

GZ: DSB-D123.154/0004-DSB/2019 from 7.3.2019□

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

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

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

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

Punctuation errors have been corrected.]□

NOTICE□

S P R U C H□

The data protection authority decides on Mag. Gerhard's data protection complaint□

A\*\*\* (complainant) of July 5, 2018 against the municipality of N\*\*\*bach□

(Respondent) for violation of the right to secrecy as follows:□

- The complaint is rejected.□

Legal bases: §§ 1 paragraph 1, 24 paragraphs 1 and 5 of the Data Protection Act (DSG), Federal Law Gazette I□

No. 165/1999 as amended; Art. 77 General Data Protection Regulation – GDPR, OJ No. L119 of□

May 4, 2016, p. 1.□

REASON□

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

1. With a data protection complaint dated July 5, 2018 (specified in the letters dated□

July 11, 2018 and September 5, 2018), the complainant submitted that he was dated□

October 03, 2016 to February 28, 2018 contract employee and head of office□

Respondent, last working day was January 16th. Next to the□

official mail address gde@n\*\*\*bach.gv.at is on his work computer in the□

The municipal office also had the email address gerhard.a\*\*\*@n\*\*\*bach.gv.at set up.□

The mayor has no instructions or works agreement□

given that private e-mail traffic from this personalized e-mail address is not□

is allowed, so that the private use of the account gerhard.a\*\*\*@n\*\*\*bach.gv.at□

had been tolerated. Furthermore, there was no agreement with the complainant□

been taken as with his private emails after leaving the□

employment relationship to proceed.□

On January 24, 2018, the complainant took out his personal belongings□

picked up from the municipal office; the mayor gave him access to his□

Work computer, which was switched on that day and on which the□

Mail program "Outlook" was open, with the words "in the community there□

nothing private" refused. Said complainant's e-mail account was on□

been installed in the Outlook e-mail program on this computer and have therefore been used by everyone□

person using this computer without entering a password□

can become. The mayor admitted to seeing this e-mail account□

to have taken because he was of the opinion that this was to maintain□

of the operation of the municipality was necessary. This is the complainant□

according to not applicable, since no official mails from the□

Respondent had been led.□

Thus, the mayor illegally had access to the private e-mails of the□

complainant and justify this by saying that private use□

of this account was "inappropriate" and he asserted his right to□

derive insight.□

According to the relevant case law, according to the complainant, the mayor□

must obtain the complainant's consent before accessing the email□

Account gerhard.a\*\*\*@n\*\*\*bach.gv.at should have taken, especially since there were no other reasons□

had existed which would have justified inspection. Because of this he is□

Complainant's fundamental right to data protection has been violated. further have□

the Respondent did nothing to protect said email account from others□

make people inaccessible.□

The complainant had no opportunity to view his private emails,□  
to delete or save. Said e-mail account is also on the part of the municipality□  
was not deleted after his departure from the employment relationship and was also□  
not provided any form of appropriate data protection in this regard□  
become; Rather, it is still possible to send emails to said email account□  
send, as the sending of the test mails showed.□

After January 24, 2018, the complainant himself also had a□  
available webmail application was no longer possible to access his former e-□  
to access the mail account, since the mayor obviously caused this to happen□  
to change password. In response to an email from the complainant dated July 26, 2018, the□  
Respondent did not reply. Only after filing a complaint with the□  
The data protection authority sent the complainant the e-mails that were sent after□  
were still present when he left his employment□  
had been informed about which personal data about him□  
of the Respondent had been stored.□

The applicant did not claim a violation of the right to information or the□  
right to erasure, but considered himself within his right to□  
Confidentiality according to § 1 DSG violated by the behavior of the respondent.□

2. The Respondent commented in a letter dated September 27, 2018,□  
by examining the relevant correspondence with the complainant (letter dated□  
July 17, 2018, letter dated August 01, 2018, letter dated August 29, 2018) to the□  
Data Protection Authority submitted and stated that "I (note: the mayor)□  
hope that in the letters to Mag. A\*\*\* the allegation of injury in the□  
right to secrecy is adequately documented".□

3. In the hearing of the parties granted on January 8, 2019, the complainant led□  
out that he was on January 24, 2018, the day he lost his personal belongings□

wanted to pick up from the community, saw that his former official

community PC was switched on and a log-in with his data took place

had been, thus each person in his former e-mail account

been able to access the mails.

There are no official emails via the email account gerhard.a\*\*\*@n\*\*\*bach.gv.at

been sent or received, the contrary assertion of the

Respondent is incorrect. All official emails are sent via the official email

Mail address gde@n\*\*\*bach.gv.at been sent and received, which only on

had been set up on his work PC. Let the mayor know that fact

been known.

The address gerhard.a\*\*\*@n\*\*\*bach.gv.at, on the other hand, is temporarily private e-mail

traffic has been conducted. There is no agreement or official instruction from the

Mayor given that this e-mail account is not also for temporary private use

Mail traffic may be used. Thus, the Respondent's allegation that

that the complainant used the former e-mail account improperly

have, wrong.

The email account was deleted in July 2018. The mayor himself

admitted to having seen these emails. He has after the exit

(Employment relationship) of the complainant also took no measures to this

to secure private mails accordingly.

4. With a request for comment on January 11, 2019, the

Data protection authority the respondent in particular, appropriate

Proof of e-mail (account) use during/at or after the end of the

to settle and discuss the (permanent) employment relationship with the respondent,

how access to the complainant's former e-mail account was regulated.

5. By letter dated January 23, 2019, the Respondent replied that there was a

Agreement on (non-) private use did not exist. As with most□

As is usual in municipal offices, there would be a general account for email contact□

Municipality (gde@n\*\*\*bach.gv.at) and furthermore, every employee will receive a when they start work□

own e-mail account according to the pattern: firstname.zuname@n\*\*\*bach.gv.at and not after□

Function, area or activity (such as office management, building authority, citizen service). Therefore□

a corresponding account had been created for the complainant and his predecessor□

which was intended to carry out his activity for the municipality.□

Regarding the allegation that any person who used the former work computer of the□

used by the complainant, without password security access to all□

had his e-mails via Outlook, the Respondent first stated that□

that the access data for the e-mail account had not been set up on any other PC□

be. It does not agree that all other employees have access or access to the account□

of the complainant would have had. Of course, MS Outlook has one□

Password protection. The password was after the complainant's departure□

been changed. The Respondent might have failed to□

set up "automatic reply" in MS Outlook.□

The Respondent did not have the account of the "Head of Office" immediately after his□

want to delete because the respondent open official□

See issues, ongoing projects or demands on the community□

want. The account should have been removed after six months. the□

Respondent tried to send the private e-mails to the□

to hand over the complainant. To distinguish private from business e-mails,□

an employee had to read the subject lines and filter them accordingly. Private□

E-mails are then transferred to an encrypted USB stick and sent to the□

handed over to complainant.□

6. In the hearing of the parties granted on January 28, 2019, the complainant agreed□

agree with the Respondent that there is no agreement on the use of

e-mails in the municipality of N\*\*\*bach. Partial private use

thus also been allowed. The complainant has the mayor himself

various times while entering the computer system available to him

used community for private purposes; however, the mayor is always

assumed that the specifications he put in the room only for the

Employees of the municipality of N\*\*\*bach, but should not apply to himself.

Every employee of the municipality has an e-mail account according to the pattern:

Firstname.surname@n\*\*\*bach.gv.at, but have on the account

gde@n\*\*\*bach.gv.at only the head of department and the mayor had access and was only

this e-mail address has been used for official matters of the municipality of N\*\*\*bach.

Therefore, the mayor was aware that the email address

gerhard.a\*\*\*@n\*\*\*bach.gv.at not intended for the exercise of the activity as head of office

had been and no official e-mail traffic was conducted via this e-mail account

(therefore the data protection authority is encouraged to look at those official e-mails from

to be sent to the mayor).

Regarding password protection with regard to "Outlook", the complainant stated that

that the e-mail account set up on the office manager's PC

accessed by every employee without entering an additional password

could have become. It therefore does not have a password protection to that effect

given. After turning on the PC in the office manager's office and with

Username and password, which in addition to the head of department and the mayor also

were known to the other employees of the municipality, had boarded, were

in Outlook all e-mails of the account "gde@n\*\*\*bach.gv.at" as well as

"gerhard.a\*\*\*@n\*\*\*bach.gv.at" can be viewed without entering a password

been. The mayor also took a look and admitted this.

Regarding the Respondent's assertion that after leaving  
of the complainant therefore did not have the personalized e-mail account  
want to delete in order to see current projects of the municipality etc. is a pure one  
Protective claim, since a mail traffic to that effect is currently going on via this account  
had not been conducted and the Respondent was therefore stopped  
submit emails to that effect.

#### B. Subject of Complaint

The object of the complaint is the question of whether the possibility of inspection on the part of  
of the respondent or employees of the same (municipality of N\*\*\*bach) in an e-  
Mail account of a former employee of the municipality with e-mail address after  
Sample firstname.surname@Gemeindename.gv.at or with an actual  
Inspection of the same, including official and private information (potentially) contained therein  
E-mails from the former employee, the same in his right to secrecy acc.  
§ 1 DSG has been violated. The subject of the complaint does not include the question of whether  
the Respondent violates the Complainant's right to secrecy  
by using their personal data after the end of the  
employment relationship (see data protection complaint of July 5th  
2018 or letter dated July 11, 2018).

#### C. Findings of Facts

1. The complainant was from October 3, 2016 to February 28, 2018  
Contract employee and head of office at the respondent. In addition to the general  
E-mail address of the respondent (municipality of N\*\*\*bach) gde@n\*\*\*bach.gv.at  
was for the complainant in the context of his (upright) employment to  
Respondent's personalized e-mail address  
gerhard.a\*\*\*@n\*\*\*bach.gv.at set up, which to carry out his work for the  
community was intended. A naming of email addresses by function, area

or activity (such as office management, building authority or citizen service) was not

performed. An agreement as to whether this e-mail account on the part of the

Complainant may be used privately during the employment relationship, there were

not. In addition, there was no regulation regarding the use of e-mail

Accounts after termination of employment with the complainant. For the

The e-mail account at gerhard.a\*\*\*@n\*\*\*bach.gv.at was exclusively for private use

not determined. The complainant used the e-mail account at least partially for

private purposes.

Evidence: Statements by the complainant in the letter dated July 5, 2018;

Letter from the Respondent dated July 17, 2018, letter from

Respondent of August 29, 2018; Complainant's PV of January 8th

2019; Letter from the Respondent dated January 22, 2019.

2. Deleted with or after termination of the employment relationship with the Respondent

these e-mails saved to the e-mail address gerhard.a\*\*\*@n\*\*\*bach.gv.at and

until July 2018 there was the possibility that the respondent or the

Mayors and employees of the same with corresponding log-in data

(username and password) for the former work computer of the

Complainant's access to all e-mails sent by the "Outlook" program

Complainant at this e-mail address during his upright

had sent and received employment relationship, could access.

Evidence: Statements by the complainant in the letters dated July 5, 2018,

July 11, 2018 and January 08, 2018; Respondent's letter dated July 17

2018, Respondent's letter of August 29, 2018; writing the

Respondent of January 22, 2019.

3. The Respondent (an authorized officer) shall, upon termination

of the employment relationship insight into the e-mail account to gerhard.a\*\*\*@n\*\*\*bach.gv.at



held, in particular to be able to rule out that open official

matters are not processed further. For this purpose, an employee

the Respondent read the respective subject lines of the e-mails and

filtered accordingly.

Evidence: Statements by the complainant in the letters dated July 5, 2018,

July 11, 2018 and January 08, 2018; Respondent's letter dated July 17

2018, letter from the respondent dated August 29, 2018, letter from

Respondent of January 22, 2019.

4. As of July 2018, the complainant's personalized email account

turned off. The private emails were sent to the complainant by the

Respondent during the ongoing proceedings before the data protection authority per

USB stick given.

Evidence: Statements by the complainant in the letters of July 5, 2018 and

January 08, 2018; Letter from the Respondent dated July 17, 2018, letter from

Respondent of August 29, 2018.

Evidence assessment: Determining that the personalized email address is in the context

of the employment relationship gerhard.a\*\*\*@n\*\*\*bach.gv.at has been established

from the concurring submissions of the parties (the complainant, for example,

from: "It is correct that every employee of the municipality of N\*\*\*bach has an e-

mail account according to the pattern [...] received.").

Determining that this e-mail account is intended for the activity of the municipality

was, follows logically from the previous statement. It corresponds to the general

Life experience that an e-mail account, which is specifically for an employment from

Employer is set up, also - if not exclusively - for business

affairs is determined. In addition, the ending of the domain speaks

"n\*\*\*bach.gv.at" in connection with the employment as head of the municipality

N\*\*\*bach not for an exclusively private e-mail account of the complainant, □  
but for a primarily official one. That this official e-mail account after □  
Information provided by the complainant "also" used for private mail traffic at times □  
should have been, harms the purpose of a business e-mail account, viz □  
to handle official e-mail traffic, not. The claims of □  
complainant that he actually received all official emails via the account □  
gde@n\*\*\*bach.gv.at received and sent and also his predecessor the □  
firstname.lastname@n\*\*\*bach.gv.at address for private e-mail traffic □  
have used counteracts the "dedication" of the e-mail account to exercise the □  
Activity of the complainant for the respondent (municipality of N\*\*\*bach) not. □  
The finding that the e-mail account at gerhard.a\*\*\*@n\*\*\*bach.gv.at for the □  
exclusively private use was not intended, results from the above paragraphs □  
on the one hand from the Respondent's statements in the letter of August 28th □  
2018 and from January 22, 2019 as well as from the following submissions of the complainant □  
(Letter dated January 28, 2019): "[...] there was no agreement on the use □  
from the Internet or e-mails in the municipality of N\*\*\*bach, resulting in a partially private □  
use was also allowed. I've walked into the mayor myself several times, □  
how he used the municipality's computer system available to him for private purposes □  
used. However, the mayor always assumed that he was in the room □  
the requirements set only for the employees of the municipality of N\*\*\*bach, but not for him □  
should apply themselves". Accordingly, the complainant was well aware that a □  
(Exclusively) private use of said e-mail account was not intended □  
is, even if the mayor is, according to the complainant □  
himself should have handled differently. □  
The finding that the complainant used the personalized e-mail account (also) □  
used privately based on consistent submissions of the parties. □

That the Respondent has all the content of the mailbox of the

Complainant regarding the e-mail account gerhard.a\*\*\*@n\*\*\*bach.gv.at (already  
before accessing the account), the complainant could

not sufficiently prove. Furthermore, the complainant could not

provide sufficient evidence that all employees of the respondent have the

Log-in data on his former work PC, the office manager's PC

had.

D. In legal terms it follows that:

1. Legality of the inspection of the official e-mail account by the

Respondent (mayor, employee of the respondent):

The subject e-mail correspondence in connection with the e-mail account

under the official e-mail address gerhard.a\*\*\*@n\*\*\*bach.gv.at

personal data within the meaning of Art. 4 Z 1 DSGVO, because it is information

is, which, based on the e-mail address, refers to an identified natural person,

specifically to the complainant.

The Respondent, as a community in both its own and its

to carry out certain official tasks within the assigned sphere of activity (Art. 118 et seq

B-VG; § 39 ff Styrian Municipal Code 1967 - GemO).

As can be seen from the findings, it is the personalized address

of the complainant gerhard.a\*\*\*@n\*\*\*bach.gv.at for a primarily official e-mail

Address which is intended for carrying out his duties as head of the municipality

was.

In connection with the present case, the case law on the so-called

Excessive prohibition of the former data protection commission, the legal predecessor of the

Data Protection Authority, cited (see the decision of the Data Protection Authority of

09.11.2017, GZ DSB-D122.706/0005-DSB/2017):

"The complaint request, the competent authority the determination of data or

To prohibit the use of any evidence which they may have in order to establish any of it

the facts to be determined would cause the

Data Protection Commission - at least partially - in the place of the factually competent

Authority occurs and indirectly via the rejection of the admissibility of

Factual determinations arrogated a factual universal competence. That given this

the principle of the fixed distribution of competences between state organs and

the fundamental right to a procedure before the statutory judge cannot be admissible,

is evident. The Data Protection Commission therefore assumes that its competence

to assess the admissibility of data determination in administrative procedures

Prohibition of excess is limited: When it is conceivable that by one in the matter

competent authority determined data according to type and content for the determination of the

relevant facts are suitable, the admissibility of the determination is made

from a data protection point of view. Claiming a deeper

Assessing the suitability of those chosen by the competent authority

Investigative steps would interfere with the factual competence of the investigating

Authority effect against which arises from the right to a trial before the statutory

judge to be derived from the principle of the precise delimitation of the authority's competence

objective criteria (VfSlg 3156, 8349), in exact (VfSlg 9937, 10.311) and clear

way (VfSlg 11.288, 13.029, 13.816)."

In the present proceedings, the Respondent became comprehensible

asserted and also found that the Respondent (an authorized

employees) to inspect the e-mail account after the end of the employment relationship

gerhard.a\*\*\*@n\*\*\*bach.gv.at to be able to rule out that open

governmental affairs, that is, affairs affecting the community both in

own as well as transferred sphere of activity, not further processed

will. As a logical prerequisite for being able to determine whether determined data (e.g. in an e-mail regarding an official procedure that is being carried out by the respondent is pending) by type and content for the determination of a relevant fact are suitable, the competent authority must be aware of the data can obtain, in the present case by inspection of the (former) official e-mail account of the complainant.

It was due to the purpose of the work email account that was for the Complainant regarding his former position as Head of Office Respondent has been set up, it cannot be ruled out that in the mail and outgoing e-mails with content pending at the Respondent relate to official procedures and subsequently conceivable for the determination of a relevant factual situation.

Overall, the intervention is therefore not to be judged as excessive.

For example, the facts of the case differ from those relating to the decision of the Grand Chamber of the ECtHR from 05.09.2017, 61496/08 (Bărbulescu vs Romania), especially in the following points:

- No monitoring of the complainant's e-mail traffic (not even in sense of a real-time recording of the communication over several days), but time-limited inspection by an authorized person

Employees of the Respondent to any official of any to separate private e-mails, for this purpose the content of the e-Mails read, but sorted out based on the subject line.

- The inspection took place after the end of the employment relationship with the complainant instead.

- Inspection was only taken in a business e-mail account and not in a private one.

□ The inspection was justified with the fact that it is because of this □

has taken place, so that official matters are not left undone (es □

the person responsible was not a private company, but □

a corporation under public law). □

2. On the allegation of insufficient technical and organizational measures □

and an associated violation of the right to secrecy □

complainant (possibility of inspecting the former e-mail account □

of the complainant): □

The mere existence of the possibility of access for employees of the Respondent, □

What knowledge of the user name and password for the former work PC (PC □

of the office manager) and subsequently to the e-mail account with the address □

gerhard.a\*\*\*@n\*\*\*bach.gv.at does not result in a violation of the law □

Secrecy, since this requires an intervention that has actually taken place (cf. □

Notice of September 13, 2018, GZ: DSB-D123.070/0005-DSB/2018; to actually □

the inspection that has taken place, see point D.1.). □

3. The complaint therefore proves to be unfounded, which is why according to the verdict □

was to decide. □