GZ: 2020-0.225.643 from June 12, 2020 (case number: DSB-D124.2138)

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

Addresses (incl. URLs, IP and email addresses), file numbers (and the like), etc., as well as

their initials and abbreviations may be abbreviated for reasons of pseudonymization

and/or changed. 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 Mag. Erwin A***

(Appellant) of May 6, 2018 against N***-Versicherung AG (Respondent)

due to violation of the right to secrecy as follows:

- The complaint is dismissed as unsubstantiated .

Legal basis: §§ 1 to 9 DSG 2000, Federal Law Gazette I No. 165/1999 as amended to Federal Law Gazette I No. 132/2015,

and Section 24 (5) of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended; Sections 11a and 34

of the Insurance Contract Act (VersVG), Federal Law Gazette No. 2/1959 as amended by Federal Law Gazette I No. 112/2016.

A. Submissions of the parties and course of the proceedings

REASON

1. By submission of May 6, 2018, the complainant submitted that he had one

Additional insurance with the respondent. The insurance company demands from him

Original pharmacy receipts. The submitted proof of purchase from the pharmacy

not enough for her. In order to benefit from an insurance benefit, he will

forced to disclose health-related data subject to secrecy

would. The medicines purchased are named on these pharmacy receipts

listed. He was of the opinion that the insurance company was not interested in which ones

medication the customer needs. This is subject to the confidentiality of both the doctor and

also the pharmacy. In his opinion, the insurance company must

Proof of customer sales from the pharmacy is sufficient, clearly stating how many

prescription drugs were purchased in an insurance year. have this

he already on February 20, 2018

in the course of an entry

in control and

communicated to the ombudsman procedure. The data protection authority informed him that

not possible due to an obviously non-existent data transfer

There is a violation of the law and the data protection authority will not take action in this case

could. This means that he first had to disclose this data so that a

data breach occurs at all. The complainant therefore contacted

addressed to the author of the above-cited communication from the data protection authority in order to

ask whether the ex lege guaranteed data protection in Austria actually only applies

if a data breach has occurred. Ultimately, the complainant is entitled

been given to understand that he actually had to disclose this data in order for a

data breach occurs and it is prosecuted by the data protection authority

could. The complainant perceives this as an official act provocation. He has

nevertheless complied with it and the respondent the original receipts, the sensitive ones

data would be sent. This is how the data breach happened.

Sensitive data would require the explicit consent of the person concerned. The

The Data Protection Act requires a freely granted, specific, consent for effective consent

prior information given and unequivocal indication of the will of the

respective person. It is the task of the Respondent to show that such a

consent has been duly granted. The Respondent is his written

Please, such consent to data request, collection or processing

to prove, not complied with. There is no need for these

required data transmission nor consent to it, they demand, let alone

to be allowed to enforce (no authorization or obligation).

3. By letter dated March 5, 2020, received on March 10, 2020, the

Complainant submits that on May 6, 2018 he was at the Austrian

data protection authority filed a complaint. To date - more than a year and a half

later - be it without any answer or settlement. Data protection will be in Austria

apparently not taken seriously.

2. In a letter dated March 25, 2020, the Respondent submitted in summary that

the content of the complainant's complaint is consistent with the complaint of

February 20, 2018 to the GZ: DSB-D216.669/0003-DSB/2018 and do not contain any

substantiated new complaints.

In both submissions he complains

Complainant that the Respondent on the transmission of the original

Pharmacy invoices for the provision of services exist.

It should be noted that the procedure for GZ: DSB-D216.669/0003-DSB/2018 from

February 20, 2018 and the Respondent hereof with a letter dated April 17

was notified in 2018. The Respondent refers to the statement of

March 16, 2018 and add the following:

As set out in the March 2018 Opinion, the General

insurance conditions

(AVB)

Next

the

provisions

of

Insurance Contract Act (VersVG) represent the most important legal basis. she

would represent a description and limitation of insurance coverage.

The data from the original invoices in question are processed for

Assessment and fulfillment of claims arising from the insurance contract with the

concerned.

The general insurance conditions applicable here for medical expenses and

Hospital Daily Allowance Insurance (AVB 1999) are applicable to all tariffs

Conditions, the scope of which, however, depends on the tariff actually concluded

be restricted. Under these conditions, the cost of under a

Medical treatment prescribed and medicines obtained from a pharmacy are reimbursed.

According to item 7.1. of these AVB, the payment is made on the basis of netted

Original invoices, from which, among other things, the actual reference person, designation

of the services provided and the dates of the treatment.

A prescription fee confirmation from a pharmacy does not meet the criteria of AVB 1999 and

cannot therefore be accepted as a substitute for an original invoice. Apart from that

of this, the prescription fee confirmation does not contain all the information required for checking the

information required for the insured event, such as: the designation of the service

(Drug). The assessment of claims from an insurance contract can

on the basis of the prescription fee confirmation.

Furthermore, according to § 34 VersVG, the policyholder is obliged to

to provide the insurer with any information necessary to determine the insured event or the

scope of the insurer's obligation to pay is necessary. The insurer can provide evidence

according to this provision to the extent that the procurement is for the policyholder

could reasonably be expected. In particular, it should be noted that the

Submission of these original invoices is provided for in the AVB 1999.

Personal health data is also processed

in

Correspondence of § 11a Abs. 1 Z 3 VersVG, according to which the insurer in connection with

Insurance relationships in which the state of health of the insured person or□

of an injured party is significant, may process personal health data,□

insofar as this is used to assess and fulfill claims arising from an insurance contract□

is essential.□

This personal health data is determined in accordance with Section 11a Paragraph 2 Z 2□

VersVG, according to which the insurer uses personal health data for the purposes specified in paragraph 1□

stated purposes only on the basis of the policyholder or the injured party□

provided documents. For this reason, too, it is necessary that□

the complainant provides the documents.□

The complainant's reasoning cannot therefore be accepted, since□

Action of the Respondent fully in accordance with the statutory provisions□

correspond and this to the assessment and fulfillment of claims from a□

insurance contract and to determine the scope of the obligation to provide benefits□

insurer is essential.□

3. By letter dated April 6, 2020, the complainant submitted in summary that□

Respondent justify their actions with the VersVG and claim that they - to□

Determination of the insured event and the scope of the insurer's obligation to provide benefits -□

may request and process the personal health data, insofar as this is necessary for□

this for the assessment and fulfillment of claims from an insurance contract□

is essential.□

According to the complainant's perception of justice□

be personal□

Health data is not required at all for this, especially since the insurance company anyway□

guarantee that a balanced invoice issued by a pharmacy for a□

Medication in any case relates to a medication prescribed by a doctor, since it is from her anyway□

only prescription drugs prescribed by doctors would be reimbursed. this□

means by implication that personal health data for assessment and

Fulfillment of claims from an insurance contract in no way necessary,

let alone "essential". The restriction "so far" also makes it clear

that a condition applies here, which the insurer admits but grossly disregards.

It is noted in this context that the complainant consequently

– and also because of the processing error of the data protection authority – also in 2019 and 2020

was forced to disclose sensitive personal health information.

There can also be no norm conflict between the VersVG and the DSG because

the Data Protection Act represents the higher-ranking standard in any case. So there is none

sufficient legal basis for the Respondent to provide pharmacy receipts

or pharmacy bills demand that

any sensitive personal information

would provide health data. This is not least also in the extension of the

medical confidentiality

to

see,

then

also pharmacist

had

one

duty of confidentiality that will be circumvented.

To put it plainly: it is simply none of the Respondent's business if someone

suffer from severe depression and need long-term medication from a specialist for this

need, which the EUR 85 annual maximum rate does not even come close to covering.

B. Subject of Complaint

Based on the submissions of the complainant, it is clear that the subject of the complaint

the question is whether the Respondent is thereby entitled to the Complainant

breached secrecy by making an insurance payment to the

Complainant asked for the original receipts from a pharmacy and not just that

Proof of purchase from the pharmacy.

C. Findings of Facts

As a state civil servant, the complainant has additional insurance with the

Respondent set up by the state of Upper Austria as a group insurance

would. The Respondent requests the transmission of the service for the provision of services

Original pharmacy receipts. The medicines purchased are on these receipts

named.

In a letter dated February 20, 2018, the complainant submitted a

Control and ombudsman procedure according to § 30 DSG 2000 essentially before that

The insurance company (respondent) demanded the original pharmacy receipts from him. the

customer proof of purchase submitted by the pharmacy is not sufficient. On this

Pharmacy receipts are listed by name for the medicines purchased, this has the

not interested in insurance. This procedure became GZ: DSB-D216.669

logged.

By letter dated March 20, 2018, the data protection authority sent the

Complainant received a statement from the Respondent and informed that out

This shows that "original invoices due to the between the contracting parties

concluded insurance contract for the provision of services must be submitted. In

In this context it should be pointed out that by an obviously not

there is no possible infringement of the law that has taken place and the data has been passed on

Data Protection Authority cannot act in this case."

With a letter dated April 17, 2018, the procedure was discontinued informally.

By letter dated May 6, 2018, the complainant raised after the

Original invoices were submitted by him again complaint.

This complaint was not logged due to an internal error. Only because

of the complainant on March 10, 2020, the content of the complaint became

treated.

Evidence assessment: The findings are based on the submissions of the parties and the

File content or the file GZ: DSB-D216.669.

D. In legal terms it follows that:

1. This complaint is procedurally based on the new legal situation (DSG as amended in Federal Law Gazette I

No. 24/2018) in accordance with Section 24 (5) DSG.

In terms of substantive law, however, the matter is after the end of May 24, 2018, the

time of the alleged violation of the right to secrecy, applicable

To assess provisions of §§ 1 to 9 DSG 2000 or the VersVG, because to this

Date of the GDPR or the necessary adjustments to the VersVG by Federal Law Gazette I

No. 16/2018 were not yet applicable.

There is no question that in the present proceedings data is already being passed on

has taken place. The complainant believes that the payment of the

insurance benefit the transmission of a prescription fee confirmation is sufficient and he

by submitting the balanced original invoices in his right to confidentiality

would be violated, since the Respondents thereby became aware of the prescription prescribed for him

Medication - and indirectly about his state of health - obtain.

The data at issue provide information about the health of the

Complainant and are therefore sensitive data within the meaning of § 4 Z 2 DSG 2000. The

Permissibility of processing is therefore based exclusively on Section 9 DSG 2000.

According to § 9 Z 3 DSG 2000, the use of sensitive data is permitted, among other things, if

the authorization or obligation to use results from legal regulations,

insofar as these serve to safeguard an important public interest.

The processing of health data in the context of insurance law is based on

§ 11a VersVG, according to its paragraph 1 the insurer

in connection with

Insurance relationships in which the state of health of the insured person or

of a victim is significant, may process personal health data,

insofar as this is for the administration of existing insurance contracts (Z 2) or for the assessment and

Fulfillment of claims from an insurance contract (Z 3) is essential.

According to § 11a paragraph 2 VersVG, insurers may process personal health data for the

in para. 1 only in the following way, i.e. by questioning the

Person who is to be insured or is already insured, or by

Interviewing the injured party (Z 1) or based on the policyholder or from

Damaged documents provided (Z 2).

§ 34 VersVG obliges the policyholder to provide information to the

Insurer if this is used to determine the insured event or the scope of the

the insurer's obligation to perform is required. The insurer can provide evidence in this respect

demand than procurement can reasonably be expected of the policyholder.

The obvious purpose of the obligation to provide information and receipts is to fill the information deficit

of the insurer against the policyholder. Naturally he is

Policyholders are informed more comprehensively about the life circumstances affecting them

as the insurer. He should therefore provide the insurer with all the information known to him

and hand over the documents available to him. The policyholder has

First notify the insurer of the occurrence of the insured event (§ 33 VersVG) and then

upon request to the insurer further information and/or documents for the examination of his

obligation to perform

within the meaning of § 34 VersVG. The

is an obligation of

policyholder. The insurer can demand the information he needs

deems necessary, insofar as they can be significant for the reason and scope of his service

(see the judgment of the Supreme Court of November 5, 2014, GZ 7 Ob 180/14t mwN).

The case law of the OGH on § 34 VersVG can also be seen that the

The policyholder must provide any information necessary to determine the insured event

is required. The insurer may request such information as it deems necessary

holds; however, he is responsible for proving that the requested information was necessary (see

Grubmann, VersVG8 § 34 (as of July 1st, 2017, rdb.at) E 10 mwN).

In principle, all documents are subject to the obligation to provide documentation within the meaning of Section 34 (2) VersVG

which the policyholder has at his disposal or which he obtains from third parties

can

(which already exist). The obligation to provide evidence

is a correlate to

Obligation to provide information, so that the authorization of the request for information at the same time

The yardstick for the justification of the document request is. Only in rare exceptional cases

it cannot be reasonably expected of the policyholder to

in its

power of disposal, to submit (see again Grubmann, loc.cit., E 63 with further references).

2. Applied to the present case, this means:

Due to the clear order of § 34 VersVG, the complainant is subject to a

and Obligation to provide evidence to the Respondent.

In this case, the transmission of the health data can refer to § 11a Para. 1 Z 3 and Para. 2

Support Z 2 VersVG.

The Respondent, on the other hand, has the burden of proof that the requested

Documents to determine the insured event or the scope of the obligation to provide benefits

are actually required.

It must therefore be examined whether the Respondent rightly insisted that her

complainants the original invoices from the pharmacies and not just sales receipts

transmitted.

Item 7.1. In this case AVB 1999 can be seen as a specification of § 34 VersVG

(see in relation to the General Conditions for Legal Protection Insurance –

ARB 2000 again the judgment of the Supreme Court of November 5, 2014 already cited).

The Respondent already stated in its statement of March 16, 2018 that

any erroneous double submissions due to a mere prescription fee confirmation

cannot be determined and thus correct processing by your employees

cannot be guaranteed in the interest of the entire insured community.

The complainant did not substantiate this.

In this respect, it seems "conceivable" that the Respondent received the original invoices

for the assessment of the relevant facts, namely the precise scope of their

obligation to perform, required.

As a result, there is no violation of the right to secrecy, which is why

was to be decided accordingly.

Insofar as the complainant complains that he has to submit a complaint to the

Data Protection Authority was forced to send the original invoices and

thus disclosing sensitive data, the reply to him is that it is him instead of a

procedure

would have been open to the data protection authority

none

to submit original invoices and, in the event of the Respondent's refusal, theirs

to provide insurance benefits, to sue them in civil courts.