complaint) not unusual□

was:□

So led Dr. Walter P*** stated that at least in his survey on June 7, 2019□

the use of Mr H***'s *** file hosting account (an employee of□

complainant) was known. Also during the hearing on□

February 27, 2019 in front of the ASG Vienna to file number *5 Cga *31/18h, Dr. Walter□

P*** made business files available to customers by way of an online service□

have been provided if their e-mail inbox does not have sufficient storage capacity□

have exhibited. In addition, during the review of September 12, 2019□

revealed that other (former) employees also have various *** file hosting folders with□

business files of the complainant or a corresponding one□

have access permission.□

The respondent's statement in the context of his questioning is based on this□

dated June 7, 2019, according to which the *** file hosting account was used to□

To share files with customers of the complainant who, due to the file size, cannot□

Email could be sent credibly and conclusively. In the course of□

In the present proceedings, there have also been no indications that□

conclude that the Respondent has the business files in□

***filehosting account have been uploaded until its release to other than too□

used for professional purposes. Also on the part of the complainant no□

corresponding indications (e.g. that he sent the business files to a□

competing company would have sold, or similar) led to the meeting.□

With regard to the period from his release on February 23, 2018 to March 8□

2018 the Respondent during the oral hearing on June 7, 2019□

stated that after February 23, 2018 several times in the subject□

*** filehosting account entered, but he no business files of□

complainant downloaded.□

As part of the survey on June 7, 2019, the data protection authority did not have the□

Impression that the Respondent was interested in business files□

to the ***filehosting account; rather, his interest in the same□

***filehosting account stored private files (essentially pornographic□

content) that he shared with an acquaintance from his private circle□

has. The Respondent acted with regard to the statement that after his□

dismissal did not download any of the complainant's business files,□

also believable.□

These findings are further supported by the results of the September 12 review□

2019 supported. As part of the review on September 12, 2019, for example,□

Regarding the folder "****PricingPolicy" - the undisputed business files of the□

Complainant contains - revealed that the modification date with the year 2013□

is listed, on this folder apparently for a long time (neither by the Respondent,□

nor other authorized persons) was accessed.□

If the complainant in this context with a statement of

October 17, 2019 submits that the stored in the *** filehosting account

I have increased the amount of data from 1.25 GB to 1.54 GB of data - and thus apparently

wants to lead to the meeting that the respondent continues to have access himself or third parties

Have given access - it is to be countered that found in the context of the inspection

became that in addition to the Respondent, other persons (such as former

Employees) have access permissions to folders that are also in the

present *** filehosting account. In addition, there is also the

private folder "Philipp K****" in the ***filehosting account, to which other people as well

Have access permissions and to increase the amount of data as well

could be returned. Due to the increased amount of data in

*** filehosting account in question, it cannot therefore be concluded that

the Respondent's business files of the complainant in the period after

downloaded after his dismissal.

6. The complainant has the admissibility of the use of *** file hosting for

at the point in time at which the complaint was made was not regulated under employment law. The use of

*** In any case, the complainant had file hosting with an employee, namely Mr

H*** known.

Evidence assessment: The statement made is based on the statements of the

Appellant at the oral hearing on June 7, 2019.

7. On January 29, 2018, the respondent received instructions with the

Provided that the use of the complainant's accounts, the laptop, the

Service telephones and all other work equipment for non-official use are prohibited

may be.

Evidence assessment: The statement made is based on the opinion of the

Complainant of October 17, 2019 and on the instructions of January 29

2018, a copy of which is attached to the file (see the complainant's statement

from October 17, 2019, attachment ./5).

8. For the email address n***@a***consulting.com was after the February 23 release

Set up a forwarding function in 2018 so that emails from customers who

Respondent had looked after, continue to be processed by the complainant

could. On March 8, 2018 at 10:26 a.m., the complainant received the following notice from

Received *** file hosting to the email address n***@a***consulting.com (excerpt, formatting

not reproduced 1:1):

"Hello Gerhard N***,

a new device (web browser) has just been added to your account. Out

For security reasons, we would like to know if it was you."

On March 8, 2018 at 10:21 p.m., the Respondent tried to change the password of the

to change the actual *** filehosting account. The complainant has

found out about this attempt because ***filehosting sent a second email to n***@a***consulting.com

with the following note (excerpt, formatting not reproduced 1:1):

"Someone recently changed the password of your ***filehosting account

requested. If that was you, you can set a new password here:"

On the basis of the aforementioned emails of March 8, 2018, the complainant stated that

Password of ***filehosting account n***@a***consulting.com changed.

Evidence assessment: The findings made are based on the statements of the representative

the complainant, Dr. Walter P***, and the respondent within the framework of

oral hearing on June 7, 2019 and on the two emails from ***filehosting

of March 8, 2018, copies of which are attached to the file (see the statements of the

Appellant of December 28, 2018 and July 3, 2019).

D. In legal terms it follows that:

1. On the complainant's legitimacy to lodge a complaint

Although the Respondent did not complain about this, it is for completeness□

to note that the fundamental right to secrecy, which has constitutional status,□

§ 1 para. 1 DSG continues to be entitled to "everyone" - and thus also to legal entities□

(cf. Gamper in Gantschacher/Jelinek/Schmidl/Spanberger, Data Protection Act1 § 1 Rz 3).□

Against this background, a legal entity is a data subject within the meaning of Section 24 (1).□

DSG and is it open to the complainant (as a stock corporation)□

a complaint about an alleged violation of § 1 para. 1 DSG at the□

Bring in data protection authority□

2. The timeliness of the complaint□

The Respondent submits that the claim for assertion (meaning: des□

right to secrecy) is already statute-barred. This is because within the framework of□

employment contract between the complainant and the respondent□

be that mutual claims from the employment relationship and those that are associated with it in□

Connection are forfeited if not received within three months of the due date□

be made in writing to the other party.□

However, if the complainant in this context leads to the meeting that it□

objectively a data protection claim and not one□

Claims from the employment relationship are not to be opposed.□

Apart from that, the fundamental right to secrecy is not a contractual disposition□

accessible and the preclusion periods for the assertion of a□

alleged violation of § 1 Para. 1 DSG exclusively according to § 24 Para. 4 DSG□

standardized specifications.□

In the present case, there is no question that the complainant filed the complaint□

of December 28, 2018 within one year of knowledge (receipt of the "warning email" from□

***filehosting on March 8, 2018) submitted to the data protection authority, which is why□

the complaint proves to be timely.□

3. On the distribution of roles under data protection law□

a) General information on the concept of responsible person□

The determination of the distribution of roles under data protection law is for the complaints procedure□

according to § 24 DSG or Art. 77 Para. 1 DSGVO of decisive importance, as determined□

becomes who is responsible for compliance with the respective data protection regulations, how□

the data subject can exercise their rights and ultimately also against whom (i.e. which□

person responsible) the data protection complaint must be directed (respondent party).□

According to Art. 4 Z 7 DSGVO is that natural or legal person, authority, institution□

or other body responsible for processing, carried out alone or jointly with□

others about the purposes and means of processing personal data□

decides. The key criterion here is the decision-making component. The role□

of the person responsible results primarily from the fact that a specific□

body has decided to process personal data for its own purposes.□

The "purpose" describes an expected result, while the "means" describes the way and□

Determine the way in which the expected result is to be achieved (cf. Art. 29-□

Working Party Opinion 1/2010 on the terms "for processing□

Responsible" and "processor", WP 169, 00264/10/DE, S 15 ff, still in relation□

on Art. 2 lit. d of the data protection directive 95/46/EG).□

According to Art 4 Z 8 GDPR, that natural or legal person, authority, institution or□

other body processors who process personal data on behalf of the□

processed by responsible persons. The key criterion here is being bound by instructions.□

The role of the processor thus results primarily from the fact that□

a specific body has decided to process personal data on behalf of the□

to be processed by the person responsible (cf. Art. 29 Data Protection Working Party, WP 169, 00264/10/DE,□

S 30ff).□

b) In the matter□

First of all, it should be pointed out that any civil claims with regard to the

filehosting account n@a***consulting.com by civil law

are.

From a data protection point of view - within the scope of the GDPR and the DSG - can

the *** file hosting account, i.e. a storage medium, does not belong to any party in the sense of ownership

or property can be assigned, rather, merely a certain role in terms

insist on the personal data contained on the storage medium and

Certain duties derive from this role (of a responsible person and

processor) and rights (e.g. the rights of the data subject, but also the right of the

those responsible to process personal data under certain conditions

may) off.

In the present case, the ***filehosting provider ***filehosting, LLC., der

Appellant and the Respondent several responsible persons in question.

c) ***filehosting, LLC.

Based on the facts, it should first be noted that ***filehosting, LLC. only

Storage space as a hosting provider makes available, used by private individuals or

company can be used. ***filehosting, LLC, except in cases where in

where there are obligations based on other legal provisions - such as

Copyright infringement - does not affect which files (with

personal data) is uploaded and how this is subsequently used.

With the above considerations in mind, ***filehosting, LLC is thus classified as

Processor for the personal data stored in the *** file hosting account

to qualify data.

This qualification also coincides with the statements of the Art. 29 data protection group,

according to which a hosting provider, provided that it does not use the personal data for its own

purposes, is not to be seen as the person responsible (cf. Art. 29-

Data Protection Working Party, WP 169, 00264/10/DE, p. 31).

d) Complainant

Based on the facts of the case, the Respondent has the objective

***filehosting account created in the course of the ongoing employment relationship and

his private files and business files of the complainant in the

***file hosting uploaded. Furthermore, the Respondent in his position as

Project manager using ***filehosting the business files anyway

also shared with clients of the complainant.

With regard to the use of ***filehosting and business files and them

contained personal data, it must be stated that the behavior of the

Respondent as an employee of the complainant is also attributable to the latter

(cf. Art. 29 Data Protection Working Party, WP 169, 00264/10/DE, p. 21, according to which the processing

by a natural person working for a company and the data within the

activities of the company, attributed to the company as the responsible body

will).

In view of the above considerations, the complainant is therefore

Responsible for the business files stored in the *** filehosting account, in

which contain personal data.

With regard to the use of *** file hosting and the personal data of

Respondent (the private files in the "Philipp K****" folder), it should be noted that

this data is stored on a storage medium (folder in a *** file hosting account)

are located, at the present time only the complainant and not the

Respondent has access.

As the complainant herself submits, the commercial use of *** file hosting

not regulated as a hosting provider at the time, but at least occasionally

known and therefore at least tolerated. Based on this, the data protection authority is

Believes that the complainant has sufficient control over the means of processing

took personal data.

In this context, reference should be made to the duty of care of an employer, which

after stRsp of the Supreme Court, so that the employer even after the dissolution of the

employment relationship has to ensure that the employee is not disadvantaged

arise (cf. RIS Justice RS0021412).

In the present case, the complainant keeps the data for the respondent

after the complainant's departure from the company

backed up or deleted and does not use them for any other purpose. Based on that

DSB believes that the complainant also has sufficient influence on the

current purposes of processing personal data.

In view of the above considerations, the complainant is

at the present point in time also as the person responsible for the personal data of the

Respondent (the private files in the folder "Philipp K***").

4. Right to Confidentiality

First of all, it should be noted that information can only be classified as a trade secret

qualify if the requirements of § 26b UWG are met, these

Essentially, information is not generally known or readily accessible

may be and on the part of the person entitled to dispose of them accordingly

Confidentiality measures have been taken (cf. Art. 2 Z 1 of the Directive (EU)

2016/943).

On the question of whether it is

in the complainant's business files, located in the ***filehosting folder

are business secrets, there is no need to go into detail here:

Unlike the scope of protection according to §§ 26a ff UWG, personal data are

§ 1 para. 1 DSG also protected if on the part of the person entitled to dispose (here: the

data subject) no appropriate confidentiality measures with regard to the

handling of data were taken.

The only requirement for the scope of protection according to § 1 Para. 1 DSG is that a

there is a legitimate interest in secrecy, with such then

is excluded if data due to their general availability or because of their

lack of traceability to the person concerned, a claim to secrecy

are not accessible.

The relevant submissions of the Respondent, according to which the

business files are primarily business reports, which are public anyway

are accessible can again be left undecided:

According to the current case law, it can be assumed that § 1 para. 1 DSG in the light

of the provisions of Union law (Art. 8 EU-GRC) is to be interpreted restrictively, so that

generally available data not ipso facto from the scope of data protection law

regulations are excluded (cf. the decision of the DSB of September 4, 2019,

GZ DSB-D124.482/0005-DSB/2019).

With regard to the traceability of the business files to the complainant

to state that, as stated, it is data that the complainant

to handle projects with their customers, which is why they are directly involved

related to the complainant and are therefore hers

personal data (cf. the judgment of the ECJ on December 20, 2017,

C-434/16 [Nowak] para. 34, according to which the term “personal data” has a broad

Underlying understanding, this finding being based on personal data

legal entity).

With regard to the scope of protection of the right to secrecy, it should be noted that this

protection against transmission and disclosure as well as protection against investigation

includes personal data (cf. Jahnel, Handbuch Datenschutzrecht [2010]

margin no. 2/15).□

5. In the matter□

Based on the distribution of roles, it follows that the complainant is responsible for the□

business files located in the *** filehosting account at any time□

Responsible iSd Art. 4 Z 7 DSGVO to qualify and the upload as well as the further□

use of these business files is attributable to them. The use of a□

*** filehosting accounts was - at least in the period of the complaint - about it□

at least tolerated.□

A violation of the right to secrecy can be sustained in the period of□

employment relationship between the complainant and the respondent□

not available for this reason alone.□

The fact that the respondent with instructions from January 29, 2018□

Use of the complainant's accounts for non-official purposes prohibited□

been saved, but he still has private files in addition to business files in the□

*** has saved the file hosting account is also not able to infringe the right to□

justify secrecy, as it is through the continuous storage of his private□

Files to no transmission or disclosure of the business files of□

complainant has come to unauthorized third parties.□

Also the fact that the Respondent tried on March 8, 2019 to□

Changing the password to the subject ***filehosting account is a violation of the□

The right to secrecy is not sufficient, as it has remained a mere attempt and□

In this case, too, there is no violation in the form of transmission or disclosure to unauthorized persons□

Third party has manifested (cf. the decision of the data protection authority of September 13, 2018,□

GZ: DSB-D123.070/0005-DSB/2018, according to which a violation of the fundamental right□

Confidentiality can only be established ex post and possibly□

injuries that occur cannot be addressed).□

With regard to the complainant's argument that the question arises as to whether the

Respondent gives other people unlawful access to company and

Business secrets have granted, is on the Rsp of the Administrative Court

point out that a general submission consisting of mere conjecture

amounts to inadmissible exploratory evidence for which an authority is to be included

is not obliged (cf. the decision of the Administrative Court of January 3, 2018, Ra 2017/11/0207

Case 3).

Apart from that, there are also no indications, especially since in the context of

Insight, as stated, has also shown that only (former) employees of

Complainant have access to folders where business files are located.

Finally, the respondent has the business files of the complainant,

as stated, at no time inappropriate - i.e. "outside the area of activity"

of the complainant – used.

At this point it is not overlooked that the Respondent after his dismissal

on February 23, 2018 according to their own statements several times on the subject

***filehosting account accessed.

However, in the opinion of the data protection authority, this does not result in a violation of

Right to secrecy justified, since the Respondent, as established, does not

accessed or downloaded the business files, but his

Interest dedicated to the private files also located on the ***filehosting account

was. Thus, in this case, too, there is no transmission or disclosure of business information

Files of the complainant came to unauthorized third parties.

With regard to the private files located on the ***filehosting account (folder

"Philipp K***) it should be noted that the complainant for this, as already mentioned above

executed, as the person responsible for data protection within the meaning of Art. 4 Z 7 DSGVO

qualify is. However, since in this case these are exclusively private files of the

Respondent acts, any access to these private files by ☐

the Respondent no violation of the right to secrecy ☐

to justify the complainant, because this is not data related to the ☐

complainant acts. ☐

6. Result ☐

As a result, it can be stated that at no point in time was a transmission or ☐

disclosure of the complainant's business files to unauthorized third parties and also ☐

the Respondent did not unlawfully determine this data ☐

is. ☐

There is therefore no violation of the right to secrecy, which is why according to the verdict ☐

was to decide. ☐