Litigation room

Decision on the substance 57/2023 of 17 May 2023

File number : DOS-2022-01721

Subject: Complaint regarding refusal of access to sound recordings

The Disputes Chamber of the Data Protection Authority, composed of Mr Hielke

Hijmans, chairman, and Messrs. Jelle Stassijns and Frank De Smet, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016

on the protection of natural persons with regard to the processing of

personal data and on the free movement of such data and revocation of

Directive 95/46/EC (General Data Protection Regulation), hereinafter GDPR;

Having regard to the law of 3 December 2017 establishing the Data Protection Authority,

hereafter WOG;

Considering the regulations of

internal order, as approved by the Chamber of

Representatives on 20 December 2018 and published in the Belgian Official Gazette on

January 15, 2019;

Having regard to the documents in the file;

Made the following decision regarding:

The complainant:

Mr X, represented by Mr. Arne Saerens and Mr. Peter Van

Aerschot, both with offices at 8200 Bruges, Lieven Bauwensstraat

20, hereinafter “the complainant”;

The Defendant: Y, represented by Mr Benjamin Docquir and Mr. Margo Cornette, both

having its office at Marsveldplein 5, 1050 Brussels, hereinafter referred to as “the defendant”.

I. Facts and Procedure

1.

On April 7, 2022, the complainant submits a complaint to the Data Protection Authority against

defendant.

The complainant entered into two agreements with the defendant, whereby the defendant

would be responsible for developing a website (“…”) and company videos (“…”) for the

complainant, collectively referred to as "the Agreements". Under these agreements

telephone conversations took place regarding the functional development and design of

this website and videos. Such telephone conversations were recorded by the

defendant with a view to the proper implementation of the complainant's wishes in the framework

of the agreement. However, the complainant claims that he was not aware of this

recordings. Since 2021, there has been a dispute between the complainant and the defendant regarding the

performance of the agreement. In this context, the complainant has the right to inspect

with regard to telephone recordings. The defendant refused to provide a copy

of the telephone recordings, but states that the complainant can access the recordings

listen in her offices. The complainant believes that the telephone calls were unlawful

recorded and that his right of access was ignored. So he has a complaint

submitted to the GBA.

2. On April 28, 2022, the complaint will be declared admissible by the First Line Service on the grounds

of Articles 58 and 60 WOG and the complaint is dismissed pursuant to Article 62, § 1 WOG

submitted to the Disputes Chamber.

3. On April 28, 2022, in accordance with Article 96, § 1 WOG, the request of the

Disputes Chamber to carry out an investigation transferred to the Inspectorate,

together with the complaint and the inventory of the documents.

4. The investigation by the Inspectorate will be completed on 29 June 2022, the report reads

appended to the file and the file is transferred by the Inspector General to

the Chairman of the Litigation Chamber (Article 91, § 1 and § 2 WOG).

The report contains findings regarding the subject of the complaint and decision

that there would be a violation of:

1. Article 5 (1) (a) and (2) and Article 6 (1) GDPR;

2. Article 5, Article 24 (1) and 25 (1) and (2) GDPR;

3. Article 12 paragraph 1, paragraph 2, paragraph 3 and paragraph 4 and Article 15 GDPR; and

4. Article 12(1) and (2), Article 13(1) and (2), Article 5(2); Article 24(1) and Article

25, paragraphs 1 and 2.

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5. On 4 July 2022, the Disputes Chamber will decide on the basis of Article 95, § 1, 1° and Article 98 WOG

that the file is ready for consideration on the merits.

6. On 4 July 2022, the parties concerned will be notified by registered mail

of the provisions referred to in Article 95, § 2, as well as of those in Article 98 WOG. Also

they are informed of the time limits for their

to file defenses.

As regards the findings relating to the subject matter of the complaint, the

deadline for receipt of the statement of defense from the defendant

recorded on 29 August 2022, those for the complainant's reply on 19

September 2022 and finally those for the defendant's reply on 10

October 2022.

7. On 8 July 2022, the complainant requests a copy of the file (Article 95, § 2, 3° WOG), which

was transferred to him on July 14, 2022, and he indicates that he wishes to make use of

the possibility to be heard, in accordance with Article 98 WOG.

8. On 11 July 2022, the complainant will electronically accept all communication regarding the case.

9. On August 29, 2022, the Disputes Chamber will receive the statement of defense from the

defendant with regard to the findings relating to the subject matter of the

complaint. The defendant argues that the processing on its part is correct and permitted
data processing, with the principle of lawfulness and transparency
are respected. The defendant also argues that it may be incomplete
answering a question from the
Inspection service no violation of the
accountability. The defendant then argues that it is entitled to
access has not been made difficult. Finally, the defendant points out that they are transparent
has provided information to the complainant and has the necessary technical and
organizational measures to ensure the exercise of data subjects' rights
facilitate.

10. On 19 September 2022, the Litigation Chamber will receive the statement of reply from the complainant
with regard to the findings relating to the subject matter of the complaint. The complainer
agrees with the findings of the Inspectorate regarding the illegality of the
processing, the accountability for compliance with the obligations in the GDPR
and the transparency and information obligations on the part of the defendant. For what
concerns the finding regarding the obstruction of the right of inspection, the defendant states
that he wishes to exercise his right of access, as granted by the GDPR, and
that the restrictions invoked by the defendant are disproportionate to
his right of access.

11. On 10 October 2022, the Disputes Chamber will receive the statement of rejoinder from the
defendant with regard to the findings relating to the subject matter of the
complaint in which the argumentation is resumed as set out in the conclusion of
answer.

12. On November 28, 2022, the parties will be notified that the hearing will
take place on January 30, 2023.

13. On January 30, 2023, the parties will be heard by the Disputes Chamber.

14. On February 3, 2023, the minutes of the hearing will be sent to the parties appearing

submitted.

15. The Disputes Chamber does not receive any comments because of the parties that have appeared

regarding the record.

16. On 5 April 2023, the Disputes Chamber informed the defendant of its intention

made to proceed to the imposition of an administrative fine, as well as the

amount thereof in order to give the defendant the opportunity to defend himself,

before the sanction is effectively imposed.

17. On May 25, 2023, the Disputes Chamber will receive the response of the defendant to the

intention to impose an administrative fine, as well as the amount

of them.

II. Motivation

II.1. Article 5 (1) (a) (2) and Article 6 (1) GDPR with regard to legality

II.1.1. Findings in the Inspection Report

18. During the investigation, the defendant explained that the processing of

personal data through the recordings of the telephone conversations is based

to Article 6(1)(b) GDPR, i.e. “the processing is necessary for the performance of a

agreement to which the data subject is a party, or at the request of the data subject before the

conclusion of an agreement to take measures'. Based on his research

the Inspectorate concludes that the defendant has fulfilled the obligations imposed by Article

5 (1) (a), (2) and Article 6 GDPR has not been complied with. From the Respondent's Replies

after all, the Inspectorate cannot determine the answer to the research questions during the inspection

to what extent telephone conversations are effectively recorded, what the exact

purposes and the duration of storage of the recordings. In addition, the

according to the Inspectorate, the defendant failed to demonstrate the necessity. Hereby refers

the Inspectorate according to Article 10/1, §1 of the Law of 30 July 2018 on the

protection of natural persons

to the processing of

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personal data, which allows recording of telephone conversations provided that the bee

the communication involved parties are informed of before registration

the registration, its precise purposes and the duration of storage of the registration. The

The Inspectorate thus concludes that the defendant has complied with the obligations

by Article 5 (1) a) and (2) GDPR and Article 6 GDPR with regard to the

principle of legality.

II.1.2. Position of the complainant

19. In his conclusions, the complainant fully agrees with the findings of the Inspectorate.

II.1.3. Defendant's position

20. The defendant disputes this finding and argues in its conclusion that the recordings are

are really necessary for the correct execution of the agreement.

21. As to the necessity for proper performance, the defendant notes

that the Inspectorate has not asked to demonstrate the necessary nature,

since only the defendant was asked on what legal basis the processing operations,

being the recordings of the telephone conversations have taken place. In her conclusions

the defendant further explains the necessity. The necessity is twofold:

on the one hand the implementation of the specific agreement between the defendant and the complainant and

on the other hand, the guarantee of the quality of this agreement, which is a necessary

corollarium is of the execution of the agreement. These phone calls are for

to discuss the wishes and needs of the customer. The defendant illustrates this as follows:

when the parties have signed a contract, for example for making a

website, they discuss the concrete implementation modalities by telephone. The purpose of

this conversation is essential because it is at this time that the client explains his activities
are, what he expects from the website, etc. Based on this telephone conversation, a first
website layout design created. This method was chosen based on
the clientele of the defendant (mainly self-employed persons) who prefer a fast and
telephone conversation instead of an exchange of e-mails. This method does not prevent
that the customer receives written confirmation of the basic data that were
provided for the development of the website. Through constant communication between
her and her clients, the defendant can deliver tailor-made projects for the client
the recordings give the project managers the opportunity to check whether the needs have been met
of the customer, as expressed during the conversations. Thus, according to the defendant, no
there is a violation of Article 5 (1) a) (lawfulness) j° Article 6 (1) GDPR.
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II.1.4. Review by the Litigation Chamber
22. The starting point of Article 5(1)(a) GDPR is that personal data will only be processed lawfully
may be processed. This means, among other things, that there is a legal basis for the processing
of personal data as referred to in Article 6(1) of the GDPR must be present. In
further elaboration of this basic principle, Article 6 (1) GDPR states that personal data only
may be processed on the basis of one of the legal grounds listed in the article.
23. The Disputes Chamber notes that the recording of telephone conversations in the context of
business transactions are governed by both the GDPR and Article 10/1, §1 of the Law
of 30 July 2018 on the protection of natural persons with regard to the
processing of personal data (hereinafter: WVP).
24. The assessment of this file will therefore initially take place on the basis of the
provisions of the GDPR. The question arises to what extent the processing of
personal data took place lawfully, in accordance with, inter alia, Articles 5 and 6
of the GDPR. The Disputes Chamber emphasizes that the application of the GDPR as a regulation

of the European Union overrides the aforementioned national legislation because of the direct operation and primacy within the European legal order.1

25. As already mentioned, the defendant argues that the recording of the telephone conversations is based on the legal basis as understood in Article 6(1)(b) GDPR, i.e. “the processing is necessary for the performance of a contract involving the data subject party, or at the request of the data subject before entering into a contract to take measures”. It is therefore up to the defendant to prove that she legitimately invokes this ground for processing.

26. When personal data are necessary to perform a contract with the data subject that agreement forms the basis for the processing of those personal data, as stated in Article 6(1)(b) GDPR. The Disputes Chamber finds that the parties have entered into two agreements, the (“…”) dd. August 18, 2021 for what concerns the development of the website and the (“…”) for the purpose of producing a corporate video, also concluded on August 18, 2021. Both agreements were signed the Disputes Chamber.

27. Furthermore, a controller can only rely on this legal basis if the processing of personal data is strictly necessary for the conclusion or

1 i.o. CJEU of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos t. Dutch Administration of Taxes, C-26-62, ECLI:EU:C:1963:1; CJEU of 15 July 1964, Flaminio Costa v. E.N.E.L., C-6-64, ECLI:EU:C:1964:66; on the legal protection of citizens on the basis of Union law and the principles of 'direct effect” and “primacy”, see C. BARNARD, The Substantive Law of the EU: The Four Freedoms, Oxford (5th ed.), 2016, 17.

performance of the agreement. There must therefore be a direct and objective connection between the processing of personal data and the purpose of the contract.

28. The Disputes Chamber establishes that, according to the defendant, the necessity relates has on the one hand the performance of the specific agreement between the defendant and

complainant and, on the other hand, the guarantee of the quality of this agreement. Based on
two agreements between the defendant and the complainant
Litigation Chamber finds that these agreements contain several more general provisions
contain such as a description and cost of the services chosen by the complainant as
subscriber, the type of video to be produced, etc. Provisions regarding the
specific modalities were not stipulated in these agreements. The included
telephone conversations took place in the context of discussions of the specific
modalities . It goes without saying that not all customers have the same wishes and requirements
for their website or video. Also the use of a telephone call allows for easy
to discuss, clarify any ambiguities or ask questions, for both
parties. Any requirements for the customer can also change, which means that the
the defendant can respond more quickly by conducting these conversations by telephone
instead of by email. The recordings of these conversations serve to be able to be used again
listened to if necessary (for example when in doubt about certain aspects of the website, or to
verifying that all customer requests have been met). Considering its efficiency for
both the controller and the customer, the Litigation Chamber is of the opinion that
the necessity requirement is met.
29. As a result of the above, the Litigation Chamber believes that there is no infringement of
Article 5 (1) a) with regard to lawfulness and Article 6 (1) GDPR was committed
by the defendant.
II.2. Article 12, paragraph 2, paragraph 3 and paragraph 4 and Article 15 GDPR
II.2.1. Findings in the Inspection Report
30. On the basis of its investigation, the Inspectorate determines the right of the defendant
of inspection by the complainant unjustly made more difficult. After all, the defendant refuses a copy
of the telephone recordings, but only offers the possibility to transfer the recordings
to come and listen

at its headquarters. The defendant states, according to the

Inspectorate does not have elements that justify that it would be effectively impossible to

to provide the complainant with a copy of the aforementioned recordings in which, where appropriate

personal data of third parties have been made unrecognizable.

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II.2.2. Position of the complainant

31. The complainant recalls that – in accordance with Art

15 GDPR – de

controller

access via a copy of the

personal data. If a copy is the most appropriate way of providing access,

can, may and must be provided with a copy. The initial refusal of the

the defendant is a blatant violation of his rights, according to the complainant. The proposal to

coming to listen to the recordings at the head office does not meet the requirements of the

right of access as provided for in the AVG and makes it more difficult to exercise the right to

access significantly.

32. The complainant does not dispute that the right of access is not absolute and can be limited if

it would prejudice the rights and freedoms of others. However, this should not matter

lead to deprivation of all information. However, the complainant argues that the

restrictions do not apply to this case.

33. With regard to the exception in Article 15(4) GDPR regarding respect for the

rights of freedoms of third parties, the complainant states that the processed personal data of

the employees in the telephone conversation are very limited. It is, after all, a normal

professional telephone conversation using standard salutations.

Consequently, according to the complainant, the refusal to provide a copy is for these reasons

disproportionate. The complainant adds in subordinate order that he can too

agree to receive a version where the direct identification data of the

employees are omitted, or possibly even a written version of the

conversations where the direct identification data of the employees are omitted,

provided that the text of the recordings has been checked by an objective party or by the

playing the conversations after receiving the written text.

34. As to the defendant's argument regarding the use of the recordings as

piece of evidence in the context of legal proceedings, reminds the complainant that there is

no such legal proceedings have yet taken place. In addition, the

Respondent for forwarding the correct call/text. If the defendant

forwards the authentic conversations and declares this to be the case, there is none for the complainant

problem about this.

35. Finally, the complainant refers to the defendant's argument that the provision of

a copy of the recordings may constitute a breach of business secrecy. The complainer

argues that this cannot be the case. After all, these are standard conversations between a

customer and a company. Questions were asked during these conversations

every

website builder proposes to build a website or to make a business on a website

can imagine. According to the complainant, this cannot constitute a business secret. In addition, eight

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the complainant is bound by the provisions of the GDPR when obtaining or processing it

of the copies and that this is of course only intended for personal consultation.

36. As regards the alleged abuse of law , the complainant argues in its conclusions that the

the defendant herself has always contacted the complainant by telephone.

If all contacts were made by e-mail, the complainant would have all information

possess. Since the defendant therefore chose to make contact by telephone

it is normal that she should also be responsible for safeguarding the right

upon inspection by the complainant as he cannot exercise this himself. The complainant argues that it is not
the rights of defense of the defendant are being violated, but the
rights of defense of the complainant. After all, the complainant exercises a personal right that
is granted to him pursuant to a European regulation. This right to inspect the
the complainant is misunderstood by the defendant merely to keep the evidence to herself
and therefore complicates any future procedure.

II.2.3. Defendant's position

37.

In principle, the defendant argues in its conclusions that it does not have the right of access
unnecessarily complicated. As already stated, she has refused to provide a copy of
the recordings, but instead she invites the complainant to the recordings in her office
come and listen. After all, it argues that granting inspection does not mean a copy
must be provided. Referring to Article 15(4) GDPR, the defendant argues that the
right to obtain a copy is not absolute and obtaining a copy is not
may interfere with the rights and freedoms of others. The defendant argues that
reluctance to send a copy of a recording is fourfold.

38. Firstly, these recordings also contain personal data about/of employees of the
defendant. According to the defendant, it is not desirable that such recordings be included in the
get hold of a (dissatisfied) customer, as dissatisfied customers become employees
directly and in an unauthorized manner. Besides, it would
providing these recordings a
violate the protection of
personal data of the employees who are part of the recordings. Hereby has
the defendant made the trade-off between, in its view, improper use of the
right of access on the one hand and the right to protection of personal data of the
involved employees on the other hand.

39. Second, the defendant argues that the complainant wishes to use these recordings as evidence in a civil dispute or proceeding. If it comes to a court procedure, it is necessary to preserve the authenticity of the recordings.

This is made more difficult when the personal data of the employees concerned is removed from the conversation will be deleted.

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40. Third, the defendant argues that a large part of the production process is by telephone expires. Based on the telephone recordings, the working methods and know-how, and according to the business secrets, can be derived from the defendant.

41. Fourth, the defendant argues that the exercise of the right of access is unfounded since it constitutes a manifest form of abuse of law. The complainant and the defendant are after all, involved in a contractual dispute regarding the performance of the agreement.

As part of this, the complainant wishes to use the recordings as evidence in the context of a possible legal action. The rules and restrictions on the submission however, evidence in civil litigation is expressly regulated to rights of defense and the right to contradict. Due to the obligation to to transfer recordings, the right to a fair trial as guaranteed in Article 6 of the European Convention on Human Rights are ignored as the as a party to civil proceedings, the defendant can itself take the initiative and determine how the process proceeds. Deny the defendant the right to choose which evidence it wants presenting and when, is a flagrant violation of her right to due process.

II.2.4. Review by the Litigation Chamber

General principles

42. To begin with, the Litigation Chamber recalls that the right of access is one of the essential requirements of the right to data protection. It is the "gateway" which enables the exercise of other rights conferred by the GDPR on the data subject

grants, such as the right to rectification, the right to erasure and the right to

restriction of processing.2

43. The complainant has repeatedly exercised his right of access pursuant to Article 15 GDPR with regard to

of the defendant by requesting that he be provided with a copy of the recordings of

the telephone conversations in which the complainant participated. Through his lawyer, Mr

the complainant sent a final request by e-mail and registered letter on 21 March 2022

to the complainant:

My client urges you to provide an electronic copy of all

telephone conversation recordings that you have that involve my client if

participant in the conversation.

My client also requests about the processing of the telephone conversation recordings

provide him with the following additional information:

2 See most recently CJEU, 12 January 2023, Österreichische Post AG, C-154/21, ECLI:EU:C:2023:3, para 38, but also CJEU, 17 July 2014, YS et al., C-141/12 and C-372/12, EU:C:2014:2081, para 44, and CJEU 20 December 2017, Nowak, C-434/16, EU:C:2017:994, para 57, see also decision 15/2021 dd. February 9, 2021, para 141, and decision 41/2020 dd. July 29, 2020, para

47

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- the processing purposes

- the grounds for processing

- what other categories of personal data you have with regard to the conducted

keeps track of telephone conversations in addition to the actual recordings,

- the recipients or categories of recipients to whom the data has been or will be

provided;

-

if possible, the period during which the personal data is expected to be collected

are stored, or if that is not possible, the criteria for determining that period;

- when the personal data is transferred to a third country or a

international organization, information on the appropriate safeguards in this regard

transfer.

44. According to Article 15(1) of the GDPR, the data subject has the right to obtain from the

to obtain a definite answer from the controller as to whether or not he is being processed

regarding personal data. If the latter is the case, the person concerned has it

right to obtain access to those personal data and to information referred to in Article 15,

paragraph 1 a) - h) is stated, such as the purpose of the processing of the data and the

any recipients of the data, as well as information about its existence

rights, including the right to request rectification or erasure of its data, or to

submit a complaint to the GBA. The purpose of the right of access is the data subject's ability

to understand how his personal data is processed and what the consequences are

thereof, as well as to check the correctness of the processed data without him being

need to justify intention.3

45. Article 12 of the GDPR concerns the way in which data subjects can exercise their rights

exercise and stipulates that the controller is exercising those rights

must be facilitated by the data subject (Article 12 (2) of the GDPR), and without delay and in

in any case within one month of receipt of the request must provide information about the

measures taken in response to his request (Article 12(3) of the GDPR).

Where the controller does not intend to comply with the request,

he must communicate his refusal within one month, and inform the person concerned about the

possibility to submit a complaint against this refusal to the supervisory authority

data protection authority or appeal to the courts (Article 12(4).

of the GDPR).

3 EDPB Guidelines 01/2020 on data subject rights – right of access, dated 18

https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf, paragraph 13.

January 2022, available at

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46. The Disputes Chamber notes that the last request for inspection was sent by e-mail and

by registered mail on March 21, 2022. In this context, the Disputes Chamber points out that

the European Data Protection Board (hereinafter: EDPB) at that time already published the 'Guidelines

01/2022 on the rights of data subjects – right of access”4

published which provides guidance for controllers to deal with the

exercising the right to access.

Modality – provision of a copy

47. With regard to the modalities on which a controller should act

the Disputes Chamber points out

that Article 15 (3) GDPR stipulates that the controller must provide the data subject with a

copy of the personal data being processed. The obligation to a

to provide a copy should not be construed as an additional right of the data subject,

but as a means of granting access to the data. Consequently, access serves

to the data pursuant to Article 15 (1) GDPR, the complete information on all

data and this access cannot therefore be construed as granting

access to only a summary of the data. The obligation to make a copy

provision serves the purposes of the right of access, namely to the data subject

to become aware of the lawfulness of the processing and to verify it

check (recital 63). To achieve these goals it is in most

cases, it is not sufficient that the data subject is only allowed to view the information temporarily. Therefore

the data subject must be given access to the

information through a copy of the

receive personal data.5

48. The question therefore arises in what form the copy should be provided. Article 15(3) in fine GDPR states that when the data subject submits his request electronically submits, and does not request any other arrangement, the information in a commonly used electronic format must be provided, whereby the prevalence must be determined from the point of view of the data subject and not of the controller.6 In some In some cases, the circumstances themselves determine the format in which the personal data must be used be provided, such as with audio recordings since the voice of the person concerned itself is a constitutes personal data. In some cases, a transcript of the conversations may also be provided

4 EDPB Guidelines 01/2020 on data subject rights – right of access, dated 18 https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf

5 EDPB Guidelines 01/2020 on data subject rights – right of access, dated 18 https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf para 21 et seq.

6 EDPB Guidelines 01/2020 on data subject rights – right of access, dated 18 https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf, para 146 et seq.

January 2022, available at

January 2022, available at

January 2022, available for consultation

suffice, for example when this was agreed between the complainant and the controller.7

49. The Disputes Chamber believes that it had to transfer a copy of the sound recordings must be forwarded to the complainant. After all, these sound recordings contain the personal data that are spoken, but also the voice of the complainant, which also constitutes personal data and cannot be displayed in transcripts.

50. For the sake of completeness, the Disputes Chamber refers to the judgment rendered in the case

“Österreichische Datenschutzbehörde”8 in which the Court of Justice stated that “it
right to obtain from the controller a copy of the
personal data that are processed means that the data subject has a fair and
comprehensible reproduction of all such data must be given. This right includes it
right to obtain a copy of extracts from documents or even complete ones
documents or database extracts containing, among other things, those data, if the
provision of such a copy is indispensable to enable the data subject
effectively exercise the rights conferred on him by this Regulation, whereby must
It should be emphasized that this should also take into account the rights and
freedoms of others”.9

Exceptions

51. Despite this broad concept of a copy, and notwithstanding the fact that it is the
main modality by which access must be granted may be subject to certain conditions
circumstances other modalities are appropriate. Recital 63 of the GDPR states that the
right of access must not prejudice the rights or freedoms of others, including
including business secrets or intellectual property and in particular to it
copyright that protects the software. However, those considerations should not lead to it
that the data subject is withheld all information.

52. As already explained, the defendant puts forward several arguments in its claims
about this.

53. First, the defendant argues that the telephone recordings also contain personal data of
include its employees. The rights and freedoms of these employees continue to apply
to be insured by the defendant. The Litigation Chamber notes that Article 15, paragraph 4 of
the GDPR stipulates that the right to obtain a copy must not affect the
rights and freedoms of others. The general concern that rights and freedoms
of others can be affected by complying with the request for access, is not

7 EDPB Guidelines 01/2020 on data subject rights – right of access, dated 18

https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf para 153 et seq.

8 CJEU, , 4 May 2023, F.F. t. Österreichische Datenschutzbehörde, C-487/21, ECLI:EU:C:2023:369.

9 CJEU, , 4 May 2023, F.F. t. Österreichische Datenschutzbehörde, C-487/21, ECLI:EU:C:2023:369, para 45.

January 2022, available at

sufficient to invoke Article 15 (4) GDPR. The Disputes Chamber points it out

note, however, that the controller must be able to demonstrate that in the concrete

situation, the rights or freedoms of others would actually be affected.

54. As can be deduced from recital 4 of the GDPR and from the rationale behind Article 52 paragraph

1 of the European Charter of Fundamental Rights, in particular that the right to protection

of personal data is not an absolute right. Recital 4 states more specifically: “[…]

The right to the protection of personal data is not absolute, but must be

be considered in relation to its function in society and must conform to it

principle of proportionality against other fundamental rights […]".

the exercise of the right of access must also be weighed against others

fundamental rights in accordance with the principle of proportionality. The EDPB has

in the

Guidelines provide three steps to perform this trade-off. When this

consideration ex Article 15 (4) GDPR shows that granting the request is negative

affects the rights and freedoms of other participants (step 1), the

interests of all participants are weighed, taking into account the specifics

circumstances of the case and with the likelihood and severity of the risks involved

associated with the provision of the data. The controller

must try to reconcile the conflicting rights (step 2), for example

by taking appropriate measures to mitigate the risk to the rights and freedoms of

limiting others, such as, for example, the information concerning others as much as possible illegible instead of refusing to provide a copy of the personal data provide. However, if it is impossible to find a reconciliation solution, the controller decide in a next step which of the conflicting rights and freedoms and freedoms prevail (step 3).

55. Applied to the present case, the defendant has, in accordance with the above step one evaluated the complainant's application and determined that the withdrawals contain personal data of employees.

56. In the context of step 2, to verify whether transferring the copy has an impact on the rights and freedoms by others must the defendant if controller to try to resolve the conflicting interests reconcile by taking appropriate measures to mitigate the risk to rights and freedoms of the data subject as much as possible. It is in this context that the defendant has offered to come and listen to the recordings at its head office. The complainer declined this opportunity, but could nevertheless agree to a transcript received with omission of the direct identification data of the employees of defendant, subject to the necessary guarantees as to its correctness. However, none was found a way between the parties to reconcile the conflicting rights.

57.

In the third step, the defendant thus had to verify which of the conflicting

rights prevail. This should take into account the probability and

seriousness of possible risks with regard to the rights and freedoms of the

employees in the telephone recordings. The defendant contends that the right belongs to her

employees prevail and in this way wishes to shield them from (dissatisfied)

customers. The Disputes Chamber does not follow this view. The Disputes Chamber notes that there

personal data of the employees may be present in the telephone recordings,

but that it is about a limited amount, such as the voice and the name. In addition

the conversation of a professional nature. The Disputes Chamber therefore concludes that there are few

have no adverse consequences for the rights and freedoms of employees. The

The Litigation Chamber therefore rules that the defendant does not rely on these rights and

liberties can appeal for the refusal to transfer a copy to the

defendant.

58. As a second argument in the context of the refusal to provide a copy to the

complainant, the defendant argues that the Inspectorate misjudged during the investigation

that the complainant wishes to use these recordings as evidence in a civil lawsuit

dispute or proceeding, the authenticity and integrity of which must be preserved. The

The complainant argues in this regard that no legal proceedings have yet been initiated.

59. The Disputes Chamber points out that, given the broad application and interpretation of the

right of access, the purpose for which the right of access is exercised must not be

considered a condition for the exercise of this right. So it won't come

to data controllers to verify why the data subject has access to it

personal data, but only on what the request for access entails and whether or not

does not process personal data of the data subject. In the aforementioned Guidelines, the

EDPB also gives as an example that a controller is not allowed to access

refuse on the basis of suspicions that the personal data concerned would be used

may be required by the person concerned to defend himself in court in the case

of a commercial dispute with the controller.10 The Disputes Chamber

therefore concludes that the defendant cannot rely on this for the refusal

of the right of access.

60. Third, the defendant argues that a large part of the production process is by telephone

and aims to discuss the needs, wishes, working method, etc. with the customer.

After all, the products offered by the defendant are tailor-made products

for the customer. Based on the conversation content, such as the questions that would be asked

10 EDPB Guidelines 01/2020 on data subject rights – right of access, dated 18

January 2022, available at

https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf para

13. AG Emiliou

confirms this statement in its Opinions in Case C-307/22, 20 April 2023, FT v. DW, para 28, https://eur-

lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CC0307.

to the customer, it would therefore be possible to share the working methods, know-how and so on

derive business secrets from the defendant.

61. As already mentioned, recital 63 states that the right of access must not be prejudiced

to the rights or freedoms of others, including trade secrets. The GDPR

does not, however, clarify what should be covered by business secrecy within the meaning of Recital 63 GDPR

to be understood. In Belgian national law, Article I.17/1 ELC defines it

trade secret as follows:

“Information that meets the following cumulative conditions:

a) it is secret in the sense that it, in its entirety or in its correct composition and

arrangement of its constituents is not generally known or easily accessible

is for persons within the circles usually dealing with the

relevant type of information;

b) it has commercial value because it is secret;

c) it has been subject to reasonable consideration by the person lawfully in control of it

measures, given the circumstances, to keep it secret."

62.

The Disputes Chamber understands from the conclusions of the defendant that in the recordings

discussing how the website would be built. Questions would have been asked

from which the know-how and production processes of the defendant could

being distracted. Transferring a copy of these conversations would therefore be a violation

form part of the defendant's trade secret, the defendant claims. The

However, the Litigation Chamber notes that this information does not comply with the above

definition of a trade secret. According to the first condition of the aforementioned

definition is a trade secret in the sense that it, in its entirety, or in its proper form

composition and arrangement of its constituents, is not generally known, or easy

is accessible to persons within the circles usually dealing with the

relevant type of information. The Litigation Chamber notes that this information is not

limited

accessible

is. This

information becomes

indeed communicated

in

standard conversations with all customers, where it is also possible for competitors to

pretending to be a customer in order to obtain the necessary information. Moreover, this one

information is also not protected by a non-disclosure agreement. This would

thus mean that the customers would have access to the alleged business secrets of the defendant

can and may pass on to third parties. After all, the information is already given during

the conversations themselves without any agreement to keep them secret at the time

to hold. Moreover, the information still needs to be in the correct composition or arrangement

components are placed so that they could be relevant to the know-how

track down.

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63. In view of the above, the Disputes Chamber rules that the above-mentioned exceptions

to the right to transmit a copy do not apply in this case.

Abuse of law

64.

In subordinate order, the defendant argues that the exercise of the right of access

is unfounded as it constitutes a manifest abuse of law. The Defendant

argues in this connection that the complainant misused the relevant

wishes to obtain recordings in the context of the commercial dispute. In its conclusions

the complainant argues that it is the defendant herself who is in constant contact by telephone

recorded with the complainant. According to the complainant, the defendant must therefore be responsible for the

safeguard the complainant's right of inspection, as he cannot exercise this himself.

65. The Litigation Chamber recalls that EU law is not intended to be abused or

fraud may be invoked.11 Advocate General Kokott states in connection with the

abuse of the right of access that determines whether there has been abuse as well

requires an objective as well as a subjective element. What, first, the objective element

must be apparent from a set of objective circumstances that, notwithstanding the

formal compliance with the conditions imposed by a Union regulation, the

scheme intended purpose was not achieved. Secondly, such a determination also requires

a subjective element, in the sense that a set of objective factors must show that

the essential purpose of the acts in question is an unjustified

gain benefit. After all, the prohibition of abuse does not apply when the

the acts in question may have an explanation other than the mere acquisition of

an (unjustified) advantage.12

66. With regard to the objective element, the Disputes Chamber notes that the wishes and

needs of the complainant, which he expresses as a customer of the defendant, as personal data

be qualified as such information because of its content, purpose or effect

is related to a specific person (namely the complainant himself). Express these conversations

after all, the vision and train of thought of the complainant with regard to the desired products.

The collection of this information by the defendant is for the purpose of developing a product

tailored to the complainant. After all, it is the complainant's intention to

the bespoke website and video to distinguish itself (and its sole proprietorship)13

of its competitors.

11 CJEU, 9 March 1999, Centros, C□212/97, EU:C:1999:126, para 24, CJEU, 2 June 2016, Bogendorff von Wolffersdorff,

C□438/14, EU:C:2016:401, paragraph 57.

12 AG Opinion at CJEU, 20 July 2017, Nowak, C-434/16, ECLI:EU:C:2017:582, para 42 et seq.

13 The Court of Justice has ruled that "insofar as the official title of the legal person is one or more natural

identifies persons", the legal person under Articles 713 and 813 of the Charter of Fundamental Rights of the

European Union can claim the protection of data related to it.13 Since the AVG

is an elaboration of the overarching safeguards laid down in these Charter provisions, such

protections for legal persons also derive from the GDPR, although this protection does not apply to the legal person as such

67. This qualification as personal data means that the basic principles of the GDPR

apply as well as that the data subject can exercise his rights under the GDPR

exercise, such as the evaluation of its correctness or the right to oppose

the processing of his personal data outside the context of the closed
agreements to. It must thus be established that the granting of a right to
access to those wants and needs in the recordings serves the purpose of the GDPR, that in it
exists to guarantee the protection of the right to privacy of the
complainant in connection with the processing of his personal data.

68. With regard to the subjective element, the Litigation Chamber finds that the essential
the purpose of the acts in question is not to take an unfair advantage
to acquire. The Disputes Chamber states that the exercise of the right of access is the only
way is for the complainant to check to gain access to which personal data the
the defendant processes and how this processing takes place, if necessary. Since
the contacts are made by telephone, the complainant himself has no written record of the
processing of its data. A request cannot be refused if the
the person concerned would have the intention to use the personal data to file a complaint
against the defendant.14 Consequently, there can be no question of an abuse of law.

69. The Inspection Report finds that there would also be a breach of Article 12(3) and (12)
4 GDPR. However, the Litigation Chamber finds that the defendant has an answer
has formulated at the request of the complainant within the set period of one month,
as a result of which there is no infringement of Article 12 (3) GDPR. The defendant has
the request for inspection was also not simply refused, but stated -insufficient
equivalent - alternatives to, so that there is no infringement of Article
12 (4) GDPR.

70. In view of the above, the Disputes Chamber rules that the defendant is not correct
and has lawfully acted upon the exercise of the right of access to the
complainant, which constitutes an infringement of Article 12(2) and Article 15 of the GDPR.

II.3. Article 5(1)(a) (transparency), Article 12(1) and Article 13(1) and (2) GDPR

71. Based on Article 12(1) and Article 13(1) and (2) of the GDPR, it is necessary that the

defendant as controller to the data subjects concise, transparent

and provides understandable information about the personal data being processed. The

the aforementioned transparency obligations constitute a concretization of the general ones

transparency obligation of Article 5(1)(a) GDPR. As already explained, the

concerns, but the natural person(s) who constitute them, and is likely to arise mainly in cases where the

legal entity is in fact a sole proprietorship or a small family business with a transparent "corporate veil".

14 EDPB Guidelines 01/2020 on data subject rights – right of access, dated 18

https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf, paragraph 13.

January 2022, available at

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the defendant take the appropriate technical and organizational measures to

guarantee and be able to demonstrate that the processing takes place in accordance with the GDPR. The

the defendant must thereby effectively implement the data protection principles, the

protect the rights of the data subjects and only process personal data that

are necessary for each specific purpose of the processing.

II.3.1. Findings in the Inspection Report

72. The Inspectorate first of all finds that the defendant does not demonstrate that she is the complainant

has effectively informed transparently and in a timely manner about the information that needs to be disclosed

delivered in accordance with Articles 12 and 13 of the GDPR.

II.3.2. Position of the complainant

73. The complainant fully agrees with the findings of the Inspectorate. Adds to this

he admitted that he had indeed not been adequately informed that the

calls were recorded. The complainant denies that he calls the

was informed that the interviews were being recorded. It's first on it

subsequent e-mail communication that he was informed of the recordings. Consequently has

the defendant has not complied with its information obligation.

II.3.3. Defendant's position

74. The defendant argues in its conclusions that it has failed to fulfill its obligations of transparency
has not violated Articles 12 and 13 GDPR. The defendant argues that it
complainant at different times and through different channels
informed about the processing at issue, namely when the contracts are concluded,
via the privacy statement on the website and via the automatic messages upon receipt of
the calls. As for the lack of clarity regarding the recordings made by the
Inspection Service was established, the defendant raises that the telephone calls
were only recorded for incoming and outgoing calls from the general number.
If an employee contacted the complainant directly or directly through the
the complainant was contacted, the conversations were not recorded. In addition, the
complainant was informed of his rights under the GDPR according to the defendant's implementation
in order to facilitate its exercise. The defendant therefore concludes that it is
has duly complied with its obligations under Articles 12 and 13 of the GDPR.

II.3.4. Review by the Litigation Chamber

75. The Litigation Chamber must judge whether the complainant has been adequately informed about the
disputed processing to meet the requirements of Article 12 (1) and Article 13 (1) and (2) GDPR
to fulfil.

76. Article 12,
paragraph 1 GDPR prescribes that the controller “appropriate
measures” to ensure that the data subject receives the information referred to in Articles 13 and 14
[...] related to processing in a concise, transparent, understandable and easy way
accessible form and in clear and plain language, in particular when the
information is specifically intended for a child”.

77. The Disputes Chamber notes that Article 14 of both concluded agreements stipulates

that the telephone conversations can be recorded for the purpose of carrying out the

agreement. This is also stated in the privacy statement. In this regard, the

Litigation room to the

guidelines

regarding

transparency of the Group

Data Protection Article 29 which provides as follows: "Any company with

a website would have a statement or notice on that site about the protection of the

privacy should be published. A direct link to this statement or

notice on the protection of privacy would be clearly visible

must be on every page of the website, under a commonly used term (eg.

"Confidentiality", "Confidentiality Policy" or "Protection Notice".

privacy".15 The Article 29 Data Protection Working Party states that "all

information sent to a data subject should also be accessible at

a single place or in the same document (on paper or in electronic format) that is easy

can be consulted by this person if he has any information given to him

wish to consult." 16

78. The Litigation Chamber points out that the complainant was informed about the disputed

processing via the agreements – signed by him – and via the privacy statement.

However, the Disputes Chamber hereby notes that not all essential information has been communicated

became.

79. First of all, the Disputes Chamber notes in this context that the privacy statement is not op

mentions in sufficient detail the precise legal basis(s), the

purposes of the processing and the personal data used, as required

by Article 13 (1) and (2) GDPR. The Disputes Chamber has established that the privacy statement is

mentions these elements, but that the way in which it is not comprehensible and transparent to

the data subjects, since it is not clear to the data subject which data is for which

purpose are processed and on the basis of which legal basis this is done. Ideally provides

the controller a list of the different purposes for which

he processes personal data, each time indicating which (categories of)

15 Working Group "Article 29", "Guidelines on transparency under Regulation (EU) 2016/679", revised and

Version approved on 11 April 2018 (available at: https://ec.europa.eu/newsroom/article29/items/622227), point 11.

16 Working Group "Article 29", "Guidelines on transparency under Regulation (EU) 2016/679", revised and

Version approved on 11 April 2018 (available at: https://ec.europa.eu/newsroom/article29/items/622227), point 17.

personal data are processed for this purpose, from which source they were obtained

how long they are kept and with which (categories of) recipients they (may) be used

shared.17

80. Second, the Disputes Chamber notes that the privacy statement does not state clearly

makes of the retention periods of the personal data concerned or the criteria for

provision thereof, as required by Article 13 (2) a) GDPR. The privacy statement states

the following in this regard: “[Defendant] shall use all necessary means to ensure

ensure that the data of a personal nature is kept for the above

purposes described and that it does not exceed the legal deadlines.” As also from the

Guidance from the Data Protection Group shows that such

wording not. The Data Protection Working Party points out in this regard that the

(mention of the) retention period is related to the principle of minimum

data processing covered by Article 5 (1) c) GDPR as well as the requirement of storage limitation

of Article 5 (1) e) GDPR. It specifies that “the storage period (or the criteria for

determine) may be dictated by factors such as legal requirements or sectoral

guidelines, but should always be formulated in such a way that the data subject, on the basis

of his or her own situation, can assess the retention period for specific

data/purposes".18 In view of all of the foregoing, the Disputes Chamber proposes a

violation of Article 5(1)(a), Article 12(1) and (2), Article 13(1)(c) and (2)(a)

of the GDPR.

II.4. Article 5 GDPR, Article 24 (1) GDPR and Article 25 (1) and (2) GDPR

II.4.1. Findings in the Inspection Report

81. The controller must comply with the principles of Article 5 GDPR and that

can demonstrate. This follows from the accountability as understood in Article 5, paragraph 2 j°

article 24,

paragraph 1 GDPR. Based on Articles 24 and 25 GDPR, every

controller takes appropriate technical and organizational measures

to ensure and be able to demonstrate that the processing takes place

in accordance with the GDPR.

82.

In its Inspection Report, the Inspectorate notes that Articles 5, 24(1) and 25(1) and

2 GDPR were violated.

17 This allows the data subjects to ask specifically with which individual via a request for the right of access

recipients the personal data are communicated, see e.g. CJEU, 12 January 2023, Österreichische Post AG, C-154/21,

ECLI:EU:C:2023:3.

18 Guidelines on Transparency under Regulation (EU) 2016/679, WP260rev1 adopted on 29 November

2017, p25.

83.

In the context of his research on accountability in the context of the

compliance with the basic principles of Article 5, paragraph 2 GDPR, the Inspection Service has the following

question sent to the defendant:

"A documented answer to the question of which technical and

organizational measures the [the defendant] has taken to ensure that

its processing activities take place in accordance with the principles on

processing of personal data in accordance with Articles 5, 24 and 25 of the GDPR."

84. The defendant has formulated an answer to the above question that, according to the

Inspectorate, focuses on – according to the defendant – the correct handling of the

request for the complainant's right of access. The Inspectorate sets its

Inspection report that this answer is beside the point as the question was related to

the defendant's compliance with all basic principles of the GDPR since the 25th of May 2018.

Consequently, the Inspectorate comes to the conclusion that there has been a violation of Article 5, Article

24 (1) and Article 25 (1) GDPR.

85. Secondly, the Inspectorate finds that the defendant does not provide evidence

what technical and organizational measures were taken to exercise it

of the rights of the data subjects and to be able to adequately monitor them

in accordance with Article 12 GDPR. In this context, the Inspection Service refers to (i) being

previous finding that the defendant wrongly denied the complainant's right of access

made it more difficult and (ii) the fact that the defendant does not mention anything in its answer

and copies of documents that in practice, on the one hand, the management and employees

inform and raise awareness of the defendant about facilitating and adequate follow-up

of the rights of the data subjects and, on the other hand, contribute to preventing infringements and

(human) errors regarding the rights of the data subjects become effective and efficient

followed up and, where necessary, sanctioned. As a result, the Inspectorate arrives at the

finding that there is a violation of Article 24(1) and Article 25(1) GDPR.

II.4.2. Position of the complainant

86. The complainant agrees with the findings in the Inspection Report.

II.4.3. Defendant's position

87.

In its conclusions, the defendant disputes this finding. The defendant regrets that the
Inspectorate has come to a violation of accountability as understood
in Article 5 (2), Article 24 (1) and Article 25 (1) GDPR due to a misunderstanding of a
of the questions of the Inspectorate by the defendant. The defendant denies the
finding that her answer to the above question was not specific enough, while
the question was anything but specifically formulated, according to the defendant. The Defendant
also points out that she had mentioned in her reply that she was always available to all

further information, but that no further questions were asked. In addition, some
days later the inspection investigation was completed.

88. Since the defendant's findings regarding transparency and the right of access
contested, it therefore also argues that it does have the appropriate technical and organizational
has taken measures to ensure transparency obligations and
facilitating the right of access.

II.4.4. Review by the Litigation Chamber

89. The Litigation Chamber recalls that each controller has the
basic principles on the protection of personal data as understood in Article 5,
must comply with paragraph 1 GDPR and must be able to demonstrate this. That follows from the
accountability in Article 5(2) GDPR in conjunction with Article 24(1) GDPR as
confirmed by the Litigation Chamber19.

90. Based on Articles 24 and 25 of the GDPR, the defendant must take appropriate technical
and organizational measures to ensure and be able to demonstrate that the
processing takes place in accordance with the GDPR. The defendant must do so
effectively implement data protection principles, the rights of data subjects
as well as only process personal data that is necessary for each
specific purpose of the processing.

91.

In the context of its investigation, the Inspectorate assessed to what extent the

the defendant has taken the necessary technical and organizational measures to

comply with these principles from Article 5 (1) GDPR and in particular the principle of

legality and transparency. In this case, the defendant has replied to

the Inspection Service in which it explains the aspects regarding the GDPR from the

complaint, such as the information obligations and the right of access. The Dispute Chamber reads

however, in the Inspection Report that the answer formulated by the defendant

was not sufficient for the

Inspection Service. As explained above

is the

Inspectorate in this case believes that certain information, which is for the Inspectorate

essential

is to arrive at a good assessment, which means that the

Inspectorate concluded that there had been a violation of Article 5, paragraph

2, Article 24 (1) and Article 25 (1) GDPR.

92. The Disputes Chamber hereby notes if the Inspectorate establishes that there are no

concrete information was provided by a controller, this one

leads to further research. The Disputes Chamber establishes that

in this case no additional questions were asked about specific subjects or that no

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https://www.dataprotectionauthority.be/professioneel/publicaties/besluiten.

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no specific documents were requested in order to make a proper assessment of the

case with regard to accountability under the

basic principles of the GDPR included in Article 5(1)(b) to f) GDPR.

93. The Disputes Chamber established in section II.2.4 that there had been an infringement of

the obligation to facilitate the request for access by the data subject

pursuant to Article 12, paragraph 2 in conjunction with Article 15 GDPR. The Litigation Chamber has ruled in part II.3.4

that there was also a breach of the transparency obligations such as

included in Article 12 (1) and Article 13 (1) (c) and (2) a) GDPR with regard to the

understandable language and the indication of the retention periods in the privacy statement.

94.

The Disputes Chamber therefore concludes that the defendant could not demonstrate that he

has taken the necessary technical and organizational measures to comply with this

obligations. Consequently, the Litigation Chamber concludes that there was an infringement of

Articles 5 (2), 24 (1) and 25 (1) GDPR with regard to the obligations

arising from Article 12, paragraph 2 j° Article 15 GDPR on the one hand and Article 12, paragraph 1 and Article

13 (1) c) and (2) a) GDPR on the other hand.

95. As for accountability

in the context of compliance with the

basic principles of the GDPR as understood in Article 5(1)(b) to f) GDPR, the

Litigation Chamber determined that there are insufficient elements to lead to a violation of this

judgements.

III. Sanctions

III.1. General

96. On the basis of the documents in the file, the Disputes Chamber establishes that there is

subsequent violations

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Article 12 (2) and Article 15 GDPR with regard to the right of access;

Article 5 (1) (a) (transparency), Article 12 (1) and Article 13 (1) (c) and (2) a) GDPR, for

with regard to the understandable language and the indication of the retention periods in the

privacy declaration;

97. Pursuant to Article 100 of the WOG, the Disputes Chamber has the authority to:

1° to dismiss a complaint;

2° to order the exclusion of prosecution;

3° to order a suspension of the judgment;

4° propose a settlement;

5° formulate warnings and reprimands;

6° to order that the data subject's requests to exercise his rights be complied with

to practice;

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7° order that the data subject be informed of the security problem;

8° order that the processing be temporarily or permanently frozen, restricted or prohibited;

9° order that the processing be brought into compliance;

10° rectification, restriction or deletion of data and notification

to recommend it to the recipients of the data;

11° to order the withdrawal of the accreditation of certification bodies;

12° to impose penalty payments;

13° to impose administrative fines;

14° the suspension of cross-border data flows to another State or

to recommend an international institution;

15° transfer the file to the prosecutor's office of the public prosecutor in Brussels, who

informs it of the follow-up given to the file;

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

the Data Protection Authority.

III.2. Article 5 (1) (a) (transparency), Article 12 (1) and Article 13 (1) (c) and (2) (a) GDPR in

in combination with the accountability principle ex Article 5(2), Article 24(1) and

Article 25 (1) GDPR

98. As regards the infringement of Article 5(1)(a) (transparency), Article 12(1) and Article

13 (1) (c) and (2) a) GDPR, with regard to the understandable language and the indication of the

retention periods in the privacy statement, the Disputes Chamber reminds that they have a lot

attaches importance to transparency as one of the fundamental principles of the GDPR.

Transparency is an overarching obligation under the GDPR, which applies

is in three key areas: 1) the provision of information to data subjects related to

proper processing; 2) the way in which controllers

communicate with data subjects about their rights under the GDPR; and 3) the manner

on which controllers help data subjects to exercise their rights.

In addition

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hold controllers and processors accountable. It's coming

therefore to the defendant as controller to take the necessary appropriate

take technical and organizational measures to enforce the principle of transparency

guarantees. In the present case, the breach of transparency is not of that nature

prevent or seriously hinder the application of these core areas. In this case, the infringement

limited to stating the necessary information in an obscure manner,

as well as not explicitly stating the retention period. Consequently, the Litigation Chamber

is therefore of the opinion that a reprimand in accordance with Article 100, paragraph 1, 5° is appropriate

for this infringement.

III.3. Article 12 (2), Article 15 GDPR, in combination with the principle of accountability ex

Article 5 (2), Article 24 (1) and Article 25 (1) GDPR

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99. With regard to Article 12 (2), (3) and (4), Article 15 GDPR, in conjunction with the

accountability principle pursuant to Article 5(2), Article 24(1) and Article 25(1) GDPR for

regarding the right to

inspection, the Disputes Chamber deems it appropriate to have a

impose an administrative fine of EUR 40,000 (Article 83(2), Article

100, §1, 13° WOG and article 101 WOG).

100. It should be pointed out in this context that the administrative fine does not matter

purports to terminate an offense committed, but a firm enforcement of

the rules of the GDPR. After all, as can be seen from recital 148 GDPR, the GDPR states

First of all, in the event of any serious infringement – including the first finding of an infringement –

penalties, including administrative fines, in addition to or instead of appropriate ones

measures are imposed.20 Below, the Disputes Chamber demonstrates that the infringements that

the defendant has committed on the aforementioned provisions of the GDPR by no means small

infringements, nor that the fine would impose a disproportionate burden on a

natural person as referred to in recital 148 GDPR, where in either case

can be waived from a fine. The fact that it is a first adoption of a by

the defendant committed an infringement of the GDPR, does not affect this in any way

On

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the Disputes Chamber

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administrative

impose a fine. The Disputes Chamber will impose the administrative fine

application of Article 58(2)(i) GDPR. The instrument of administrative fine has

in no way intended to terminate infringements. To this end, the GDPR and the WOG provide for a

number of corrective measures, including the orders referred to in Article 100, §1, 8° and 9°

WOG.

101. Taking into account Article 83 GDPR and the case law21 of the Marktenhof,

the Disputes Chamber to impose an administrative sanction in concrete terms:

The seriousness of the breach (Article 83(2)(a) GDPR)

102. In the context of the transparency principle, the controller must provide the

facilitate the exercise of the data subject's rights. For data protection

it is essential that data subjects can easily exercise their rights under the GDPR

can exercise. This enables the data subject to simply

20 Recital 148 states: “In order to strengthen enforcement of the rules of this Regulation, penalties,

including administrative fines, to be imposed for any breach of the Regulation, in addition to or instead of

appropriate measures imposed by the supervisory authorities pursuant to this Regulation. If it

concerns a minor infringement or if the expected fine would place a disproportionate burden on a natural person

person, a reprimand may be chosen instead of a fine. However, it should be taken into account

with the nature, seriousness and duration of the infringement, with the intentional nature of the infringement, with

damage-limiting

measures, with the degree of responsibility, or with previous relevant infringements, with the manner in which the infringement

occurred

has come to the attention of the supervisory authority, with compliance with the measures taken against

the controller or the processor, with the adherence to a code of conduct and with all other aggravating

or mitigating factors. The imposition of penalties, including administrative fines, should be subject

to appropriate procedural safeguards in accordance with the general principles of Union law and the Charter,

including effective remedy and due process. [own underlining]

21 Brussels Court of Appeal (Marktenhof section), X t. GBA, Judgment 2020/1471 of 19 February 2020.

way to find out which personal data a controller

processed and whether this processing is lawful. A good interpretation of the right of access is

furthermore necessary to exercise other rights, such as the right to rectification

and the right to data erasure. This principle was recently endorsed by the Court of Justice

confirmed.22 In view of the present violation, however, in the opinion of the

Litigation Chamber concerns a serious infringement, in which the defendant's rights

stakeholders has not been sufficiently facilitated. The Disputes Chamber considers the imposition of

a reprimand is therefore insufficiently effective, not proportionate and not dissuasive.

The defendant has not facilitated the right of inspection with its policy. She

refuses

after all

to provide access in a manner that allows the complainant to

view personal data not only temporarily. Consequently, it became the exercise of it

right of access of the complainant by the defendant. From a professional party

as the defendant, who systematically processes personal data in the context of the

performs recordings for the performance of agreements, it may be expected that it will be on the

is aware of the applicable standards and the appropriate technical and organizational

takes measures to handle this personal data correctly. The

the defendant has thus failed to observe the guarantees that the GDPR provides for the right of access

gives to respect.

The number of data subjects (Article 83 paragraph 2, a) GDPR)

The Disputes Chamber notes that recording telephone conversations is a

is standard practice of the Defendant, and that the disclosure policy

this personal data is not in accordance with applicable law, making it

it cannot be ruled out that similar cases have occurred or will occur

occur in the future. However, the Disputes Chamber takes into account the fact that only

one complaint was lodged.

The intentional or negligent nature of the breach (Article 83(2)(b) GDPR)

As to whether or not the breaches were intentional (not negligent)

are

committed,

remembers

the

Litigation room

to it

that

"not

intentionally" means that it was not the intention to commit the infringement, although the

the controller had not complied with the duty of care pursuant to

the law rested upon him. With regard to the negligent nature of the infringement

(article 83.2.b GDPR), the Dispute Chamber understands that the infringement was not committed with

malicious intent to harm the AVG. The Disputes Chamber finds that the defendant

has always responded to the complainant's requests, and that it has alternatives in terms of

22 CJEU, 12 January 2023, Österreichische Post AG, C-154/21, ECLI:EU:C:2023:3, para 28 et seq. see also CJEU, 17 July 2014, YS

et al., C-141/12 and C-372/12, EU:C:2014:2081, para 44, and CJEU 20 December 2017, Nowak, C-434/16, EU:C:2017:994, para 57

proposed modalities with regard to the inspection, but that these were not sufficient

to the modalities provided for the GDPR and the guidelines mentioned above

the EDPB.

Measures taken to limit the damage suffered by those involved

In the context of the transparency principle, the controller must on the grounds

of Article 12, paragraph 2, of the GDPR, the exercise of the rights of the data subject

under - inter alia - Article 15 of the GDPR. Both the complainant and the

the defendant suggested possible solutions, but failed to reach a compromise. Like this

the defendant failed to comply with prior to and during the proceedings

the various possible solutions proposed by the complainant, such as

for example, transferring the transcript after checking its accuracy. A

possible solution offered by the defendant was to listen to the

recordings at the head office in Drogenbos. It is for data protection

essential that those involved have to in an easy way, and not just temporarily

can see. The Disputes Chamber therefore argues that an alternative method of access is then

of the right to a copy was offered, but that this offered modality no

could provide an adequate solution.

Previous breaches by the controller (Article 83(2)(e) GDPR).

The Litigation Chamber also takes into account the fact that the defendant has never before

was the subject of an enforcement procedure of the GBA.

Categories of personal data (Article 83(2)(g) GDPR)

The Litigation Chamber takes into account the fact that there is no evidence that is sensitive

data were processed.

Aggravating circumstance (Article 83(2)(k) GDPR)

The Disputes Chamber points out that the present case concerns the rights of

data subjects and in particular the right of access. As already mentioned, the right of

inspect the gateway for other rights or claims - whether or not under the GDPR

to practice. It is therefore essential to guarantee this access in a way that the

data subject has access in a sustainable manner. The Disputes Chamber also takes this into account

with the fact that there was an imbalance between the parties in that sense of the complainant

had the requested personal data and could not simply do so without it

intervention of the defendant.

Extenuating circumstances (Article 83(2)(k) GDPR)

The Litigation Chamber also takes into account the fact that the defendant is constructive

cooperated, both during the Inspectorate investigation and during the procedure for the

Litigation room.

Conclusion

103. The whole of the elements set out above justifies an effective,

proportionate and dissuasive sanction as referred to in Article 83 GDPR, taking into account

the assessment criteria specified therein. The Litigation Chamber points out that the other

criteria of art. 83 (2) GDPR in this case are not such that they lead to another

administrative fine than that imposed by the Litigation Chamber in the context of this

decision has been made.

104. On 5 April 2023, a sanction form (“form for reaction against intended

sanction”) addressed to the defendant containing the intention to impose a fine of 70,000

to impose EUR. She submitted her response regarding the content on April 25, 2023. The

In summary, the defendant states in its response to the sanction form that:

1) the Litigation Chamber has not taken into account the concerns of the

defendant, nor with the fact that the request for access to a broader civil law

dispute, which is by no means

is taken into account by the

dispute room;

2) the fact that the complainant is invited to listen to the recording is not

necessarily means that the right of inspection is only temporary. Complainant has it

right to make notes while listening and always received one in the past

summary via e-mail of the elements that were discussed during a telephone conversation

discussed, including the personal data processed by the defendant.

The goal was not to prevent him from accessing it, but to prevent it

evidence would be unauthorizedly distributed, altered or manipulated.

If it did, it could be used in a conflicting way

with the rights of the defendant's employees;

3) from the alleged fact that it would have hindered the right of access – quod certe

non -, the Litigation Chamber cannot possibly establish and decide that the defendant

would not have appropriate procedures (under Articles 24 and 25 GDPR);

4) the complainant's lawyer never proposed to come and listen to the recording

has answered;

5) the Litigation Chamber assumes that it would systematically carry out large-scale processing

perform. This is not the case; and

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6) the proposed fine is disproportionate to the infringements committed

established.

105. The defendant regrets that certain circumstances were not taken into account,

in particular the duration of the infringement, the non-intentional nature of the infringement and the

categories of personal data to which the breach relates.

1) First, with regard to the duration of the infringement, the defendant wishes to repeat

refer to the civil dispute that exists between the parties.

2) Second, there was no willful misconduct or malice on the part of the defendant.

The Respondent has robust and adequate internal procedures, policies and

rules in place to protect personal data and always in good faith

endeavored to comply with the GDPR in both spirit and letter.

3) Finally, as indicated above, are the categories of data used by

defendant are processed limited and usually relate to the company

and not on the natural person himself (e.g. contact details, company name,

company social network and domain name).

106. The Litigation Chamber

believes that the above by the defendant

in the

elements put forward in the sanction form have already been dealt with in the decision and in

were taken into account when determining the fine in accordance with Article

83 (2) GDPR. The elements from the sanction form used by the Disputes Chamber

additional considerations are discussed below.

107. As to the defendant's argument regarding the alleged

disproportionate nature of the administrative fine, the Disputes Chamber points out

that according to Article 83.5 GDPR, the violations of the Articles are Article 12(2)(3)

and paragraph 4, Article 15 GDPR subject to administrative fines of up to EUR 20,000,000

or 4% of the total annual turnover of the previous financial year.

108. As regards the defendant's argument that the administrative

fine in this case would be higher than in previous decisions of the Litigation Chamber,

should be pointed out that in accordance with Article 83.2 GDPR as well as the guidelines

of the Group 2923 fines are imposed “according to the circumstances

of the specific case”. In addition, the Disputes Chamber points to the

case law of the Court of Appeal in Brussels, section Marktenhof, according to which “het

Belgian

legal system has no binding precedent value

[gives] neither to

administrative or judicial decisions. Any decision of a judge (and this

23 Data Protection Working Party Article 29, Guidelines on the application and setting of administrative fines for the purposes

of Regulation 2016/679, October 3, 2017.

applies equally to any decision of an administrative authority, provided that it

principle of equality is not violated) is specific and does not extend to another

than the case under consideration”.24 With regard to the amount of the imposed

administrative fine, the Marktenhof also pointed to the margin of appreciation of the

Litigation Chamber: “In practice, this means that the GBA cannot decide on its own to comply with the

not to impose a fine on the offender, but also that, if it decides to impose a fine, this

is situated between the minimum, ranging from EUR 1, and the intended maximum. Which fine is imposed, will be decided by the GBA taking into account the criteria set are listed by Article 83(2) GDPR".25

109. The defendant objects that when determining the amount of the fine in the sanction form the consolidated turnover of the French parent company has been used in instead of the turnover of the defendant itself. The defendant does not wish to go alone emphasize that it was a subsidiary of Regicom Webformance in 2021, but also that the Disputes Chamber should only take into account the annual figures of the defendant since parent company is not decisive exerts influence over the subsidiary. The defendant also submits its annual figures for 2021 amounted to EUR 24,683,149.

110. On the basis of all the elements set out above, the Litigation Chamber to adjust the proposed sanction from EUR 70,000 to EUR 40,000. The infringements found justify an effective, proportionate and dissuasive sanction as referred to in Article 83 GDPR, taking into account the provisions therein assessment criteria. The Disputes Chamber is of the opinion that a lower fine in the the present case would not meet the requirement of Article 83(1) of the GDPR criteria, according to which the administrative fine is not only proportionate, but also effective and dissuasive must be.

III.4. Other grievances

111. The Disputes Chamber proceeds to dismiss the other grievances and findings of the

Inspectorate because, based on the facts and the documents in the file, they do not belong to the

conclude that there has been a breach of the GDPR. These grievances and

findings of the Inspectorate are therefore regarded as manifestly unfounded

within the meaning of Article 57(4) of the GDPR.26

24 Brussels Court of Appeal (Marktenhof section), NV N.D.P.K. t. GBA, Judgment 2021/AR/320 of 7 July 2021, p. 12.

25 Brussels Court of Appeal (Marktenhof section), NV N.D.P.K. t. GBA, Judgment 2021/AR/320 of 7 July 2021, p. 42.

26 See point 3.A.2 of the Disputes Policy of the Litigation Chamber, dd. 18

at

https://www.dataprotectionauthority.be/publications/sepotbeleid-van-de-geschillenkamer.pdf

June 2021,

consult via

IV. Publication of the decision

112. Given the importance of transparency with regard to decision-making by the

Litigation Chamber, this decision will be published on the website of the

Data Protection Authority. It

however, it is not necessary that the

identification data of the parties are disclosed directly.

FOR THESE REASONS,

the Disputes Chamber of the Data Protection Authority decides, after deliberation, to:

- on the basis of article 100, §1, 5° WOG to formulate a reprimand with regard to the

defendant for the infringement of Article 5(1) (transparency), Article 12(1) and Article

13 (1) (c) (2) (a) GDPR with regard to the understandable language and the indication of the

retention periods in the privacy statement;

- based on Article 83 GDPR and Articles 100, 1, 13° and 101 WOG, an administrative

to impose a fine of EUR 40,000 on the defendant for the infringement of article

12 (2) Art. 15 GDPR with regard to facilitating the right of access to the

complainer;

- pursuant to art. 100, §1, 6° WOG to order the defendant to grant the right of access

to be known to the complainant in accordance with Article 12, paragraph 2 in conjunction with 15 GDPR; and

- to dismiss the other grievances pursuant to Article 100, §1, 1° WOG.

Pursuant to Article 108, § 1 of the WOG, within a period of thirty days from the

notification against this decision may be appealed to the Marktenhof (court of

Brussels appeal), with the Data Protection Authority as defendant.

Such an appeal may be made by means of an inter partes petition

must contain the information listed in Article 1034ter of the Judicial Code27. It

27 The petition states under penalty of nullity:

1° the day, month and year;

2° the surname, first name, place of residence of the applicant and, where applicable, his capacity and his national register or

3° the surname, first name, place of residence and, if applicable, the capacity of the person to be

enterprise number;

summoned;

4° the object and brief summary of the means of the claim;

5° the court before which the action is brought;

6° the signature of the applicant or his lawyer.

a contradictory petition must be submitted to the Registry of the Market Court

in accordance with Article 1034quinquies of the Ger.W.28, or via the e-Deposit

IT system of Justice (Article 32ter of the Ger.W.).

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(get). Hielke HIJMANS

Chairman of the Litigation Chamber

28 The petition with its appendix is sent, in as many copies as there are parties involved, by registered letter

sent to the clerk of the court or deposited at the clerk's office.