

Litigation Chamber

Decision on the merits 177/2022 of 2 December 2022

File number: DOS-2021-04789

Subject: Complaint for communication of personal data to a third party

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

Hijmans, chairman, and Messrs. Dirk Van Der Kelen and Jelle Stassijns, 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

to the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the data protection), hereinafter "GDPR";

Considering the law of December 3, 2017 establishing the Data Protection Authority, hereinafter "LCA";

Having regard to the internal regulations as approved by the House of Representatives on December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

Made the following decision regarding:

The complainant :

Mr. X, hereinafter "the plaintiff";

The defendant: Y, hereinafter "the defendant"

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I. Facts and procedure

1.

On June 20, 2021, the complainant filed a complaint with the Data Protection Authority against the defendant.

The subject of the complaint concerns the processing of personal data by

Mr Z, an employee of the De Veldmuis vaccination center in (...) (hereinafter referred to as the "vaccination center"). During an incident in the parking lot of the vaccination center between the complainant as a visitor to the center and the parking attendant as employee of the center, the parking attendant requested the complainant's data from of reception. Subsequently, the parking attendant transmitted this personal data to the complainant's employer to inform them of the incident. This communication gave led to the complainant's dismissal from his position as a volunteer firefighter with the city of (...). Following this, the plaintiff lodged a complaint with the city of (...). This complaint was declared inadmissible and returned to the defendant. Given that the complainant did not receive no response from the defendant, he lodged the present complaint with the Data Protection Authority (DPA).

2.

On August 13, 2021, the complaint was declared admissible by the Front Line Service on the basis of Articles 58 and 60 of the LCA and the complaint is forwarded to the Litigation Chamber under article 62, § 1 of the LCA.

3.

On September 2, 2021, in accordance with Article 96, § 1 of the LCA, the Chamber's request Litigation to proceed with an investigation is forwarded to the Inspection Service, as well as the complaint and the inventory of parts.

4.

On January 6, 2022, the investigation by the Inspection Service is closed, the report is attached to the file and it is transmitted by the Inspector General to the President of the Chamber Litigation (art. 91, § 1 and § 2 of the LCA).

The report contains findings regarding the subject matter of the complaint and concludes that it is question of a violation of Article 5, paragraphs 1 and 2, of Article 6, paragraph 1, of Article 24(1) and Article 25(1) GDPR.

The report also contains findings that go beyond the scope of the complaint.

The Inspection Service generally notes that it is a question of a breach of

Article 38 and Article 24(1) GDPR.

5.

On January 14, 2022, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and article 98 of the LCA, that the case can be dealt with on the merits.

6.

On January 14, 2022, the parties concerned are informed by e-mail of the provisions such as set out in article 95, § 2 as well as in article 98 of the LCA. The parties concerned are

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also informed, pursuant to Article 99 of the LCA, of the deadlines for transmitting their conclusions.

For findings relating to the subject of the complaint, the deadline for receipt of conclusions in response of the defendant was set for February 25, 2022, that for the conclusions in reply of the complainant on March 18, 2022 and finally that for the conclusions in respondent's reply dated April 8, 2022.

For findings going beyond the subject matter of the complaint, the deadline for receipt of the defendant's submissions in response was set for February 25, 2022.

7.

On January 14, 2022, the defendant accepts all communications relating to the case by electronic way.

8.

On January 15, 2022, the plaintiff accepts all communications relating to the case by way of electronic.

9.

On January 17, 2022, the defendant requests a copy of the file (art. 95, § 2, 3° of the LCA),

which was transmitted to him on January 18, 2022.

10. On February 25, 2022, the Litigation Chamber receives the submissions in response from the defendant regarding the findings relating to the subject-matter of the complaint. These findings also include the defendant's reaction to the findings carried out by the Inspection Service outside the framework of the complaint. First of all, the defendant objects that it does not act as data controller for the treatment that is the subject of the complaint. Next, the defendant argues that on the basis of the inspection report, it cannot be said that personal data has been processed. Finally, the defendant argues that the employees of the vaccination center been informed of the GDPR obligations. Regarding findings outside of the context of the complaint, the defendant points out that there is indeed a settlement administrative between the defendant and the data protection officer who defines the function of the delegate. The Data Protection Officer is part of a team of data protection officers in which each acts as an assistant to the the other in case of absence to ensure continuity. The defendant asserts that the plaintiff first approached the city of (...) and not the defendant itself. The complaint was declared inadmissible by the city of (...) but the complainant would not have been informed. The complaint was then transmitted to the defendant but the latter did not deal with it further. because she considered that the complaint did not fall within her competence and that she had already been processed.

11. On April 7, 2022, the Litigation Chamber receives the complainant's submissions in reply, in with regard to the findings relating to the subject matter of the complaint. First, the plaintiff objects that the defendant's submissions were not sent to it in time

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timely. The deadline for the simultaneous transmission of the conclusions was set for

February 25, 2022. The Complainant did not receive them until March 2, 2022. Then the Complainant claims

that personal data has indeed been processed. The complainant considers also that the defendant shifts its responsibilities to other parties by asserting that it does not act as controller. Concerning the assertions of the defendant relating to the complaint lodged with the city of (...), the complainant maintains that these are inaccurate. He was indeed informed of the non-admissibility of the complaint by the city of (...). The complaint to the city of (...) then was forwarded to the defendant. On May 8, 2021, the complainant received a letter from the defendant indicating that he would be informed of the follow-up to the complaint, but this did not take place.

12. On April 8, 2022, the Litigation Chamber receives the submissions in response from the defendant. First, the defendant would like to apologize for the complainant since the latter was not informed of the outcome of the investigation by aforementioned admissibility. Finally, the defendant again wishes to point out that for the operation of the vaccination center, the city (...) intervenes jointly with the defendant as "subcontractor". The Flemish Health and Care Agency of the Authority flamande intervenes here as "responsible for processing" according to the defendant.

II. Motivation

II.1. Identity of the controller

13. The treatment complained of in this case by the complainant is the communication of his personal data by the guard of the parking lot of the vaccination center in the city of (...), where the complainant worked as a volunteer firefighter.

This communication took place during an alleged incident in the parking lot.

14. The Litigation Chamber refers to Article 4(2) of the GDPR which defines 'processing' as follows: "any operation or set of operations whether or not carried out using processes automated and applied to personal data or sets of data personnel, such as collecting, recording, organizing, structuring, storage, adaptation or modification, extraction, consultation, use,

communication by transmission, broadcast or any other form of making available, the
reconciliation or
interconnection,
there
limitation,
deletion or
the destruction".

The communication of personal data by the parking attendant must therefore
qualify as processing within the meaning of Article 4(2) of the GDPR.

15. The question then arises as to who should be identified as responsible for the
treatment for this treatment.

16. In accordance with Article 4.7) of the GDPR, it is to be considered responsible for the
processing: "the natural or legal person, public authority, agency or other

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body which, alone or jointly with others, determines the purposes and means of the
treatment." In his complaint, the complainant indicates that he does not know who is responsible for the
treatment and that he could not find his identity in the communication of the
defendant. The complainant states that he presumes that the data controller is the
coordinator of the vaccination center and therefore mentions in his complaint the data of
the defendant. The Litigation Chamber is aware of the fact that it is not always
obvious for the complainant to determine precisely who is acting as
controller. It is therefore up to the Litigation Chamber to determine, by
through an investigation by the Inspection Service or not, who must be qualified as responsible
treatment

17. The Court of Justice has on several occasions interpreted the concept of "controller"
broadly in its case law in order to ensure effective and comprehensive protection

of the persons concerned¹.

18. In accordance with Guidelines 07/2020 concerning the notions of responsible for the processor and processor in the GDPR of the European Data Protection Board (EDPB or European Data Protection Board), the quality of the controller(s) of the treatment concerned must be the subject of a concrete assessment². According to the Court of Justice, when assessing the level of responsibility, consideration should be given to all relevant circumstances of the case³.

19. During the inspection investigation, the defendant maintained that it was not responsible treatment for this disputed treatment. As part of the organization of the center vaccination, the defendant refers to the subcontract which was concluded between the Flemish Care and Health Agency on the one hand and the defendant and the city of (...) on the other hand. This subcontracting agreement applies to subcontractors who, in the context of the execution of the mission of the Flemish Care and Health Agency, will process personal data staff in the context of the operation of the vaccination centre. In this contract of subcontracting, the Flemish Care and Health Agency is designated as responsible for the treatment and the defendant and the city of (...) both as subcontractors (within the meaning of Article 4.8) of the GDPR) with regard to the organization and functioning of the vaccination center.

1 See in particular CJEU, 5 June 2018, C-210/16 - Wirtschaftsakademie Schleswig-Holstein, ECLI:EU:C:2018:388, recitals 27-29.

2 See EDPB, Guidelines 07/2020 concerning the notions of controller and processor in the GDPR, July 7, 2021, as specified by the DPA in a note "Update on the notions of data controller / subcontractor with regard to Regulation (EU) n°2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of personal data (GDPR) and some applications specific to the liberal professions such as than lawyers".

20. First of all, and referring to the subcontract mentioned above, the Flemish Care and Health Agency must be identified as the controller for activities falling within the scope of this subcontract, namely the processing of personal data in the context of the operation of the center vaccination.

21. The question therefore arises whether the disputed processing, that is to say the communication personal data of the complainant by the parking attendant to the employer of the complainant in connection with the notification of an alleged incident that occurred in the car park of the vaccination center, falls within the scope of the subcontract.

The Inspection Service concludes in its inspection report that this is not the case.

22.

It does not appear from the file that the disputed processing was part of the good operation of the vaccination center. The Litigation Chamber points out that the defendant asserts in its submissions that the parking warden wanted to find out with the reception to find out if other incidents involving the complainant had not been place. According to the defendant, this would be part of the guarantee of the security of visitors to the vaccination center. The Litigation Division considers, however, that if there were had a concrete threat to the safety of visitors - which does not appear from the file -, more effective actions existed, such as questioning the security guard present or the vaccination center coordinator.

23.

It appears from the file that the complainant went to the vaccination center on April 16, 2021; date the alleged incident occurred in the parking lot. The e-mail of the parking attendant sent on this subject to the complainant's employer dated 19 April 2021. The Chamber

Litigation points out that sending an email regarding a security incident alleged 3 days after the alleged incident cannot be considered an act guaranteeing the safety of visitors, especially since the complainant is a visitor to the vaccination center and therefore, that after this alleged incident, he would no longer have been present, the if necessary, only sporadically at or near the vaccination center, for example for possible complementary vaccines. If the safety of visitors to the center of vaccination was compromised in a less urgent manner, the parking attendant could simply ask a collaborator within the vaccination center to monitor, without the complainant's personal data having to be requested or transmitted to the city of (...).

24. Nor do the conclusions or the other documents in the file allow us to assert that the complainant was present for his vaccination for the firefighters (for example during a priority period because of the essential job as a volunteer firefighter), nor that the plaintiff could be associated at any time with the city of (...). This emerges also from the email in question from April 19, 2021 in which the parking attendant indicates

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himself that he did not recognize the complainant and therefore did not know that the complainant was volunteer firefighter only after having requested his personal data from a receptionist.

25. In view of the foregoing and in accordance with the findings of the Inspection Service, the Chamber Litigation comes to the conclusion that the disputed processing does not fall within the scope the general operation of the vaccination center and therefore took place outside the field application of the subcontract. Therefore, the Flemish Care and Health Agency does not cannot be qualified as a data controller in this case.

26. Next, the Litigation Division will examine whether the defendant should be considered as the data controller for the disputed processing. In this context, the Chamber

Litigation refers to the aforementioned subcontract in which both the city of (...) that the defendant intervenes as subcontractors within the framework of the organization of the vaccination center. In its pleadings, the defendant asserts at this subject that it is responsible for the planning and organization of the medical staff and that the city of (...) the east for non-medical personnel, such as the guards of the parking lot of the center of vaccination.

27. The Litigation Chamber notes that Mr. Z is an employee of the city of (...) and that in this capacity, he was present as guard of the parking lot of the vaccination center, and is therefore part of the non-medical staff. Under the aforementioned subcontracting agreement, the city of (...) must ensure that personal data is exclusively treated in within the scope of the subcontract.

Subcontractors also guarantee that their employees are informed of the applicable data protection obligations, as stipulated in the contract of subcontracting. In this case, it is Mr. Z, as parking attendant, who is responsible for the various assessments and the various choices he has made, including the treatments related data. The Litigation Chamber points out that Mr Z decided to notify this alleged incident in the parking lot to the complainant's employer. Besides, Mr. Z also notifies the alleged incident using his email address

professional of the city of (...). Therefore, the defendant cannot be considered to be the data controller for the disputed processing. Bedroom

Litigation draws attention to the fact that neither the inspection report nor the exhibits of the record does not make it possible to determine who, in the context of this complaint, should be designated as data controller given that neither the city of (...), nor Mr. Z were involved in this procedure with a view to identifying the person responsible for the

treatment.

28. In short: the Litigation Division concludes that the defendant has determined neither de jure nor de facto the purposes and means of the processing of personal data concerned.

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The Litigation Division therefore considers that in the context of this complaint, the respondent cannot be qualified as a controller within the meaning of Article 4(7) of the GDPR. However, this does not exclude that a complaint relating to these facts may be filed with against another controller.

29. Consequently, the Litigation Chamber does not accept the complaint and the findings of the Inspection service that followed, established within and outside the complaint.

The Litigation Chamber therefore decides to proceed with a classification without further action on the grounds technical in accordance with its discontinued policy⁴.

III. Publication of the decision

30. Given the importance of transparency regarding the decision-making process of the Chamber Litigation, this decision is published on the website of the Protection Authority Datas. However, it is not necessary for this purpose that the identification data of the parties are communicated directly.

FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation to close the complaint without further action, pursuant to Article 100, § 1, 1° of the LCA.

Pursuant to Article 108, § 1 of the LCA, this decision may be appealed to the Court of Markets (Brussels Court of Appeal) within thirty days of its notification, with the Data Protection Authority as defendant.

This recourse can be introduced by means of a contradictory request which must repeat the particulars listed in article 1034ter of the Judicial Code⁵. The contradictory request must be of

4 See also Decision 117/2021 of October 22, 2021 and the Chamber's Dismissal Policy

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<https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-litigation.pdf>.

5 "The request contains on pain of nullity:

available

the address

next

heading

2021,

3.1.A,

June

18

To

the indication of the day, month and year;

1°

2° the surname, first name, domicile of the applicant, as well as, where applicable, his qualities and his national register number or

Business Number ;

3° the surname, first name, domicile and, where applicable, the capacity of the person to be summoned;

4° the object and the summary statement of the means of the request;

5° the indication of the judge who is seized of the application;

6° the signature of the applicant or his lawyer."

filed with the registry of the Markets Court in accordance with article 1034quinquies of the Code

court⁶, or via the e-Deposit computer system of Justice (article 32ter of the Judicial Code).

(Sr.) Hielke HIJMANS

President of the Litigation Chamber

6 "The request, accompanied by its appendix, is sent, in as many copies as there are parties involved, by letter recommended to the clerk of the court or filed with the registry."