

GZ: DSB-D123.342/0001-DSB/2019 from 23.1.2019□

[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. R*** G***□

(complainant) of 19 August 2018 (received by the data protection authority on□

August 22, 2018) against N*** GmbH (respondent party), represented by□

Lawyer Mag. X*** Y***, due to violation of the right to erasure as follows:□

- The appeal is dismissed.□

Legal basis: § 1 and § 24 paragraph 1 and paragraph 5 of the Data Protection Act (DSG),□

Federal Law Gazette I No. 165/1999 as amended; Art. 17 of Regulation (EU) 2016/679 (data protection□

Basic Regulation - GDPR), OJ No. L 119 of 4.5.2016, p. 1., § 27 para. 1□

Doctors' Laws 1998 – Doctors' Act 1998, Federal Law Gazette I No. 169/1998 as amended; Art. 10 of the Convention on□

Protection of human rights and fundamental freedoms (EMRK), Federal Law Gazette 1958/210 as amended; Article 11□

the Charter of Fundamental Rights of the European Union (EU-GRC), OJ 2016 C 202, 389□

idgF.□

REASON□

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

1. With a complaint dated August 19, 2018 (to the□

Data Protection Authority received on August 22, 2018) from that they are with the□

do not consent to the publication of their personal data. You have the□

Respondent repeatedly asked to delete their data, but this was done on the part of the□

Respondent had always been rejected. As attachments, the

Appellant a dated August 6, 2018 and to the Respondent

directed e-mail with the following content: "(...) Also, you vehemently ignore my

Prohibition on you to use my personal data according to DSGVO from April 18.!!! I

I hereby ask you one last time to visit my personal data page

remove data. (...)". Furthermore, the complainant submitted three e-mails addressed to her

Mails from the Respondent dated June 26, 2018, August 6, 2018 and dated

August 14, 2018.

2. The data protection authority asked with a rectification order of September 18, 2018

with the complainant whether they have the right to erasure or the right to

regard secrecy as violated. Furthermore, the data protection authority required the

Appellant that she liked the request addressed to the Respondent

Submit deletion of April 2018.

3. The complainant replied by letter dated September 25, 2018 that she

the Respondent several times to delete their personal data

called on their homepage, but this was never initiated. She continued

that she wanted to exercise her right to erasure and she did so for the first time in April 2018

requested the deletion of their personal data. Also put the

Complainant further e-mail correspondence between her and the

Respondent before.

4. The data protection authority challenged the complainant with a second

Deficiency remedy order dated October 9, 2018, to the respondent

directed cancellation request from April 2018. Next she asked

Data Protection Authority asked the complainant whether it was correct that she gave her pre and

Last name including title ("Dr. R*** G***"), as well as the job title ("gynaecologist")

and the phone number ("****") and address ("****") from the website of

Respondent wanted to have deleted. The data protection authority also asked whether the phone number "****" is the private phone number of the complainant act.

5. The complainant stated in a letter dated September 25, 2018 that she the request for cancellation of April 2018 addressed to the respondent have more. From the e-mail enclosed with the letter from the Respondent to the Complainant of April 10, 2018, however, shows that the complainant already requested deletion in April 2018. Together with the letter put the Complainant also email correspondence between her and the

Respondent, including an e-mail addressed to the Respondent Mail from the complainant of August 7, 2018 with the following content: "Exactly the judgment of the Supreme Court was in 2016. You may not have noticed that it's a new one General Data Protection Regulation Act since April 2018. It is forbidden here personal data such as name, address, telephone number against the will of the affected person are used. I told you not to do that! (...)"

6. The data protection authority requested the respondent by letter dated November 23, 2018 for comments and forwarded the complaint to the complainant.

7. The Respondent submitted its comments by letter dated December 14, 2018, as well as a copy of the complainant's request for deletion dated 9 April 2018 and a screenshot of the complainant's entry on the N*** portal of December 11, 2018.

In its statement, the Respondent stated that it was available on the Internet at Internet address www.n***.at operates a doctor search and evaluation platform. be it correct that the Respondent public data according to § 27 Doctors Act (in particular names and surgery address, department) of the complainant on her platform

publish. Patients would get reviews and testimonials on the platform □

doctors can give. The physicians evaluated would in turn have the opportunity to □

to comment on and comment on the field reports. On the □

Portal of the Respondent are various quality assurance measures □

(GTC with specifications for content, filters, notice and take down procedures, □

Comment function for doctors etc.) implemented. The processing of □

The data that is the subject of the complaint is based on an overriding □

legitimate interest of the respondent; this exists in the interests of one □

to keep a complete public directory of all resident doctors and the □

To give patients the opportunity to find, read, experiences about these doctors □

publish and to facilitate the search for a doctor. doctors - according to the respondent □

continue - the platform offers the opportunity to present yourself, receive feedback and □

to comment on testimonials. The Respondent's interest is □

in particular through the constitutionally protected right to freedom of opinion and □

Freedom of information (Art. 10 EMRK) protected (VfGH 8.10.2015, G 264/2015). After □

Judiciary outweighs this interest in processing on the N*** platform □

A doctor's interest in deletion (OGH June 27, 2016, 6 Ob 48/16a). A consent □

of the doctor is not required; the processing of his data is also against his □

will permitted. The processing also takes place on the basis of the predominant □

legitimate interest of third parties, namely the users of the N*** platform □

Exchange of information in exercise of the right to freedom of expression and information. □

There is a high value in a public exchange of opinions on health issues □

public interest, which the respondent complies with on the N*** portal. There □

Health issues and in particular the issue of finding a suitable doctor □

would affect everyone is the public interest in an exchange of views □

about it evident. Especially in the area of opinion-forming on health issues □

a special public interest in a broad information and

exchange of views. In this context, the BGH in a

Doctor evaluation platform in Germany recorded the case: "It is to be expected

first of all by the very considerable interest that the public has in it

information about medical services." (Federal Court of Justice September 23, 2014, VI ZR 358/13; margin no. 39).

Restrictions on the freedom of communication in this area would therefore be special

seem drastic. In this context, the ECtHR in the case

Bergens Tidende (ECtHR, judgment of May 2nd, 2000, complaint no. 26132/95) the special

Interest of the public in information about the consequences of medical activity

(cosmetic operations) stressed and this over the interests and the professional

reputation of the doctor. There is therefore a considerable interest in

Public that transparently and also critically reports on medical services and

an exchange of views is made possible. There is no right to erasure

complainant. Apparently, the complainant erred in law in assuming that

processing of their data is in any case only permissible with their consent and

that they can process the data at their discretion and without justification

could prohibit. This results from the "ban" she has pronounced on the

Use of their data (e-mail dated August 6th, 2018) and the formulation "Exactly the verdict

of the Supreme Court was in 2016. You may not have noticed that it's a new one

General Data Protection Regulation Act since April 2018. It is forbidden here

personal data such as name, address, telephone number against the will of the

affected person are used. I told you not to do that!" in the e-mail of

Complainant from 07.08.2018. In fact, the processing of the data is complete

the Respondent, however, admissible. There is no reason for deletion

in accordance with Art. 17 Para. 1 GDPR. Nor was any such reason asserted

been. According to the Respondent, the processing in question serves the

Exercising the right to freedom of expression and information within the meaning of Article 17 (3) lit

GDPR. Furthermore, the processing for the assertion, exercise and defense

of legal claims related to quality assurance on the N*** portal

(esp. in connection with abuse reports, objected incorrect claims) required

(Art. 17 para. 3 lit. e GDPR). For these reasons, too, there is no

right to erasure.

8. By e-mail dated December 19, 2018, the data protection authority sent the

Appellant the Respondent's statement of November 14, 2018

to party membership.

9. The complainant did not comment on this.

B. Subject of Complaint

The subject of the complaint is the question of whether the Respondent

complainant violated her right to erasure.

C. Findings of Facts

1. The Respondent operates a doctor search and

review portal. Public data according to § 27 Medical Act, namely title, first and

Last name ("Dr. R*** G***"), job title ("gynaecologist") and address

("****") and telephone number ("****") of the complainant's surgery are on the

Respondent's website published.

2. The complainant requested the deletion of her for the first time on April 9, 2018

personal data from the Respondent's website.

3. The Respondent rejected a deletion - among other things in the

email sent to the complainant on August 14, 2018 - on the grounds that

that the use of the Respondent's personal data is permissible

is.

Evidence assessment: The findings are based on the consistent submissions

of the complainant and the respondent. That the Respondent

mentioned personal data of the complainant published, results

also from an official search on the website www.n***.at on the key date

January 21, 2019. That the data published on www.n***.at are identical to the

The data to be published in accordance with Section 27 of the Medical Act results from an official decision

Research on <http://www.aerztekammer.at/arztsuche> as of January 23, 2019.

D. In legal terms it follows that:

1. First of all, it should be noted that the complaint in question is only against

the deletion of data: title, first and last name, job title, address and

telephone number of the complainant's surgery and not against one

Review on the Respondent's website.

2. Furthermore, the decision of December 17, 2018 on DSB-D123.040/0006-

DSB/2018, in which the data protection authority with regard to a - the same

Respondent concerned – Complaint of violation of the right to

Confidentiality has expressed that it is in accordance with § 27 Medical Act

published data from doctors is not data worthy of protection within the meaning of Section 1 (1).

DSG is acting, which is why the complaint was to be dismissed (cf. also the - still on

Legal situation according to the "Data Protection Act 2000" - judgment issued by the Supreme Court of

June 27, 2016, GZ 6 Ob 48/16a, according to which a violation of the fundamental right to data protection

according to § 1 DSG 2000 for public data according to § 27 paragraph 1 Doctors Act in principle

can be ruled out).

3. In the present case, however, the complainant did not have the right to

Secrecy, but the right to erasure asserted.

Article 17 GDPR (right to erasure ("right to be forgotten")) reads:

"(...)

(1) The data subject has the right to demand that the person responsible

personal data relating to them will be deleted immediately, and ☐

The person responsible is obliged to delete personal data immediately if ☐

one of the following reasons applies: ☐

a) The personal data are relevant for the purposes for which they were collected or referred to ☐

processed in any other way is no longer necessary. ☐

b) The data subject withdraws their consent on which the processing is based ☐

Article 6(1)(a) or Article 9(2)(a) and is absent ☐

to another legal basis for the processing. ☐

c) The data subject objects to the ☐

Processing and there are no overriding legitimate reasons for the ☐

processing, or the data subject objects in accordance with Article 21(2). ☐

against the processing. ☐

d) The personal data have been processed unlawfully. ☐

e) The deletion of the personal data is necessary to fulfill a legal obligation ☐

Obligation required by Union law or the law of the Member States, ☐

to which the person responsible is subject. ☐

f) The personal data was collected in relation to the services offered by ☐

Information Society collected in accordance with Article 8(1). ☐

(...) ☐

(3) Paragraphs 1 and 2 do not apply if processing is necessary ☐

a) to exercise the right to freedom of expression and information; ☐

b) to fulfill a legal obligation that requires processing under the law of ☐

Union or the Member States to which the person responsible is subject, or for ☐

Performance of a task that is in the public interest or in exercise ☐

public authority delegated to the controller; ☐

c) for reasons of public interest in the field of public health ☐

in accordance with Article 9 paragraph 2 letters h and i and Article 9 paragraph 3;□

d) for archival purposes in the public interest, scientific or historical□

research purposes or for statistical purposes in accordance with Article 89 paragraph 1, to the extent that□

Paragraph 1 of the law is likely to achieve the objectives of this processing□

renders impossible or seriously impairs, or□

e) to assert, exercise or defend legal claims.”□

4. Objective are on the website of the Respondent of the pros and□

Last name including title, job title, address data and telephone number□

published by the complainant's ordination.□

5. This is personal data according to the complainant□

Art. 4 Z 1 GDPR. Their publication on the Respondent's website□

www.n***.at represents a processing of personal data within the meaning of Article 4 Z 2□

GDPR.□

6. As with any processing of personal data, the first thing to do is to□

Turn off the legal basis for the processing, i.e. whether the processing of the□

personal data is lawful within the meaning of Art. 6 GDPR or § 1 DSG.□

7. The processing of personal data is lawful, among other things,□

if the use of personal data with consent (see § 1□

Para. 2 DSG) or - as it says in the GDPR - with the consent of the person concerned□

takes place in accordance with Article 6 (1) (a) GDPR.□

8. The Complainant now demands that the Respondent delete her□

personal data and clearly justifies this by the fact that they□

does not consent to the processing of their data or in which the publication of their data is not permitted□

has consented.□

9. What the complainant overlooks in this context, however, is that it□

for the lawfulness of the processing not necessarily in each case the□

consent of the data subject is required. This is how § 1 DSG and Art. 6 DSGVO see it

before that a processing of personal data (among other things) even then

is lawful if it is used to protect overriding legitimate interests

others (see § 1 para. 2 in conjunction with para. 3 and para. 4 DSG and Art. 6 para. 1 lit. f GDPR)

is required.

10. However, the

Respondent in the present case by constitutionally

protected right to freedom of expression and information (Article 10 of the ECHR and Article 11 of the EU

GRC) brings into play. She leads out from that at a public exchange of views

there is a high level of public interest in health issues, which the

respondent on the N*** portal. The Respondent brings

further suggests that health issues and in particular the topic of finding

a suitable doctor affect everyone, which is why the public interest in one

exchange of opinions and the formation of opinions about it is evident.

Ultimately, the Respondent also refers to the majority of legitimate ones

Interests of third parties, namely the users of the N*** platform, in the exchange of information in

Exercising the right to freedom of expression and information.

11. The data protection authority follows the arguments of the respondent and leaves

of a predominance of the interests of the respondent on the one hand and the

Users of the website www.n***.at on the other hand from:

In the present case, the right to data protection collides (specifically: the right to

deletion) of the complainant with the right to freedom of expression

Respondent and third parties, namely the website user of the website

www.n***.at

Freedom of expression is protected by Art. 11 of the EU-GRC ("Freedom

of expression and freedom of information"). This right "closes the

Freedom of expression and freedom to express information and ideas without government interference□

and to receive and transmit without regard to national borders". Art. 11 EU□

GRC corresponds to Art. 10 ECHR. According to Art. 52 Para. 3 of the EU-GRC applies: To the extent that these□

Charter contains rights equivalent to rights guaranteed by the ECHR,□

“they have the same meaning and scope as they are given in the above□

Convention is awarded". The restrictions that lawfully apply to the provisions of Art. 11 EU□

GRC enshrined law can be applied, may therefore go beyond the in Art. 10□

Paragraph 2 of the ECHR does not go beyond the restrictions provided for, so they must be legal□

be provided and in a democratic society “to protect [...] the good□

reputation or the rights of others”. With this concept (the constraint□

the right to freedom of expression) also includes the right to data protection□

(See European Union Agency for Fundamental Rights, Handbook on□

European data protection law, 2014, p. 23 ff).□

12. Under Article 10(1) of the ECHR, everyone has “the right to freedom of expression”.□

"Everyone" includes both natural and legal persons - thus also□

the Respondent ("N*** GmbH") - with (cf. Bezemek in□

Holoubek/Lienbacher, GRC commentary (2014) Art. 11 GRC (as of May 1, 2014, rdb.at)).□

13. On the compatibility of the right to data protection and the right to freedom□

opinion, the ECtHR has made several landmark judgments, including□

Axel Springer AG versus Germany. In this case, the ECtHR held that a□

Prohibition issued by a domestic court against the owner of a□

Newspaper that published an article about the arrest and conviction of a well-known□

actor wanted to publish, is a violation of Art. 10 ECHR. The ECtHR□

referred to criteria that he used in his case law when weighing up between the□

Right to freedom of expression and the right to respect for private life□

(Art. 8 ECHR), which includes the right to data protection, had stipulated:□

Firstly, is the event referred to in the article in question

an event of general interest?

Second, is the person concerned a public person?

interest?

Third. How was the information obtained and was it reliable (see

European Union Agency for Fundamental Rights, Handbook on the European

Data protection law, loc. cit.)?

14. If you put those worked out by the ECJ in Axel Springer AG against Germany

criteria to the present case, then with regard to the first criterion

affirm that (the publication and) the non-deleting of the data of

Appellant is in the general interest, as finding a suitable

doctor affects every person.

With regard to the second criterion, it should be stated that - although the private individual

the complainant may not be a person of public interest - nevertheless in the

Exercise of her profession, that is: in her work as a gynecologist, a public one

interest is to be affirmed. This interest is manifested in the fact that each person

Looking for a gynecologist on www.n***.at and the complainant

Can be found.

Regarding the third criterion: In its opinion of December 14, 2018 leads

the Respondent from: "It is correct that the Respondent public

Data according to § 27 ÄrzteG (especially name and surgery address, department) of

complainant published on her platform". At the on the website of

Respondent published data of the complainant is

those data that according to § 27 ÄrzteG on the part of the Austrian Medical Association in a

electronic list of doctors and group practices authorized to practice

(list of doctors) are to be published. Official research has shown that the

data published by the Respondent on its website www.n***.at□

are with those published on the website of the Austrian Medical Association.□

The data used by the Respondent on www.n***.at□

Complainant are therefore reliable.□

15. On the basis of what was said, therefore, the balancing of interests to be carried out was to be carried out□

between the complainant's interests in the deletion of her□

personal data from the website www.n***.at on the one hand and the applicable□

interests of the Respondent and the users of the N*** platform on□

Exchange of information in exercise of the right to freedom of expression and information□

on the other hand, of a preponderance of the interests of the Respondent□

to go out□

16. There is therefore lawful processing due to overriding legitimate interests□

interests of the person responsible and third parties within the meaning of Article 6 (1) (f) GDPR.□

17. In principle, the complainant has the right to erasure□

of personal data in accordance with Art. 17 Para. 1 GDPR. In the present case□

However, the Respondent relies on the exception of Art. 17 Para. 3□

lit. a GDPR, according to which the person responsible processes personal data of the persons concerned□

Person then does not have to delete, as far as the processing of personal data□

the data subject to exercise the right to freedom of expression and□

information is required. As shown, the Respondent can, however,□

Right to the existence of overriding legitimate interests in exercising the right□

based on freedom of expression and information.□

The appeal was therefore dismissed accordingly.□