

GZ: DSB-D123.076/0003-DSB/2018 from October 31, 2018□

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

Addresses (incl. URLs, IP and e-mail addresses), file numbers (and the like), etc.,□

as well as their initials and abbreviations can be used for pseudonymization reasons□

be abbreviated and/or modified. Obvious spelling, grammar and□

Punctuation errors have been corrected.]□

NOTICE□

S P R U C H□

The data protection authority decides on Walter A****'s data protection complaint□

(complainant) of June 25, 2018 against N*** Wasservertriebs GmbH□

(Respondent) for breach of the right to secrecy and for□

Violation of the information obligation as follows:□

1. The complaint is upheld and it is found that□

a) The Respondent thereby has the right to the Complainant□

Breached secrecy by giving his cell phone number□

Promotional measures used, and□

b) the Respondent's obligation to provide information pursuant to Art. 14 (1) and□

Para. 2 lit. a to e and g DSGVO violated.□

2. The Respondent is ordered, within a period of four□

w e c h e s, otherwise execution, a full notification in accordance with Art. 14□

GDPR with regard to information that the complainant does not already have□

were brought to the attention of this procedure.□

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; Article 14, Article 57 paragraph 1 letter f, Article 58 paragraph 2 letter c and A

Paragraph 1 of the General Data Protection Regulation (GDPR), OJ No. L 119 of 04.05.2016, page 1.□

REASON□

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

1. With a submission dated June 20, 2018 (ha. received on June 25, 2018), the□

Complainant alleged a violation of Art. 5, Art. 7, Art. 13 and Art. 14 GDPR and□

submitted that the Respondent received this on June 20, 2018 by telephone□

contacted to sell a water cooler. To the question of□

Complainant, where the Respondent got his cell phone number from, he had□

received no information.□

2. With a statement dated July 30, 2018, the Respondent brought□

summarized, that on June 20, 2018 there was actually a phone call between her and□

the complainant had taken place. However, there would be no violation of□

Principles governing the processing of personal data, nor a violation of the□

information obligations. The focus would be on wholesale and on the conclusion of contracts□

with companies or organizations. The Respondent has the on the□

Website of the national association of the "**** psychological aid association"□

(http://www.****hv.at) phone number announced. This number wise□

no reference to an identified or identifiable natural person. The number□

be a date that does not refer to a natural person but to an organization□

relate However, only natural persons could be affected within the meaning of the GDPR and the DSG□

being. Even if the complainant was a data subject, there would be none□

Infringement, since the mere dialing of the number published on the website□

does not trigger an information obligation according to Art. 14 DSGVO. Although the phone number is the□

Organization "**** psychological aid association" although on the organization's website□

collected, but neither stored nor passed on, or in any other more extensive way□

way been used. The fact that with a one-time phone call to the□

Interlocutors would first have to be given a large amount of information that□

all would not be relevant to start the actual conversation, would the□

Far exceed the requirements of the GDPR. The Respondent has in

Properly state your company and the purpose of the call.

3. In his opinion of 9 August 2018, the complainant countered that

the cell phone number provided on the website is a call option

or a contact option for those affected to get advice. also be

On the website you can see that this is a website for people with

deal with mental problems. Telephone advertising is forbidden in Austria. Furthermore have

the Respondent alleges that the Complainant already purchased a product from

you have, which would not be true.

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 confidentiality by providing his cell phone number

advertising measures used.

In addition, the question arises as to whether the Respondent has fulfilled its duty to provide information

has violated by informing the complainant in the context of this telephone

contact did not provide any (complete) information.

C. Findings of Facts

1. The Respondent collected a mobile phone number on the website of the

State association of the "**** psychological aid association", http://www.****hv.at/.

2. The URL http://www.****hv.at/ is structured as follows (formatting not

reproduced 1:1):

[Editor's note: The part reproduced here in the original as a facsimile

The ****HV website cannot be used for legal documentation purposes with justifiable

Effort to be reproduced pseudonymised. In summary, it is

the website of a nonprofit organization that provides help to people with mental health problems

diseases, mental and psychosocial problems. the

Complainant appears there with a photo as "chairman" and contact person.])

3. Clicking on the link next to the complainant's picture read

Continue here", you get to the complainant's profile with the URL

http://www.***hv.at/***.html. This is structured as follows (formatting

not reproduced 1:1):

[Editor's note: The part reproduced here in the original as a facsimile

The ***HV website cannot be used for legal documentation purposes with justifiable

Effort to be reproduced pseudonymised. In summary, it is

a self-description with photo stating a general e-mail address of the

***HV and a mobile phone number of the complainant.])

Evidence assessment: The findings made are based on the insofar undisputed

Submission of the complainant of June 20, 2018, on the statement of

Respondent dated July 30, 2018 and when the URLs were accessed

http://www.***hv.at/ and http://www.***hv.at/***.html on October 31, 2018.

4. The Respondent contacted the Complainant by telephone without

Existence of consent to sell or offer their products. the

During the telephone conversation, the complainant requested information

from which source the Respondent got this cell phone number. the

Respondent did not provide this information.

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

Complainant of June 20, 2018. The Respondent denied this in her

Neither did the statement of July 30, 2018, but merely suggested that a

Information about "our company and the purpose of the call" - so not exactly

from which source the cell phone number was obtained - would be mentioned.

D. In legal terms it follows that:

D. 1 On the competence of the data protection authority

First of all, it should be noted that calls for advertising purposes without prior consent

of the subscriber ("unsolicited messages") according to the provision of § 107 paragraph 1

TKG 2003 (which implements Art. 13 of Directive 2002/58/EC) and a

Corresponding administrative penalty according to § 109 Abs. 4 Z 8 TKG 2003 if necessary by the

competent telecommunications authority is to be imposed.

In this regard, the legal situation has also changed with the validity of the GDPR since May 25, 2018

not changed (cf. Art. 95 GDPR, according to which the regulation natural or legal

Individuals in relation to processing in connection with providing public

accessible electronic communication services in public

No additional obligations are imposed on communications networks in the Union, insofar as they

are subject to specific obligations set out in Directive 2002/58/EC, which are the same

pursue goal).

However, this does not mean that the complainant does not have a privacy complaint

according to § 24 Abs. 1 DSG or Art. 77 Abs. 1 DSGVO. Admittedly, the

Admissibility of the call for advertising purposes - as explained - according to the provisions of the

TKG 2003, in this respect an assessment of the lawfulness of the processing within the meaning of Art. 6

GDPR excluded. However, by violating the TKG 2003

at the same time a violation of the right to secrecy according to § 1 paragraph 1

DSG and also a violation of those provisions of the GDPR that

Do not impose any additional obligations within the meaning of Art. 95 GDPR on those responsible.

D. 2 Violation of the right to secrecy

a) Personal data

As submitted by the Respondent itself, the cell phone number on the

Website of the national association of the "**** psychological aid association" (****HV)

collected and then used to contact them.

If the Respondent submits that from their point of view it is not a

personal data of the complainant, but only one

I intended to conclude a contract with the ****HV, it must be countered that it

precisely does not depend on the intention of the person responsible, data in a certain way

to exploit. Likewise, § 1 Para. 1 DSG does not indicate the fault of the

those responsible. Rather, with regard to the question of whether a personal

Data is available, whether with a reasonable and legally permissible

identification is possible at great expense (cf. the judgment of the ECJ of October 19

2016, C-582/14, para. 43ff).

In the present case, the "profile" of the complainant is below the

specified telephone number on the URL http://www.****hv.at/. On the profile of

Complainant with the URL http://www.****hv.at/****.html it can be seen that it is

in this case the cell phone number of the complainant and, as a result, a

personal data ("Walter A*** - Mobil 06** / 1*2*3**45"). the

Circumstance that this cell phone number is apparently also used by people in need

"Counseling number" is used, does no harm.

b) In the matter

In the present case, it should first be noted that the complainant

Although on a violation of Art. 5 and Art. 7 GDPR (thus a lack of

Consent) based, but the rights of the data subject in Chapter III GDPR (Articles 12 to 23)

be enumerated exhaustively. According to the case law of the data protection authority, a

the data subject nevertheless bases itself on every provision of the GDPR,

if this results in a possible violation of the right

Confidentiality according to § 1 Para. 1 DSG (cf. DSB from September 13, 2018,

DSB-D123.070/0005-DSB/2018, according to which the person responsible violated Art. 32

can lead to a violation of § 1 Para. 1 DSG). Accordingly, there was one

Violation of the right to secrecy to check, which - as explained - not by

Art. 95 GDPR is included.

The Respondent submits that the Complainant (as Chairman of the ****HV)

already published the cell phone number on the website. She overlooks it

However, that cell phone number just wasn't made publicly available to

to receive calls for promotional purposes. Rather, the cell phone number serves as

"Counseling number" for people in need and should not be inappropriate (for

advertising measures) are used.

Respondent's general assumption of non-infringement

confidentiality interests worthy of protection for legitimately published data

not compatible with the provisions of the GDPR (cf. Jahnel, Handbuch

Data Protection Law [2010] Margin no. 4/27, but still with reference to Section 8 (2) DSG 2000). This

Perspective is also in line with the requirements of § 107 paragraph 1 TKG 2003, according to which

a cell phone number provided on a website for advice purposes

just not sufficient as a legal basis for the implementation of advertising purposes

is, but expressly a consent of the participant (or in the

data protection terminology: the data subject) is required.

As a result, it can therefore be stated that the Respondent is available

mobile phone number provided by the complainant inappropriate for advertising measures

used, which is why a violation of the right to secrecy was determined.

D. 3 Violation of the obligation to provide information

a) On Art. 14 as a subjective right

As already explained, the rights of data subjects are set out in Chapter III GDPR (Articles 12 to 23)

exhaustively listed. Although the provision of Art. 14 (duty to provide information if the

personal data were not collected from the data subject) not in

Art. 12 para. 2 mentioned, which only states that the person responsible for the data subject

person to exercise their rights under Articles 15 to 22 of the Regulation (henceforth

not Art. 14) must facilitate.

However, the European legislator has decided to extend the information obligation

Art. 14 GDPR should nevertheless be regulated in Chapter III of the regulation and not in

Chapter VI, which regulates the obligations of the controller and the processor.

It is already clear from the heading of Chapter III ("Rights of the data subject") that

according to Art. 14, it is on the one hand the duty of the person responsible,

to provide certain information, but on the other hand also a right

the data subject stipulates that he or she should also receive this information.

The fact that Art. 14 is apparently not mentioned in Art. 12 (2) GDPR can only

to be understood in such a way that the person responsible - for example in contrast to the right to

Information or deletion - not only active at the request of a data subject

must be (cf. Art. 12 Para. 3, according to which "about the request pursuant to Article 15

up to 22 measures taken must be informed immediately"), but the

The duty of the person responsible to provide information must be fulfilled regardless of the application.

Against this background, a violation of the information obligation does not have to be - such as

a violation of Art. 32 GDPR (cf. again DSB of September 13, 2018 loc. cit.) -

under § 1 para. 1 DSG, but can be subsumed directly on the basis of

DSGVO can be asserted as a subjective right.

b) In the matter

In the present case, personal data of the complainant

(mobile phone number) not collected from the complainant. Subsequently, the

Mobile number used to contact the complainant for promotional purposes.

Against this background, the Respondent pursuant to Art. 14 GDPR

subject to information.

In the present case, the Respondent initially refused the

complainant expressly within the framework of the telephone contact□

required notification of the information regarding the source (which, as stated, as□

subjective right can be demanded). This information was obtained as part of the□

Proceedings before the data protection authority subsequently granted.□

In addition, the Respondent also violated Article 14(3)(b) of the□

Regulation, according to which the further information according to Art. 14 DSGVO at the time□

to be made available in the first communication to the complainant. Self□

if you do not understand the telephone contact as a message and thus□

Art. 14 (3) lit. a GDPR applies, the Respondent would have□

no later than one month after the collection of the data, the relevant information□

have to make available.□

The result was also a violation of the information obligation according to Art. 14 GDPR□

determine.□

A period of four weeks seems appropriate to provide the missing information□

according to Art. 14 Para. 1 and Para. 2 lit. a to e and g GDPR (cf. Art. 14 Para. 5□

lit. a GDPR).□

It was therefore to be decided accordingly.□