

[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.]□

## S P R U C H□

The data protection authority decides on the data protection complaint of RevInsp□

Gerlinde A\*\*\* (complainant), represented by lawyer Dr. Ulrich M\*\*\*, dated□

March 8, 2019 against Klaus N\*\*\* (Respondent) for violation of the right to□

secrecy as follows:□

1. The complaint is made in relation to the publication of the posting dated□

December 28, 2018, 3:58 p.m., and it is determined that the□

Respondent thereby waives the right of the complainant□

Has violated secrecy by posting on his Facebook profile along with□

Photos of an official act in which the complainant is involved as a police officer□

and you could see the inscription "To a new woman A\*\*\*\*" attached and thus□

published the complainant's surname.□

2. The complaint is related to the publication of the posting dated□

27.12.2018, 3.10 p.m., together with the associated photos as□

rejected without reason.□

Legal basis: Sections 1 (1) and (2), 9 (1), 24 (1) and (5) of the□

Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended; Art. 4, 5, 6, Art. 57 Para. 1 lit. f□

and Art. 77 Para. 1, Art. 85 of Regulation (EU) 2016/679 (General Data Protection Regulation□

– GDPR), OJ No. L 119 of 04.05.2016, p. 1; 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. 391.□

## REASON□

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

1. With a submission dated March 8, 2019, the complainant alleges an infringement□

in the right to secrecy and submits in summary that the minor□

Son Bernhard N\*\*\* (born January 21, 2006) of the respondent from a residential home in□

\*\*\*\* L\*\* was lost in \*\*\*\*\*. The Respondent had on December 27th□

In 2018, PI L\*\* in \*\*\*\*\* informed that his mj. son was with him at the address \*\*berg□

No. \*\*, \*\*mountain, stop. The nearest PI R\*\*\* was commissioned by the district control center□

been asked to bring the son back to the dorm. The complainant is□

Been a crew member of patrol "R\*\*\* 1", which carried out the official act□

have. After discussing the facts, Mj. Bernhard cooperated□

behaved, got into the company car voluntarily and into the dormitory in \*\*\*\* L\*\*□

been brought back. From the upper floor, the Respondent had, among other things, the□

Complainant photographed, whereby she expressly pointed out that□

Not agree to photograph.□

2. On December 27, 2018, the complainant found that the□

Respondent via his Facebook profile "Klaus N\*\*I" two photos of the official act□

put online publicly. The complainant was depicted in an identifiable manner□

and her name was mentioned in a post. As of December 29, 2018, that was□

Post shared and commented on several times. The post is currently no longer public.□

The processing of the image data is in violation of Articles 5 and 6 GDPR and Article 1□

Para. 1 in conjunction with Section 12 Para. 2 DSG. An exception is not fulfilled. It□

will therefore be sought to establish that the storage and transfer as well as the□

Publication by the Respondent on Facebook from December 27, 2018 until□

at least December 28, 2018 was unlawful and the complainant in her□

rights had been violated.□

3. With a statement dated May 12, 2019 (ha. received on May 15, 2019), the

Respondent essentially submits that his mj. son Bernhard N\*\*\* him and

had been taken away from his wife and was living in a dormitory. My dear Bernhard suffer

attention deficit disorder, the parents would have phoned him several times a day. At the

December 26, 2018 (and not as stated by the complainant on

December 27, 2018) Bernhard was at 2:00 p.m. with the respondent and his

Woman showed up at home. Already before that, on December 25, 2018, he was missing. the

Respondent and his wife had - as difficult as it was for them - the

police notified. At 2.30 p.m. the police R\*\*\* came with six men to

to pick up my son Bernhard. Bernhard was at this point with the

Respondent, his wife - i.e. father and mother, and 15-year-old Doris

(sister of mj. Bernhard) and her friend - in the living room around the corner table

sat down when five policemen came and Bernhard to go along immediately

requested, the complainant having announced otherwise

Putting on handcuffs and having to take Bernhard away. In the face of this

The Respondent's emotions ran high as a result of the situation and he

emotionally charged the images/postings that are the subject of the proceedings. This is im

In hindsight it was a mistake, but you have to see it in the light of the situation.

4. With a submission dated June 25, 2019, the complainant made her

Use of the hearing of the parties and announces that the opinion of the

Respondent does not result in any change in the basis for the decision. The applicable

In the opinion of the complainant, the violation of rights that had been made continued

given.

B. Subject of Complaint

Based on the arguments of the parties, the object of the complaint is to clarify whether

the complainant's right to secrecy was violated as a result

the Respondent two Facebook postings with pictures regarding a police

official act has published, on which the complainant in each case as involved

policewoman was pictured and in the second posting also with the addition "To a new woman

A\*\*\*" was mentioned by name.

### C. Findings of Facts

1. The Respondent's underage son, Bernhard N\*\*\*, born on January 21, 2006

from a dormitory in \*\*\*\*L\*\*. The respondent notified on

27.12.2018 the PI L\*\* in \*\*\*\* that his son is with him in \*\*\*berg, \*\*\*\*berg no. \*\*,

stop. The nearest PI R\*\*\* was therefore commissioned by the district control center

bring the mj. Bernhard N\*\*\* back to the dormitory in L\*\*. This official act

became et al. from the patrol "R\*\*\* 1" on December 27th, 2018 at approx. 2:30 p.m. in \*\*\*berg no. \*\*,

\*\*berg, performed. In total there were two police cars and six uniformed officers

involved in the official act.

2. The property used by the respondent with a single-family house is located on

edge of forest. From the street marked "\*\*\*\*berg", a paved driveway leads to

Respondent's family home. The two parked in that driveway

Police cars that can be seen in the photos, the photos being the two

Show service vehicles with partially open doors and three uniformed police officers who are in

stay in the immediate vicinity of the cars.

3. The complainant was a crew member of the "R\*\*\* 1" patrol. The mj. Bernhard

After appropriate discussion of the facts, N\*\*\* behaved cooperatively and

went voluntarily into the company vehicle and was subsequently also in the

Dorm returned.

4. When leaving the house, he was followed by his parents to the front door

accompanied. Following this, his father, the applicant, went to the first

floor and from there photographed the emergency vehicles next to them

including the Respondent. □

5. On December 27, 2018 at 4:39 p.m., the complainant found that the □

Respondent via his Facebook profile "Klaus N\*\*I" at 3:10 p.m. two photos of the □

police cars parked in front of his house - including uniformed police officers - with the □

Headline "This is how 12-year-old children get away from home with the police against their will □

pulled away. Please share. Police R\*\*\*\*" publicly online: □

Screenshot from the respondent's Facebook profile □

6. The Appellant requested the Respondent by telephone at 5:46 p.m. □

remove the post. □

7th From the processing history of this posting shows that it from □

Respondent posted online on December 27, 2018 at 3:10 p.m., at 5:58 p.m. that one □

image was removed from which the complainant is identifiably depicted, this □

however, uploaded again at 7:43 p.m. and again on 12/28/2018 at 1:02 p.m □

was removed. □

8. As of December 29, 2018, this post was shared by a total of 112 people and 96 times □

commented. The post is currently no longer public. □

9. On December 28, 2018 at 3:58 p.m., the Respondent posted the same again □

Photos under the title "To a new woman A\*\*\*\*": □

[Screenshot from the Respondent's Facebook profile] □

A minute later, the original title was changed to "To a new wife....." □

whereby the original entry can still be seen via the processing history □

was: □

[Screenshot from the Respondent's Facebook profile] □

By zooming in, it was possible to enlarge the image section as follows: □

[Fig. zoomed photo] □

Evidence assessment: The findings result from the credible and □

comprehensible arguments of the complainant, which by the respondent  
essentially undisputed. The only thing disputed was that the official act  
not on December 27, 2018, but on December 26, 2018. In this regard, the  
Data protection authority the comprehensible arguments of the complainant, who  
chronological process clearly presented, with a view to the  
The subject of the complaint can generally remain undecided as to the exact date  
the official act has taken place. The object of the complaint is the  
Production and publication of pictures of the official act on Facebook. on the  
exact day of the official act it comes down to the result – as far as the right to  
There is no time limit for filing a complaint – not on. Noting that two  
Cars with 6 men were involved in the official act is also evident from the  
procedural images, on which two cars can be seen, as well as the  
to that effect credible and comprehensible submissions by the respondent,  
which of the complainant in the context of the hearing of the parties also not  
was denied.

D. In legal terms it follows that:

D.1. Introduction and basic considerations:

1. The central linchpin for the decision in the present proceedings is  
the judgment of the ECJ of February 14, 2019, C-345/17 (Buivids). of this verdict  
underlying facts - the making and the publication of a self  
filmed videos on youtube, namely from the testimony of Mr. Buivids in the  
Premises of a department of the Latvian National Police in the course of a  
Administrative offense proceedings - is similar to the present facts.  
2. The ECJ has, in the context of this decision, which is still pending  
Directive 95/46/EG was based, but the essential statements were based on the GDPR  
are transferrable, two essential determinations have been made:

First, he found that recording by police officers in a

Police department and its publication in the material scope of

Art. 3 of Directive 95/46/EC falls, and on the other hand the ECJ has stated that

such processing is processing for journalistic purposes within the meaning of Art

Art. 9 of Directive 95/46/EC ("media privilege"), provided that this video

stating that the recording and publication is solely for the purpose

would have the right to disseminate information, opinions or ideas to the public. the

In the Buidvids decision, the ECJ (which, like the one at issue in the proceedings

Respondent was not a professional journalist) expressly citing his

previous case law states that "in view of the importance of the freedom of

Expression of opinion is due in any democratic society that

related terms, including that of journalism, interpreted broadly

Need to become".

3. Provisions similar to those in Directive 95/46/EC or the DSG 2000

according to the applicable legal situation can also be found in the GDPR and the

DSG as amended, as is yet to be shown.

D.2. In the matter itself:

D.2.1. Personal Data

1. According to Art. 4 Z 1 DSGVO "personal data" are all information that

to an identified or identifiable natural person ("data subject")

relate; a natural person is considered to be identifiable, who directly or

indirectly, in particular by means of assignment to an identifier such as a name, to a

identification number, to location data, to an online identifier or to one or more

special characteristics expressing the physical, physiological, genetic,

psychological, economic, cultural or social identity of this natural person

are can be identified.

2. The ECJ stated in the judgment cited above in para. 31 that the camera recorded image of a person within the meaning of the term "personal data". of Art. 2 Letter a of Directive 95/46/EC, provided that the identification of the data subject allows.

3. Since the essential criteria of the definition of "personal data" in Article 2 lit of Directive 95/46/EG and in Art. 4 Z 1 GDPR are comparable (direct or indirect identifiability of a specific or identifiable natural person) are the Conclusions of the ECJ not only on film sequences, but also on individual apply images.

4. The pictures published by means of two Facebook postings show that at procedural official act (collection of mj. Bernhard N\*\*) two Emergency vehicles in the driveway to the property \*\*berg, \*\*berg no. \*\*, with some parked with the doors open and three uniformed officers (including the Complainant [Editor's note: in the original text due to a obvious editorial oversight: "Respondent"]) right next to the cars see are. The recordings show that these three people are in area around the police vehicles, but initially no faces. Through At least the two people facing the camera are zoomed in – below them also the complainant – to recognize. In the first post about the photos from December 27th, 2018 (3:10 p.m.) it was announced that it was the "Police R\*" and in the second posting of December 28, 2018 (3:58 p.m.) is also the surname of named complainant.

5. The DPA therefore assumes that in the expandable (and thus recognizable) pictures, but all the more so in that Facebook posting that the inscription "Here's to a new woman A\*", from a processing of personal data Data within the meaning of Art. 4 Z 1 DSGVO of the complainant can be assumed, since the



Identifiability can be produced by zooming in or by mentioning the surname□

is made.□

#### D.2.2. Data processing and data protection responsibility□

1. Pursuant to Art. 4 Z 2 GDPR, "processing" means anyone with or without assistance□

process carried out by automated processes or any such series of processes in□

connection with personal data such as collecting, capturing, the□

Organizing, ordering, storing, adapting or changing□

Reading, querying, use, disclosure by transmission,□

distribution or any other form of provision, matching or□

association, restriction, deletion or destruction.□

2. Here, too, the considerations of the ECJ in the judgment of February 14, 2019, paragraph 37ff.,□

transferable. Because, as the ECJ said in the judgment, the process in it□

consists in putting personal data on a website as processing□

to watch.□

3. Since the essential criteria in the definition of "processing" of Art. 2 lit. b of the□

Directive 95/46/EG and Art. 4 Z 2 GDPR are almost identical (each with or without□

Process or series of processes carried out using automated processes□

connection with personal data, such as...), and the ECJ in the judgment of□

February 14, 2019 publication on a video website (youtube) where the□

Users can send, watch and share videos qualified as "processing"□

it can't be any different on Facebook. Taking the relevant photos and□

the publication of the personal data that is the subject of the proceedings□

Facebook are therefore undoubtedly to be regarded as processing.□

4. The object of the complaint is the respondent as the operator of the Facebook profile "Klaus□

N\*\*\*I" as the person responsible for data protection according to Art. 4 Z 7 DSGVO□

qualify because they have the purposes (such as uploading images, sharing content)□

and means (use of his Facebook profile) within the framework of Facebook Inc. for

platform options made available (cf. ECJ, judgment of June 5, 2018,

C-210/16, concerning a Facebook fan page).

D.2.3. Regarding the competence of the Austrian data protection authority:

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 Act<sup>1</sup> § 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 Comment<sup>2</sup> [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).

7. In the present case, the processing (taking photos and publication on Facebook) by the respondent. § 9 para. 1 DSG is therefore not relevant, the data protection authority considers itself competent to decide. It is therefore necessary to check whether the data processing in question is covered by the GDPR is.

D.3. Regarding point 2 (to the posting with the headline "This is how 12 year olds become Children dragged away from home with the police against their will. Please share. Police R\*\*\*" together with the associated photos):

1. With regard to the above, it must be examined whether the right to Protection of the complainant's personal data (Art. 8 EU-GRC and § 1 DSG) or the right to freedom of expression of the respondent (Art. 11 EU-GRC) prevails.

2. In its most recent Rsp. in terms of when a "Processing for journalistic purposes" is present, to which Rsp. of the ECtHR and those of referenced to this formulated criterion (cf. again the judgment of February 14 2019, C-345/17, para. 66). These criteria may, according to the Data Protection Authority also for the objective weighing of interests of the legitimate interests parties to the proceedings are used.

Accordingly, for the purpose of balancing the fundamental right to secrecy (Art. 8 EU-GRC) and freedom of expression (Art. 11 EU-GRC) in particular on

1) contributing to a debate of general interest,

2) the degree of familiarity of the data subject,□

3) the subject of the reporting,□

4) content, form and impact of publication,□

5) the manner and circumstances under which the information was obtained□

are and□

6) disable their accuracy.□

Ad 1) the contribution to a debate of general interest:□

a. With the first Facebook posting, the Respondent shares - as stated - two□

Photos of the official act that is the subject of the proceedings and explains: "So□

12-year-old children are dragged away from home by the police against their will.□

Please share. Police R\*\*\*."□

b. It is evident that the Respondent's aim was to obtain information□

To disseminate opinions or ideas in public or to publish the□

Images contribute to a debate of general interest, namely whether□

the official act in question – i.e. picking up a minor from his□

biological parents, who did not resist in this regard, and the return to□

the dormitory – with two emergency vehicles and six uniformed police officers□

seems appropriate. Questioning the proportionality of official acts –□

especially the use of police coercion and command power - emerges on a case-by-case basis□

repeatedly in the media and is regularly part of a debate of general□

interest (cf. in this sense also the judgment of the Supreme Court of June 27, 2019,□

GZ 6 Ob 6/19d).□

c. It is in relation to the first Facebook post facing the above□

criteria and the fact that not the complainant specifically, but only□

the official act was generally discussed, it can be assumed that at least one□

contribution to a debate of public interest.□

i.e. Since the first criterion has already been met, there is no need to continue with the other criteria□

To be received.□

The appeal is therefore on this point due to the primacy of the right to free□

Opinion on the right to personal data protection□

to reject.□

D.4. Regarding point 1 (regarding the posting with the heading "To a new woman A\*\*\*\*"□

along with the associated photographs):□

1. The situation is different with regard to the second posting ("Here's to something new□

Ms. A\*\*\*\*"). The complainant – as stated – has the respondent□

after the publication of the first posting, we were asked to delete it by telephone. this one□

The Respondent obviously took the call as an opportunity to post the original post□

to remove, but at the same time the photos that are the subject of the proceedings again□

Post to Facebook and add the phrase "Here's to a new Mrs. A\*\*\*."□

2. By naming the complainant's last name in connection with the□

photographs, the situation is presented differently in that it is no longer about that□

general detention of a (excessive in the opinion of the Respondent)□

Official act in the context of picking up a minor, but now the□

Complainant by name - for reasons that are not clear -□

is highlighted. One can no longer assume that this is the case□

Respondent in the second posting was about information, opinions or□

To disseminate ideas to the public or to contribute to a debate of□

to contribute to the general interest, but that he is dissatisfied with the□

complainant wished to express publicly.□

3. This is also underlined by the fact that the Respondent himself assumes that he□

made a mistake. A publication interest in the surname of the□

Complainant is not evident and therefore to be denied.□

4. The complainant, district inspector Gerlinde A\*\*\*, likes in R\*\*\*, a small one□

Community in the \*\*\*tal, known to be employed by the local police, a larger one□

It is, with a probability bordering on certainty, not part of the public□

known. It also did not come out in the process that in the course of the□

official act played a prominent role. However, is under consideration□

to include that the complainant as an organ in the enforcement of the law□

recorded during an official act. The data protection authority represents the□

believe that a different weighting should be applied here. Because it can't□

the same standard commonly used by private individuals to protect their privacy□

is created, also for organs of enforcement - especially in the context of police□

Command and coercive power – apply. This becomes clear from the already cited OGH□

Decision involving video recordings of an official act and the□

Assertion of claims from the protection of images (§ 78 UrhG).□

5. Notwithstanding the above, the Data Protection Authority considers that□

that the making of images of an official act and their subsequent□

Publication is not justified in every case, but only if this is the case□

Reasons of Art. 11 EU-GRC is necessary.□

6. The complainant's right to secrecy comes - under□

Based on the above criteria - in this regard when weighing up the higher protection□

to.□

D.5. Result□

Regarding point 1:□

The data protection authority therefore comes to the conclusion that due to the□

carried out weighing of interests in relation to the posting of December 28th, 2018,□

15:58, a violation of the right to secrecy has occurred because the legitimate□

Interests of the complainant (secrecy of their data) against the□

stated interests of the respondent (freedom of expression).□

§ 1 DSG or Art. 8 EU-GRC prevail.□

The processing of the complainant's surname that is the subject of the proceedings□

including the corresponding photographs by the Respondent was thus□

unlawful.□

Regarding point 2:□

With regard to the posting of 12/27/2018, 3:10 p.m., the data protection authority comes□

to the result that, based on the balancing of interests carried out, the legitimate□

interests of the respondent and the public (freedom of□

expression of opinion) predominate, so that an interference with the right to secrecy□

appellant was justified.□

It was therefore to be decided accordingly.□