

GZ: DSB-D123.768/0004-DSB/2019 from 18.12.2019□

[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 Bruno A***□

(Appellant) of November 9, 2018, amended by submission of November 19□

2018, against the N*** party E***stadt (Respondent), represented by Erich R***,□

due to violation of the right to secrecy as follows:□

- The complaint is dismissed as unsubstantiated .□

Legal bases: §§ 1 paragraphs 1 and 2, 24 paragraphs 1 and 5 of the Data Protection Act (DSG),□

Federal Law Gazette I No. 165/1999 as amended, Art. 8 and 11 of the Charter of Fundamental Rights of the European□

Union (EU-GRC), OJ No. C 326 of 26.10.2012, p. 39, Art□

Protection of human rights and fundamental freedoms, Federal Law Gazette No. 210/1958, § 1 Paragraph 2 of the□

Political Parties Act 2012 (PartG) Federal Law Gazette I No. 56/2012 as amended.□

REASON□

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

1. By letter dated November 9, 2018, amended by submission of November 19□

2018, the complainant submitted that the respondent had on□

November 7, 2018 the list of participants of a non-public meeting□

published on Facebook, which also has his name on it. the□

Respondent intended to pillory him publicly,□

because he was not present at the meeting on the parking space concept.□

In retrospect, it turned out that the community had forgotten one □

Invitation for said meeting to the correct email address or to the □

to the address known to the municipality. Nevertheless have the □

Respondent with the list of participants of the non-public meeting □

published his data. □

2. In a statement dated December 3, 2018, the Respondent submitted that □

on November 7, 2018 had a public meeting of the municipality of E***stadt □

for the E***stadt parking space concept. to this meeting □

In addition to community representatives, other target group representatives have also been invited. □

The complainant was also summoned, but he did not have it □

took part. A copy of the list of participants is on the Facebook page □

complainant has been posted. After the complaint became known □

the posting has been removed again, although this is not considered necessary. □

The Respondent submitted that according to Section 59(1) of the Steiermärkische □

Municipal Code (GemO) meetings of the municipal council are public. According to □

§ 60 para. 1 GemO is about every meeting of the municipal council (public or non- □

public) to record a negotiation document. According to Z 3 leg. cit. the □

Names of the chairman and the members present and absent □

to include municipal council. Responsible for data protection □

The municipality of E***stadt is responsible for processing the data contained therein. □

The attendance lists of municipal council meetings are in any case public, □

since even in non-public meetings only the deliberations are confidential □

be treated. These data are generally available, which means that a □

interest worthy of protection can be excluded. □

Both name, function and absence at the meeting are none □

data worthy of protection. On the one hand, there is a predominantly public □

Interest in this data of the complainant as a politician and person□

to know public interest and, on the other hand, whether he is in his□

public role as city councilor to meet the requirements of that position.□

The Facebook page of the N*** party E***stadt posts in the same way as the□

Homepage of the city party a periodic electronic medium within the meaning of□

Media Act (§ 1 Abs. 1 Z 5a MedienG) and will be supported by the□

media staff of the N*** party. § 9 DSG is applicable.□

Both the DSG and the GDPR would extend their scope to the□

fully or partially automated processing of personal data□

natural persons and non-automated processing□

personal data of natural persons in a file system□

are stored or are to be stored. One□

Processing of personal data stored in a file system□

are or should be stored is not recognizable.□

3. By letter dated March 28, 2019, the complainant brought□

summarized, it is not a public one, the GemO□

Corresponding session, since only a certain group of addressees informally by mail□

was invited and a public of this meeting already at the□

The fact fails that this was not properly announced. The GemO□

provide three bodies for a local politician. This meeting would□

none of these bodies fall.□

It was subsequently confirmed by the municipality by e-mail that the□

invitation was "unfortunately" sent to the old e-mail address. The post is□

deliberately been online for a few days after becoming known. In the□

Facebook page of the N *** party E *** city is not□

media company or media service.□

4. By letter dated May 21, 2019, the Respondent became a □

additional comments requested and requested to the invitation to □

to transmit at that meeting. By letter dated June 3, 2019, this was □

Letter sent to the data protection authority. □

5. By letter dated July 1, 2019, the complainant brought within the framework of his □

parties, it is clear from the supplement that it is a non- □

acted in public session without any binding character. None of the three □

Committees of the GemO lie, it was an “interim presentation of a □

Report” about the new “parking space concept” traded, to which informally by e-mail □

a specific group of addressees had been invited. Besides, be clear □

recognizable that the invitation was sent to the wrong e-mail address □

may be. □

B. Subject of Complaint □

The subject of the complaint is the question of whether the Respondent □

Complainant thereby violated the right to secrecy by □

November 7, 2018 the list of participants of the “intermediate presentation of the parking space concept □

E***stadt”, on which the name of the complainant also appears, including □

comment that the complainant did not attend that meeting □

posted her Facebook page. □

C. Findings of Facts □

The complainant is a city councilor for the municipality of E***stadt and belongs to the W*** party. □

On November 7, 2018, a meeting of the municipality of E***stadt took place □

"Parking space concept E***stadt" instead. The invitation to this was on October 23, 2018 □

sent and loaded to a specific group of addressees. The email was sent to the wrong one □

(old) e-mail address of the complainant sent. □

[Editor's note: The original at this point as a graphic file □

reproduced letter of invitation including mailing list (with old e-mail address of the

Complainant) cannot be pseudonymised with reasonable effort.])

The complainant did not attend this meeting.

On November 7, 2018, the Respondent posted on her public Facebook page

posted the following entry:

[Editor's note: The original at this point as a graphic file

reproduced Facebook posting of the Respondent cannot be justified

Effort to be pseudonymised. It consisted, in addition to a picture of the list of participants

with missing signature of the complainant, from the following text

(spelling mistakes in the original):

"Once again cooperation Not enough for W** party Councilor A**. Or is a

Parking space concept for the city of E**stadt not an issue for the traffic officer?? or

is the well-paid councilman working on the next leaflet??"]

Evidence assessment: The findings result from the undisputed submissions

of the parties and from the enclosures submitted.

D. In legal terms it follows that:

I

Competence of the Data Protection Authority

It must be checked in advance whether the media privilege within the meaning of Section 9 (1) DSG is relevant and whether in

further consequence the competence of the data protection authority is to be negated.

The data protection authority has, among other things, in the decision of December 2, 2019,

GZ DSB-D124.352/0003-DSB/2019, with § 9 Abs. 1 DSG discussed and

executed the following:

1. In Section 9 (1) DSG, the previous data protection law "media privilege" according to Section 48

DSG 2000, Federal Law Gazette I No. 165/1999 as amended by Federal Law Gazette I No. 83/2013, with expanded

Scope transposed into the GDPR system. The national regulation in

Section 9 DSG is linked to Art. 85 GDPR, a basic provision including

opening clause, to (cf. Suda/Veigl in Gantschacher/Jelinek/Schmidl/Spanberger,

Data Protection Act1 § 9 para. 1, still with reference to § 9 DSG as amended in Federal Law Gazette I No. 165/1999 as amended

Federal Law Gazette I No. 120/2017 [Data Protection Amendment Act 2018]).

According to the express legal text of Section 9 (1) DSG, two

Requirements must be met cumulatively in order to enter the privileged scope

reach:

Firstly, processing of personal data by media owners,

Editors, media workers and employees of a media company or

media service within the meaning of the MedienG and, secondly, this processing

for journalistic purposes of the media company or media service.

It is noticeable that § 9 paragraph 1 DSG restricts to a certain professional group

contains ("classic media companies"), although Art. 85 Para. 2 DSGVO such a

restriction is foreign and leg. cit. only to a "processing to journalistic

purposes" (critical Kunnert in Bresich/Dopplinger/Dörnhöfer/Kunnert/Riedl,

Commentary on the Data Protection Act, margin no. 9 to Section 9, further critical also Blocher/Wieser in

Jahnel (ed.), Data Protection Law. Yearbook 19, p. 303 ff

contrary to equality or the principle of legality).

2. It should be noted that - despite concerns about limiting media privilege

according to § 9 Abs. 1 DSG - a direct application of Art. 85 Abs. 2 DSGVO

does not appear to be expedient due to the priority of Union law regulations, since Art. 85

Para. 2 GDPR does not constitute a substantive provision, but - as mentioned -

contains the mandate addressed to the Member States, corresponding legal provisions

to enact for certain processing situations (cf. Schiedermaier in

Ehmann/Selmayr, General Data Protection Regulation Comment2 [2018] Art. 85 margin nos. 1 and 9).

3. Also the analogous application of § 9 para. 1 DSG to the present facts

is eliminated because the restriction standardized in § 9 Para. 1 DSG was in the original
planned implementation of Art. 85 (2) GDPR domestically in the version of
Data Protection Adaptation Act 2018 is not provided, which is why it is a
deliberately restrictive approach of the Austrian legislature (cf. VwGH
10/10/2018, Ra 2018/08/0189 Rs 4 mwN, according to which the analogy in public law
is generally permissible, provided that there is a real legal gap
will).

4. In addition, the complainant alleges a violation of the
Fundamental right to data protection according to § 1 DSG, i.e. a constitutional provision,
relevant. The wording of the simple legal provision of § 9 para. 1 DSG, according to which
"The provisions of this federal law and Chapter II of the GDPR
(Principles), III (Rights of the data subject) etc. (...) do not apply",
can probably not refer to § 1 DSG in constitutional interpretation, because
a simple statutory provision cannot derogate from any constitutional provision
(similar to Kunnert in Bresich/Dopplinger/Dörnhofer/Kunnert/Riedl, Data Protection Act
Commentary, margin no. 9 on Section 9).

5. It can therefore be assumed that only if the (narrow) prerequisites are met
of § 9 Para. 1 DSG legal protection exclusively by way of the ordinary courts
MedienG is possible and the data protection authority is not responsible.

6. In all other cases, the data protection authority is responsible for handling the content
responsible, but has the right to freedom of expression within the framework of the weighing process
according to Art. 11 EU-GRC or Art. 10 EMRK (cf. the decision
from September 9, 2019, GZ DSB-D124.274/0007-DSB/2019).
The same must apply to the present case.

The Respondent can, by definition, as a media owner within the meaning of
§ 1 Z 8 lit. c of the Media Act - MedienG. However, § 9 requires

Para. 1 DSG that the processing of data "for journalistic purposes of

media company or media service".

By definition, however, the Respondent is not a

Media company (§ 1 Z 6 MedienG) or a media service (§ 1 Z 7 MedienG).

In addition, in the present case, for the following reasons,

"journalistic purposes" can be assumed:

It cannot be assumed that any on the Internet

published information relating to personal data, under the

notion of "journalistic activities" and therefore for them in Art. 9 of the Directive

95/46 provided deviations and exceptions apply (see ECJ

June 1, 2017, C-345/17, margin no. 58 [Sergejs Buivids und Datu valsts inspekcija]). Although related

the objective Rsp. on the old legal situation, however, Art. 9 of the Directive

95/46 to be understood as a counterpart provision to Art. 85 GDPR.

Even with a broad interpretation of the term "journalism".

no processing for journalistic purposes was recognized as the subject of the proceedings

will. Also the fact that the Facebook page was edited by N***-

Party is looked after, can not change that. Political parties are often journalistic

active and provided with editors and employees, often exclusively in the context

work in public relations. However, the goal of political parties is not content

shaping of the medium, but rather through political activity the state

to influence decision-making comprehensively – above all through public relations work. the

Media activity can only be a "side effect" in the course of the desired

achievement of these goals are understood.

Since § 9 para. 1 DSG does not apply, it is therefore a responsibility of

data protection authority to deal with the complaint.

According to Art. 4 Z 7 GDPR, "responsible person" is the natural or legal person,

Authority, institution or other body that alone or jointly with others over the

decides on the purposes and means of processing personal data.

The object of the complaint is the Respondent as the operator of a publicly accessible

Facebook profile as the person responsible for data protection according to Art. 4 Z 7 DSGVO

qualify because they have purposes (sharing content) and means (use of a public

accessible Facebook profile) decides.

II.

Regarding the alleged violation of the right to secrecy within the meaning of Section 1 (1) DSG:

1. General

§ 1 para. 1 DSG stipulates that everyone, especially with regard to respect

of his private and family life, right to secrecy concerning him

personal data, insofar as there is a legitimate interest in it. One

Limitation of this right basically results from paragraph 2 leg. cit., the GDPR

and in particular the principles enshrined therein are, however, for the interpretation of the

In any case, the right to secrecy must be taken into account (cf. the decision of the DSB dated

October 31, 2018, GZ DSB-D123.076/0003-DSB/2018).

The data contained is undoubtedly personal data of the

Complainant and it is in principle also a legitimate interest in the

confidentiality of this personal data.

The annotated publication of the list of participants on the Facebook profile of the

In any case, the Respondent constitutes processing within the meaning of Art. 4 Z 2 DSGVO

represent.

According to Section 1 (2) DSG, restrictions on the right to secrecy are only permissible

if the use of personal data is in the vital interest of the

Affected or with his consent or in the case of overriding legitimate

Interests of another or in the presence of a qualified legal

Basis.□

A vital interest of the complainant or his consent□

undisputedly not and nothing has been said in this regard.□

It is therefore necessary to check whether there is a qualified legal basis or overriding□

legitimate interests of another the limitations of the claim□

secrecy would justify in the present case.□

2. On the right to freedom of expression□

In the present case, the Respondent argues that□

Municipal council meetings according to § 59 paragraph 1 of the GemO are public. Also the□

Attendance lists from municipal council meetings are public in any case, since also at□

non-public meetings, only deliberations are to be treated confidentially. However results□

from the letter of October 17, 2018 that it is neither a□

Municipal council meeting yet another body falling under the GemO□

(city council/municipal board or committees). Rather, it is one□

non-public, extranatural meeting (invitation to the interim presentation of the□

Parking space concept) to the next to municipal officers, business people and□

other representatives were invited. An appeal to the GemO and one based on it□

justified publication is therefore in vain.□

For the sake of completeness, it is also pointed out that the very general□

Assumption of the non-existence of a violation of protection-worthy□

Confidentiality interests for permissibly published data do not correspond to the□

provisions of the GDPR (cf. DSB 31.10.2018, GZ DSB-D123.076/0003-□

DSB/2018 with further references).□

However, overriding legitimate interests of the Respondent come into question□

in the use of the complainant's data that is the subject of the proceedings.□

The legitimate interests of the Respondent lie in the freedom of□

Expression of opinion according to Art. 10 ECHR or Art. 11 EU-GRC, on the other hand□

the legitimate interests of the complainant in general in the protection of his□

personal data as well as protection against discrediting by the□

Respondent.□

Art. 11 EU-GRC reads as follows, including the title:□

Article 11□

Freedom of expression and freedom of information□

(1) Everyone has the right to freedom of expression. This right excludes the□

Freedom of expression and freedom to express information and ideas without government interference□

and to receive and transmit without regard to state borders.□

(2) The freedom of the media and their plurality are respected.□

Art. 10 ECHR reads as follows, including the heading [Editor's note: in the original is on□

this place as a result of an editorial mistake under the heading the text of□

Art. 11 ECHR reproduced]:□

Article 10□

freedom of expression□

(1) Everyone has the right to freedom of expression. This right includes the□

Freedom of expression and freedom to receive and impart messages□

or ideas without interference from public authorities and regardless of national borders□

one. Nothing in this Article precludes States from broadcasting, motion picture or□

Subject television companies to an approval process.□

(2) Since the exercise of these freedoms involves duties and responsibilities,□

they determined formal requirements, conditions provided for by law,□

be subject to restrictions or penalties as set out in a□

democratic society in the interests of national security, territorial□

integrity or public safety, maintaining order and□

of crime prevention, protection of health and morals, protection

reputation or the rights of others are essential to the dissemination of

to prevent confidential messages or the reputation and impartiality of

to ensure justice.

Art. 11 EU-GRC defines two mutually related areas of protection: On the one hand, the (active)

freedom of expression of the speaker and on the other hand the (passive)

Recipient's Freedom of Information. In the interaction of these two elements

an exchange of information and opinion in the sense of a comprehensive

Freedom of communication guaranteed. Although the applicability to legal

Persons is not expressly arranged, this provision stands both natural

as well as legal entities (cf. Stangl in Kahl/Raschauer/Storr (ed.),

Basic questions of the Charter of Fundamental Rights and Bezemek in Holoubek/Lienbacher (ed.),

GRC Comment Art. 11).

Likewise, Art. 10 ECHR applies equally to natural and legal persons

(cf. Öhlinger/Eberhard, Constitutional Law margin no. 914).

The complainant is a city councilor for the municipality of E***stadt and is therefore active as a politician. In

albeit mistakenly sent to the wrong e-mail

Address, loaded for the interim presentation of the parking space concept. Whether it is at

this meeting is a committee of the GemO, can except in this regard

to be taken care of. The complainant plays as a councilor (of the W*** party).

Role in the community's public life, too, if only regional

Interest in whose work exist in the community.

It is evident that the Respondent's aim was to obtain information in the

To disseminate to the public or to make a contribution by publishing the list of participants

wanted to initiate a debate of general interest, namely whether the

Complainant as a politician and person of public interest in his duties

or requirements as a city councilor.□

According to Rsp. of the Supreme Court are limits to permissible criticism in relation to a politician who□

acts in his public capacity farther than in relation to a private individual. Everyone□

Politicians inevitably and willingly subject themselves to an accurate assessment of everyone□

of his words and actions not only by journalists and the wider public, but□

especially by the political opponent (cf. OGH 28.01.1997,□

4 Ob 2382/96i).□

Regarding the manner of publication (Once again, collaboration Not□

suffice for W*** party councilor A***. Or is a parking space concept for the city□

E*** city not an issue for the traffic officer? Or does the well-paid one work?□

City council just on the next flyer?? [sic]) it should be noted that the□

Data Protection Authority cannot deny the impression that the present□

Facebook posting is not solely aimed at contributing to a debate of□

trigger general interest, but the subject posting certainly□

was exaggerated.□

According to Rsp. of the Supreme Court can also make an insulting statement towards a politician□

nor be covered by the right to freedom of expression, provided that there is a connection to a□

political or general interest debate. A conscious□

defamatory statement, in which not the discussion of the matter, but□

the defamation of the person is in the foreground is not protected (cf. OGH□

June 29, 2011, 15 Os 81/11t). Art. 10 ECHR not only protects stylistically high quality,□

objectively presented and high-quality evaluations, but any□

Unvalue judgment that does not culminate in an excess of valuation (cf. OGH 15.10.2012,□

6Ob 162/12k). Sometimes Art. 10 ECHR also protects abusive language if□

this merely serves stylistic means (cf. ECtHR April 17, 2014, 20981/10).□

With regard to the effects, it should be noted that these are not significant□

are to be classified. In addition, the post has already been removed from the Facebook page□
turned off. Regarding the manner and circumstances in which the information□
have been obtained, it must be noted that the Respondent is not unlawfully in□
knowledge of the list of participants has come about, and the data in the list are unequivocal□
correct.□

3. The existence of a legal basis□

In addition, it should be noted that given the definition of a political party in□
(The constitutional provision of) Section 1 (2) PartG makes it clear that the purpose of□
political parties by the legislature primarily in the continuous "comprehensive□
Influencing the state decision-making process".□

According to the case law of the Constitutional Court are the presence□
political parties and the possibility of changing the majority structure□
Effects of the democratic principle underlying the B-VG. To the□
essential goals of political parties include the realization of their political□
Representations in the exercise of state functions by their agents and□
Confidence bearers in the various bodies of legislation and state□
Administration, especially in the general representative bodies (see□
VfSlg. 14.803/1997 and VfSlg. 20.128/2016 with further references).□

This also includes influencing the shaping of public opinion□
to be political competitors. The procedural use of the data□
of the complainant by the respondent is thus also by the PartG□
covered.□

III.□

Result□

The data protection authority therefore comes to the conclusion that due to the□
carried out balancing of interests no violation of the right to secrecy□

exists because the legitimate interests of the Respondent (freedom of

Expression of opinion) compared to the impairments of the entitled

Interests of the complainant (non-disclosure of the subject of the proceedings

Data) according to § 1 Abs. 2 DSG prevail.

Even if one wanted to deny this, the publication would be complete with commentary

also not illegal because this form of political work is covered in § 1

Para. 2 PartG, and thus in a legal basis within the meaning of Section 1 Para. 2 DSG.

It was therefore to be decided accordingly.