

GZ: DSB-D123.527/0004-DSB/2018 from 15.1.2019□

[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 the data protection complaint of Dr. Philip□

A*** (complainant) of September 26, 2018 against Med-Search*** GmbH□

(Respondent), represented by Mag. Ottokar G***, lawyer in Vienna, because of□

a violation of the right to secrecy and a violation of the right to□

Deletion as follows:□

- The complaint is dismissed as unsubstantiated .□

Legal basis: Art. 12 Para. 4, Art. 17, Art. 57 Para. 1 lit f, Art. 77 Para□

General Data Protection Regulation (GDPR), OJ No. L 119 of 04.05.2016, page 1; §§ 1, 24□

Paragraphs 1 and 5 of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended.□

REASON□

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

1. With a submission of September 26, 2018, the complainant claimed a□

Violation of the right to erasure and submitted in summary that he as□

General practitioners on the respondent's doctor search and evaluation platform,□

www.med-search***.at, is listed. He informed the respondent by letter dated□

May 30, 2018 to delete all his data on www.med-search***.at□

asked. However, the Respondent has the deletion in her□

Letter of reply dated May 30, 2018 refused on the same day. the□

Complainant further submitted that the generally public data according to

§ 27 ÄrzteG by the Respondent's evaluation platform

submitted assessments of new - unpublished - data and information

would be generated. Based on the established case law of the ECJ

not even secrecy interests are violated here, but on all

put aside interests worthy of protection. The German BGH also had in its

Decision of September 23, 2014 on GZ VI ZR 358/13 recognized that reviews

about doctors **not only significant impact on the social and professional**

a doctor's claim to validity, but rather also the choice of doctor

of people requiring treatment would affect, resulting in the assessments

directly affect the doctor's chances of competing with other doctors and

in the case of negative reviews could even endanger the professional existence.

In addition, by naming the general right of personality of the

§ 16 ABGB violated because due to the linking of generally accessible data with

often incorrect statements and statements of patients the reputation and the

good reputation was impaired.

2. The Respondent brought this up in its statement of October 30, 2018

summarized that actually public data according to § 27 ÄrzteG des

complainant would be published on the platform [www.med-search***.at](http://www.med-search.at)

and patients could give reviews and testimonials there. the

The processing of the data that is the subject of the complaint is based on a

overriding legitimate interest of the respondent. This would consist in

Interested in maintaining a fully public directory of all resident doctors

and to give patients the opportunity to read experiences about these doctors, too

publish and to facilitate the search for a doctor. The Respondent offers doctors

the opportunity to present yourself, receive feedback and testimonials

Leave a Comment. The interest of the Respondent is in particular due to the

constitutionally protected right to freedom of expression and information

protected. A doctor's approval is not required. In addition, prohibit the

Respondent inadmissible content in its terms and conditions, in particular untrue and

defamatory statements. In the event that is actually incorrect from a patient

Statements would be published, the Respondent offers the possibility

to report such testimonials. These testimonials would be in everyone

be checked on a case-by-case basis and removed if necessary. In addition, doctors could

Also comment on testimonials from patients. From the part of

Complainant's decision of the German Federal Supreme Court of September 23

2014 to GZ VI ZR 358/13 is nothing to gain: The BGH has the processing of

On the contrary, doctor data for the operation of a doctor search and evaluation portal is permissible

considered and the deletion claim of the doctor suing for deletion rejected. To the

Objection of interference with naming rights or general

Personal rights according to § 16 ABGB should be noted that the data protection authority

not responsible for this.

3. The complainant then replied - according to the parties to the results of the

investigation – in his statement of November 21, 2018

summarized, that the General Terms and Conditions of the Respondent would actually contain

that untrue claims or inaccurate testimonials from patients

would be inadmissible. However, compliance with the terms and conditions is the responsibility of the respondent

not checked, especially since the Respondent could hardly check whether a

For example, the patient was actually in the waiting room for as long as stated in the evaluation

had to wait, partly because of the obvious lack of specialist knowledge

or the simple inaction of the Respondent. The complainant submitted

his opinion in this regard, an example assessment to support his point of view

to clarify. In addition, the Respondent actually offers the doctors
the ability to comment on patient reviews. However, this is not reasonable
since the complainant uses the platform daily or at least at very short intervals
of the Respondent had to visit to justifications or explanations
submitting patient reviews. It cannot be part of the medical profession that
Doctors would have to refute incorrect statements from patients on the platform in order to
and prevent business damage. The reputation and reputation of a doctor is a
interest that is extremely worthy of protection, which is why the balancing of interests on the basis of
overriding interest must be in favor of the doctors. The partly incorrect ones
Factual allegations, information and complaints from patients on the platform
Respondent would have no relation to the call that happened to the doctors
and damage to business as a result. The general interest in partly even
incorrect statements of fact or information (e.g. about the waiting time in
waiting room until the start of treatment) should not be equated with the interest of the
the general public in exercising the right to freedom of the press or for the purposes of
Research.

B. Subject of Complaint

1. For party submissions is not only the wording of the complaint, but also the will
the party considerably. The existence of prerequisites is not strictly formal
interpret if the subject matter of the proceedings - albeit according to the interpretation of
Submissions within the meaning of §§ 6 and 7 ABGB - without a doubt, i.e. without the possibility of confusion
can be seen (VwGH 13.11.2014, Ra2014/12/0010). The – unrepresented and
legally ignorant – complainant has a violation of the general
asserted personal rights according to § 16 ABGB; a violation of this
The provision would have to be asserted in civil courts. The entire submission
However, it can be inferred from the complainant that he seeks a determination as to whether

by publishing the complainant's personal data□

www.med-search***.at a violation of the right to secrecy according to § 1 DSG□

present.□

2. In addition, the object of the complaint is the question of whether the respondents□

Complainant violated the right to erasure by responding to the request of the□

Complainant of May 30, 2018 to have all his data deleted from the platform□

www.med-search***.at did not correspond.□

C. Findings of Facts□

1. The applicant practices as a general practitioner and is a member of the□

Medical Association for Vienna. The Respondent operates under the domain www.med-□

search***.at a doctor search and evaluation portal. The professional address, telephone number,□

ordination times, diplomas and certificates as well as the name of the complainant□

published on the website www.med-search***.at in the form of a doctor profile. This□

The Respondent obtains data sets from the source <https://www.praxisplan.at/>□

(a website of the Vienna Medical Association).□

Patients can be evaluated in the form of an evaluation scale (1 point = lowest satisfaction, 5th□

Points = highest satisfaction) rate a doctor's visit overall, including one□

Detailed assessment (in terms of empathy, trust, treatment,□

Service offer, practice equipment, care in practice, waiting time in the waiting room□

and waiting time for an appointment) is possible. In addition, patients in the form of a□

Write a short field report in the free text field.□

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

Submission of the complainant of September 26, 2018, on the statement of the□

Respondent of October 30, 2018 and on an official search by the□

Webpage www.med-search***.at and the website of the Vienna Medical Association,□

<https://www.praxisplan.at/> (both accessed on January 10, 2019).□

2. The complainant has implemented various protective mechanisms in order to

to counteract the submission of irrelevant testimonials. Next to everyone

There is a "flag icon" on the review so doctors can report it

and the report - after a corresponding check - again from the doctor profile

the respondent is removed if it violates the general terms and conditions of the

Respondent violates. In addition, a rating filter is in use to

Multiple reviews within a short period of time by the same user

impede. Doctors can also comment on and receive the testimonials

a notification e-mail when a new rating is submitted on their doctor profile,

a free registration for this service is necessary.

The Respondent also offers physicians the option of a Premium Profile Large,

a premium profile medium and a premium profile small for a fee on the platform

www.med-search***.at. The marketing services offered by

Respondents vary depending on the profile offered. In addition, one can

"Top position in the Med-Search*** search result" can be obtained for a fee.

Regardless of whether a doctor profile is a paying doctor

("Premium Entry"), or a free "Basic Profile", are placed on the

Profiles of the doctors practicing locally ("Other doctors in the area") are displayed.

The Respondent's "Practice Marketing for Doctors" guide is excerpted

as follows (formatting not reproduced 1:1):

[Editor's note: The document reproduced here in the original in facsimile

from the website of the letter can not be used for legal documentation purposes

be reproduced pseudonymously at reasonable expense. It contains one

tabular overview of services with regard to the "premium entries".]

Evidence assessment: The findings made are based on an ex officio

Research on the website www.med-search***.at and the freely available

Respondent's "Practice Marketing for Physicians" guide (retrieved on January 10

2018).

D. In legal terms it follows that:

1. Right to Confidentiality

The data protection authority is the national supervisory authority in accordance with Art. 51 GDPR

§§ 18 paragraph 1 in conjunction with § 24 paragraph 1 DSG responsible for complaints if an affected

person believes that the processing of personal data concerning them

Data violates the GDPR or § 1 or Article 2 1st main part DSG.

The data protection authority has already dealt with the admissibility of the publication of

Doctor data by the Austrian Medical Association (or the Medical Association in the respective

federal state) explained and stated that the authorization to

Publication of the legal mandate to keep an electronic list

("Doctor list") of doctors and group practices authorized to practice according to § 27

Para. 1 ÄrzteG 1998 results (cf. the decision of the data protection authority of

December 17, 2018, GZ: DSB-D123.040/0006-DSB/2018; see also the judgment of the Supreme Court

from June 27, 2016, GZ 6 Ob 48/16a).

It is clear from this that at least those under § 27 Para. 1 Z 1 to 17 ÄrzteG 1998

mentioned data as not worthy of protection due to the mandatory publication

Data within the meaning of § 1 Para. 1 DSG are to be considered and also a permission

for processing in accordance with Article 6 (1) (e) GDPR.

2. To Reproduce Permittedly Published Data

At the same time, however, it must be taken into account that the very general assumption of the

Non-existence of a violation of secrecy interests worthy of protection

legitimately published data not compliant with the provisions of the GDPR

is (cf. the decision of the data protection authority of October 31, 2018, GZ: DSB-

D123.076/0003-DSB/2018 with further references).

The case in question must also be viewed in a differentiated manner in that□

Complainant expressly submits that by linking the records□

according to § 27 Abs. 1 ÄrzteG 1998 with evaluations and experience reports on the□

platform [www.med-search](http://www.med-search.at)***.at "new data and information are generated".□

The complainant is to agree that the respondent□

not to a mere reproduction of the data sets within the meaning of Section 27 (1) ÄrzteG 1998□

limited, but with the possibility of submitting a rating and a□

Field report combined, with several different detailed assessments as well□

make an overall assessment. As a result, the Respondent creates a□

informational added value, which means that it is new – about the data sets in accordance with § 27□

Para. 1 ÄrzteG 1998 - personal data of the complainant□

acts that are processed.□

Such a combination is in any case covered by the concept of processing in accordance with Art. 4 Z 2□

GDPR includes and requires permission in accordance with Art. 6 GDPR (cf□

Legal situation according to the DSG 2000 Kotschy in Jahnel (editor), data protection law and E-□

Government Yearbook 2012, 27 [47], according to which a combination of public□

accessible data with other data the admissibility of their use completely new□

check is).□

In this regard, the Respondent relies on Article 6(1)(f) GDPR.□

According to this, the processing is only lawful if the processing is to safeguard the□

legitimate interests of the person responsible or a third party and if□

not the interests or fundamental rights and freedoms of the data subject who□

require the protection of personal data prevail.□

In connection with the asserted right to erasure, it should be noted that□

that an application for deletion according to Art. 17 GDPR is then granted, among other things□

is in accordance with paragraph 1 lit. d leg. cit. the data unlawfully (i.e. without□

permit) were processed. If a balancing of interests in favor of

complainant fails, the present complaint would be due to a

Violation of the right to erasure therefore result and would be the

personal data of the complainant due to the lack of lawfulness of the

delete processing.

It should also be taken into account that the right to erasure pursuant to Art. 17 Para. 1 GDPR

cannot be exercised if the processing within the meaning of paragraph 3 lit. a leg. cit. to the

Exercising the right to freedom of expression and information under Art. 11 GRC

(or to exercise the right to freedom of expression according to Art. 10

ECHR) is required.

Ultimately, however, it can remain an open question as to whether the admissibility of the refusal

the request for erasure is checked on the basis of Article 17 (1) (d) or (3) (a) GDPR,

since in both constellations a weighing of interests has to be carried out, which

leads to the same result.

The result of this balancing of interests is ultimately also decisive for the question

whether there is a violation of the right to secrecy or legitimate interests

another iSv § 1 Abs. 2 DSG compared to the confidentiality interests of the

complainant prevail.

3. To balance interests

It therefore subsequently has to assess the legitimate interests of the

Those responsible (the respondent as the operator of the doctor search and

evaluation platform) and third parties (the patients) and are those interests

as well as possible consequences for the complainant (as a doctor listed on the platform)

to be taken into account that result from the processing in question. are there

also any protective measures to prevent or mitigate inappropriate

Consequences for the complainant to be considered by the respondent

have been implemented (cf. on the key factors that need to be taken into account when weighing up interests
are to be taken into account, Art. 29 Data Protection Working Party, Opinion 06/2014 on the term
the legitimate interest of the controller pursuant to Article 7
of Directive 95/46/EG, WP 217, 844/14/EN, p. 43).

In the context of this balancing of interests, it must also be taken into account that Art. 6 para. 1
lit. f DSGVO knows two cumulative requirements so that the respondent

can be based on this legal basis: On the one hand, the processing must

Protection of the legitimate interests of the person responsible or a third party is required

on the other hand, the fundamental rights and freedoms of the data subject who

require the protection of personal data (see Art. 7 lit. f of the

Directive 95/46/EC the judgment of the ECJ of November 24, 2011, C-468/10 and C-
469/10 (ASNEF and FECEMD) para. 38).

4. Evaluation of Interests

The complainant cannot initially be challenged if he insists

points out that the German BGH in the cited decision of September 23, 2014

to GZ VI ZR 358/13 - in a similar situation - actually

stated that "[...] the assessments [...] not only have a significant impact

have on the social and professional validity of a doctor. You can

rather also influence the choice of doctor for persons in need of treatment, thereby

directly affect the doctor's chances of competing with other doctors and

in the event of negative reviews, even jeopardize his professional existence."

However, after a comprehensive weighing of interests, the German BGH is nevertheless

came to the conclusion that the balance was in favor of the defendants and their users

(i.e. the operator of the doctor search evaluation platform and the patient) fails and

it was finally decided that there was no right to erasure.

For the sake of completeness, reference is made in this context to a further (but on the part of the

Complainant not brought to the meeting) decision of the German Federal Supreme Court of

February 20, 2018 referred to GZ VI ZR 30/17, in the context of which the BGH again

with a request for deletion from a doctor search and evaluation platform

had to deal with. In the proceedings before the BGH now underlying

Facts, a German doctor search and evaluation platform has doctor profiles like this

designed that with a non-paying doctor by means of a button

or a horizontal bar, information on locally competing doctors is displayed

were, while with a paying doctor ("premium customer") such via the local

Competitive promotional notices were not displayed. The BGH led

to the fact that the defendant thereby its position as a "neutral" information broker

leave and the basic right of freedom of opinion and freedom of the media only with less

weight can claim. The BGH therefore approved the result of the plaintiff

"protected interest in the exclusion of storage" of their data.

However, the facts to be checked before the data protection authority are different in this respect

to be considered, as well as with paying doctors with a "premium entry" on their profile

the locally practicing doctors ("Other doctors in the area") are displayed and the

Considerations of the German BGH therefore do not apply.

However, it cannot be denied that, given the practical relevance of

search and evaluation portals and the market dominance of www.med-

search***.at negative ratings and testimonials are actually the doctor's choice

can affect potential patients.

The counter to this, however, is that the complainant did not take part in his

undisturbed practice of his profession is prevented if he does not make any contributions ("premium entry")

pays and therefore does not appear as a priority in the defendant's list (cf.

already the above judgment of the Supreme Court of June 27, loc.cit.). In addition, patients

a corresponding evaluation only after a corresponding treatment by the

give up the complainant. In other words, the complainant has it

basically in your own hands, through its range of services

Get ratings on the platform.

The data protection authority does not overlook the fact that there will always be people who

Submit unobjective evaluations or testimonials on a case-by-case basis. Also not allowed

be overlooked that an affected person (such as a "dissatisfied patient")

abuse the platform and give multiple negative reviews.

However, the Respondent offers the possibility for such cases

to report experience reports that violate the General Terms and Conditions of the Respondent

and - under certain circumstances - also to remove it. Thereby located next to each

Field report a flag symbol to be able to report it quickly and efficiently.

In addition, experience reports can also be commented on accordingly.

Furthermore, the Respondent implemented an "evaluation filter" in order to

Multiple reviews by the same person within a short period of time

to counteract.

The complainant is based on the experience reports or ratings of patients

As a result, www.med-search***.at is not delivered without protection. A danger of

There is no stigmatization, exclusion or pillory effect in the present case

recognizable (cf. on the legal situation according to the DSG 2000 Jahnel, freedom of expression

and data protection using the example of online platforms, S&R 1/2015, 35 [41]).

The complainant argues that it is unreasonable for him to -

at least at very short intervals - visit the Respondent's platform

would have to provide justifications or explanations for patient ratings. It

However, it should be pointed out that the Respondent has the possibility of

Notification e-mail for a new review (whereby a free registration

necessary for this service), thus freeing the complainant's resources

be spared.□

If the complainant complains that patients and also the respondent□

would have no professional expertise at all to submit such field reports or to□

review, it must be said that it is in the field reports□

www.med-search***.at it doesn't matter:□

It is implicit in such testimonials that it is a personal one□

perception of the respective patient. In addition, www.med-search***.at□

basically only such a detailed assessment (e.g. with regard to empathy,□

Relationship of trust, treatment, range of services, practice equipment, care in the□

Practice, waiting time in the waiting room and waiting time for an appointment) which are naturally merely□

are accessible to a subjective evaluation. In other words: it is in nature□

such evaluation platforms that a professional layman can express his personal opinion□

a specific offer. In addition, the Respondent does not offer any□

Subject-specific evaluation options (such as "medical expertise of the□

doctor") (cf. on the legal situation according to the DSG 2000 the notification of the former□

Data Protection Commission of March 21, 2007, GZ K121.246/0008-DSK/2007, according to which□

requirement of data correctness is linked to the intended use of the data. Provided□

this is only in the documentation of opinions or assessments, so are the□

Data from a data protection point of view correct if this opinion or assessment□

is played back correctly).□

In addition, the experience reports relate to the professional activity of the complainant,□

i.e. an area in which personal development takes place from the outset in contact with□

of the environment. The complainant must therefore rely on the□

Observation of his behavior by the general public and criticism of his□

set services. This applies in particular to freelance doctors who□

Offer services in competition with other doctors (cf. the decision of the□

German BGH of September 23, 2014 on GZ VI ZR 358/13 mwN, which the professional

Assigns activity to the "social sphere" and states that in this regard it is of a low level

It can be assumed that it is worthy of protection, as if data are affected that correspond to the "intimate or sphere of secrecy").

On the other hand, it is of considerable interest to the public and patients

of information about medical services, especially in Austria

There is basically a free choice of doctor. Through a search and review portal like this

operated by the Respondent, receive people who sometimes do not

Knowing just now the way to find out more easily and efficiently about a particular

to exchange a topic and people can use such a platform as an additional search

and source of information regarding medical care and healthcare services

attract. (cf. again the above decision of the German Federal Supreme Court of

September 23, 2014 loc.

It must be taken into account that the right to freedom of the

Freedom of expression and information or the right enshrined in Art. 10 ECHR

on freedom of expression - in addition to the expression of opinions - too

expressly protects the receipt and transmission of messages or ideas. the

In any case, the submission and receipt of ratings or field reports is

recorded.

The Respondent therefore contributes to the operation of her doctor search and

Rating portals contribute to the fact that valuable information and

Opinions can be shared and these are freely accessible, creating a

social value is created. There is also a clear recognition and

Expectation of patients that the Respondent as the operator of the doctor search and

evaluation platform can process the necessary data (cf. also

Article 29 Data Protection Working Party, WP 217 loc.cit., p

Interest gives more weight when a person in charge is not only in business□

interest, but the processing is also in the interest of the general public□

located).□

The fact that the Respondent also has marketing opportunities□

("Premium Services") and thereby intends to make a profit is harmful□

not, especially since a certain degree of commercial success is even the indispensable prerequisite□

for the continued existence of such search and evaluation platforms (cf. the judgment□

of the ECJ of December 16, 2008, C-73/07 [Satakunnan Markkinapörssi und□

Satamedia] para. 59).□

5. Result□

Overall, the data protection authority therefore initially comes to the conclusion that□

due to the balancing of interests carried out, no violation of the right to□

Confidentiality exists because the legitimate interests of the portal users (i.e. the□

patients) compared to the impairments of legitimate interests described□

of the complainant prevail (§ 1 para. 2 DSG). Consequently, the processing□

of personal data lawfully and the requirement of Art. 17 Para. 1 lit. d□

GDPR is not fulfilled.□

The processing is also in accordance with Art. 17 Para. 3 lit a GDPR to exercise the right to□

freedom of expression and information required.□

The Respondent thus has the Complainant's request for deletion dated□

May 30, 2018 rightly not corresponded.□

It was therefore to be decided accordingly.□