

GZ: DSB-D123.224/0004-DSB/2018 from 14.1.2019□

[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 Sieglinde A\*\*\*□

(Appellant) of July 18, 2018 against the N\*\*\* Gesellschaft für□

Fiscal research & tax law mbH (respondent) due to violation in□

Right to information as follows:□

1. The complaint is upheld and it is found that the□

Respondent thereby waives the right of the complainant□

has violated information by informing her that none of them concern her□

personal data are processed by the respondent□

and the complainant the information pursuant to Article 15(1) lit. a to h□

DSGVO has not granted.□

2. The Respondent is ordered within a period of two□

Weeks with other execution, information about personal data□

of the complainant to those listed in Art. 15 (1) lit. a to h GDPR□

to give information.□

Legal basis: Section 24 (1) and (5) of the Data Protection Act – DSG, Federal Law Gazette I No.□

165/1999 as amended; Art. 4 Z 1, Z 5 and Z 7, Art. 15 Para. 1 lit. a to h and Para. 3, Art. 58 Para□

lit. c and Art. 77 Para. 1 of Regulation (EU) 2016/679 (General Data Protection Regulation -□

GDPR), OJ No. L 119 p. 1.□

## REASON ☐

### A. Submissions of the parties and course of the proceedings ☐

1. With the complaint dated July 18, 2018, the complainant summarized ☐

out that she had sent the respondent by letter dated April 18, 2018 ☐

Provision of information in accordance with §§ 1, 23, 26 and 50 DSG 2000 with regard to the ☐

personal data concerning the complainant. With letter dated ☐

On June 8, 2018, those responsible announced that she had no ☐

personal data relating to the complainant would be processed. Of the ☐

Respondents would generally only be made anonymous ☐

Statements of facts and only in exceptional cases other documents (under ☐

defacement of all personal data of third parties). ☐

will. The identity of the complainant was only through the request for information ☐

known. However, these statements were not for the complainant ☐

Comprehensible: From the Respondent's statement in relation to the ☐

Dual residency in Austria and Switzerland from February 5, 2018 is one ☐

Identification of the complainant, even if she is not named, ☐

undoubtedly possible. This statement includes, among other things, the address of ☐

Complainant in Switzerland stated that she provided information about location data ☐

and about the applicant's cultural and social identity. Let it be ☐

to assume that the Respondent in the context of preparing the Opinion ☐

other personal data (e.g. data on travel and stays in ☐

Austria and Switzerland) have processed. It is inconceivable otherwise, like that ☐

Respondent could have determined exactly where the ☐

applicant and her spouse had stayed at certain periods of time. the ☐

The information provided by the Respondent was therefore incorrect and incomplete. ☐

2. With a statement of September 4, 2018, the Respondent led to Art ☐

summarized from their activities and source of information they would

scientific work and reports based on scientific methods in the

areas of tax and economic research and the associated areas of law

create. As a rule, no separate factual investigations are carried out for this purpose

will; therefore formed the frame of reference for the statements exclusively

Information to the extent that it is transmitted by the respective clients

would be insisted on anonymisation as far as possible. Also directly on

the first page of the statement on dual residency which is the subject of the proceedings

it is pointed out that a factual matter communicated to the Respondent

form the subject matter of the remarks. Therefore, no comprehensive data are available

Travel and stays of the complainant. The facts to be assessed are in

to the extent as described in the statement as an introduction to the facts

were, by the tax representation of the deceased spouse

complainant has been sent.

In addition, there would be no "automated" processing: In the company of

The complainant does not have any IT system that independently posts data

can handle certain procedures. Only standard software of the

Office area (e.g. word processing) with its own inputs for the application. digital

Documents would only be manipulated based on individual user commands, e.g.

opened, changed, etc. The content of the same does not serve to be machine-structured

Interpretations or archiving, but as a visual object and

Knowledge basis for subsequent – again human-generated –

text elaborations. Your activity can therefore at best be in the area of a

non-automated processing of data.

In any case, there is no "processing" because there is no structure or structure that reveals the data

file system is present. If any personal information in the

Documents are available, these would at most be a part of the

Documents transmitted by the Respondent, but not according to such

Characteristics would be sorted or structured. A targeted approach without essential

Prior knowledge of the data content is therefore not even about an electronic

"Text search" possible, but can only be done by fully opening up the

entire content-related continuous text. Even if the present and in the

Opinion reproduced information as "personal data" of

complainant would be classified, there is a lack of a structured content

Processing of the same as elementary and explicit in the terms of the GDPR

lie at the bottom. Since the Respondent has no orderly, structured or

systematic information about the complainant was available, the latter only

can be informed that no personal data concerning them is held by the

Respondent would be processed.

After all, the Respondent is only a processor according to Art. 4 Z 8 DSGVO,

whereas G\*\*\* & P\*\*\* Austria as responsible according to Art. 4 Z 7 DSGVO

would consider. However, the right to information under Art. 15 GDPR can only be expressly

be asserted against the person responsible.

3. The complainant led within the framework of the data protection authority to the

results of the preliminary investigation granted party hearing, own

Determining the facts is according to the definition of the term "processing" within the meaning of

Art. 4 Z 2 GDPR not a prerequisite for the applicability of the GDPR. So be it

completely beyond doubt that the Respondent's personal data in

would be processed within the meaning of the GDPR. So far, the Respondent has not

content-related information about the processed data, which is why not understood

could become which data of the Respondent would be available. In relation to

the existence of automated processing is otherwise based on the literature and

Case law referred, according to which automated processing is in any case present, if IT systems were used to process the data. For this

It is irrelevant whether individual automated data processing operations are differentiated automatically (e.g. by algorithms) or based on human input.

A corresponding differentiation is only relevant for Art. 22 GDPR. About it

In addition, the Respondent's statements, according to which a corresponding File system is also required for automated data processing, both the wording of Art. 2 Para. 1 GDPR as well as the status of opinion in case law and literature contradict. Respondent's allegation that she processor, but not the person responsible, this contradicts the Statements in the original information and in the statement of the Respondent. If the Respondent were actually only as commissioned, would have an obligation to conclude a Processor agreement in accordance with Art. 28 Para. 3 GDPR and for the management of a Processing directory according to Art. 30 Para. 2 DSGVO existed and would have the Respondent already in its reaction to the original request of the Complainant can point this out.

## B. Subject of Complaint

In the present proceedings, the question arises as to whether the complainant her right to information has been violated because the Respondent gave her a gave negative information.

## C. Findings of Facts

The Respondent creates scientific work as part of her work and expert opinions according to scientific methods in the areas of tax and Economic research and related areas of law.

The Respondent was commissioned by "G\*\*\* & P\*\*\*Österreich" to

tax law opinion regarding “Questions of dual residency in Austria

and Switzerland”. See this electronically drafted statement

explanations, among other things, about the place of residence and the economic, cultural and social

identity of a taxpayer and his wife. This is about the

complainant. Neither the taxpayer nor the complainant will

mentioned by name.

Due to the numerous different data (location, family, economic and

social identity of the complainant) is an identification of the complainant

possible for third parties.

In a letter dated June 8, 2018, the Respondent informed in relation to the

The complainant's request for information states that she does not have the complainant

relevant personal data processed.

Evidence assessment: The findings are based on consistent submissions

the complainant and the respondent in their letters to the

data protection authority and the attached documents. The finding with regard to

the identifiability of the complainant in the statement of the

Respondent results from the numerous information in the

concrete opinion, from which, according to general life experience

shows that by narrowing down those potentially affected, only the complainant

remains.

D. In legal terms it follows that:

To the legal situation

On April 18, 2018, the complainant submitted a request for information to the

Respondent submitted.

The legal situation at the time of the decision of the data protection authority is decisive,

unless it is a matter of judging a behavior towards a particular

Time.□

As far as the right to information is concerned, this right - if the□

necessary conditions – until the end of the procedure before the□

Data protection authority to be made up for (§ 24 Para. 6 DSG), which is why□

the subject matter of the proceedings is the legal situation in force since May 25, 2018.□

Material scope of the GDPR□

Art. 2 regulates the material scope of the GDPR, which results from the form of the□

Data processing and the purpose that is being pursued with it. Regarding the□

form of data processing, the scope of application of the GDPR is opened up if□

personal data are either fully or partially processed automatically□

or are not processed automatically, but are stored in a file or□

should be. It is therefore essential that either an automated□

Procedure Executed operation or a series of operations in connection with□

personal data exists or the data is part of a according to certain criteria□

structured collection, so that easier access to the data is possible.□

With the current state of the art, it can be assumed that any form of□

automated processing suitable storage meets the conditions to be considered□

file system to be viewed. With modern data analysis techniques, too□

Little or no structured databases can be easily processed in such a way that□

Information can be searched according to various criteria. Basically□

the rules of data protection should be technology-neutral. Just not electronically□

recorded files, collections of files and their cover sheets, which are not specified according to□

Criteria are ordered, should fall outside the scope□

(Ehmann/Selmayr, DS-GVO, comment, Art. 4 Z 35).□

Since the Respondent's statement was recorded electronically and□

process carried out with the help of automated procedures (written electronically□

Opinion) in connection with personal data is the

the data processing in question falls within the scope of the GDPR. on

the legal qualification of a "file system" (Art. 2 para. 1 leg.cit) occurs because no

non-automated processing is no longer available.

personal reference

In the present case, from the procedural statement of

Respondent on dual residency, for example, statements about the place of residence, the

family and economic situation, social contacts of the complainant as well as

Interests, hobbies, belonging to clubs or a regular group on the one hand

directly, on the other hand indirectly via the relationship to the complainant's husband

derivable. This data is basically suitable for a personal reference

Complainant (cf. Art. 4 Z 1 GDPR).

However, it is questionable for whom the person must be identifiable in order for a date to be

personal applies. In this regard, recital 26 states that it is necessary for the qualification

a database as personal data is not necessary that the

The person responsible can carry out the identification himself, but it is sufficient that

any third party reasonably likely to do so,

whereby costs and time expenditure are to be considered as well as the respective

available technology and technological development (see also Ehmann/Selmayr,

DS-GVO, comment, Art. 4, para. 17; cf. also the judgment of the ECJ of

19 October 2016, C-582/14).

In the present case, it must be assumed that the combination

of several properties, the circle of those potentially affected can be narrowed down to such an extent

that only the complainant remains and is therefore clearly identifiable

will. Due to the numerous different data (location, family,

economic and social identity of the complainant) an identification of the



Appellant, without affirming significant costs and excessive expenditure of time□

be (cf. for the case of a possible identification based on a narrowed□

Group of people also the recommendation of the Data Protection Commission of May 22, 2013,□

GZ K213.180/0021-DSK/2013).□

Even if it should be true that the Respondent's data regarding the□

Taxpayers or the complainant mainly "anonymously" available□

have been asked, it cannot be followed beyond that: Anonymized□

Data are those that do not (any longer) relate to a specific or determinable□

refer natural person. In the present case, according to what has just been said,□

however, cannot be assumed. In contrast, pseudonymization (Art. 4 Z□

5 GDPR) has no effect on the personal reference of the data, since it is ultimately□

It is just another form of storage, but the person responsible□

the complete information content of the data is still available and the□

individual reference to each information element can be produced without great effort□

can. This is also clarified again in recital 26.□

Responsible□

Those responsible according to Art. 4 Z 7 DSGVO are subject to accountability□

Art. 5 para. 2 leg.cit and must therefore be able to ensure compliance with the principles for□

prove the processing of personal data. from this obligation□

recognize the extent of the decision-making power of the person responsible or the□

have joint responsibility for the purpose and means of data processing□

have to. It can by no means always be assumed that that□

Organization that has direct contact with the data subjects and about the□

collects or collects the data will be considered the controller□

can (Ehmann/Selmayr, DS-GVO, comment, Art. 4 Z 38)□

Insofar as those responsible for the implementation of the data provided about the order□

can also use for their own purposes or modify the purpose themselves,□

or if they have significant design or choice options regarding the means of□

processing, they are responsible together with the client□

consider and have further obligations (Ehmann/Selmayr,□

DS-GVO, comment, Art. 4 Z 41).□

If the Respondent believes that they are not responsible because they themselves□

does not determine any facts, but only relies on them in their respective assessment□

support information that was given to it by the respective clients,□

cannot agree to this legal view for the following reasons:□

The subject of the proceedings was the Respondent's decision, which was made by third parties□

to use the transmitted data. For the independence of the data processing□

Body (Respondent) also speak a self-interest in the□

Data processing and the technical implementation of the processing□

Additional contractual services in the form of independent and independent services□

Preparation of a tax law opinion. Independence from instructions□

a client already results from the essential feature of the activity of□

Respondent as author of “scientific papers and reports□

according to scientific methods in the areas of tax and□

economic research”. The Respondent thus has benefits with its own□

Provided scope for decision-making, a comprehensive instruction option by the□

Client "G\*\*\* & P\*\*\*\*" or a control of the legality of the data processing□

this did not emerge in the proceedings before the data protection authority.□

In particular, it is not clear to what extent the Respondent is not itself□

could decide how long data is kept or who has access to it□

processed data.□

Finally, it should be borne in mind that this, of course, does not rule out that the□

Interaction of a project and the synopsis of Art. 4 Z 2 and Z 7 DSGVO

when interpreting the area of responsibility of an individual controller

different levels of data processing (such as collection, storage, etc.).

can be different. Depending on the organizational design of a project

between individual activities controlled or carried out by a specific location

or different areas of activity and responsibility (cf.

such as Sydow, European General Data Protection Regulation, hand commentary, Art. 4, para. 126;

see also the Opinion of Advocate General Bobek in Case C-40/17).

information desk

According to Art. 15 GDPR, the data subject's right to information provides that this

has the right to request confirmation from the person responsible as to whether

relevant personal data are processed. If that's the case, so has

you have a right to information about this personal data as well as to the data specified in Art. 15

Paragraph 1 lit. a to h leg. cit. enumerated information.

In the present case, it would therefore be up to the Respondent to

provide information to the complainant. Information to the effect

that no personal data of the complainant is processed (so-called

Negative information) is not sufficient, as this is not the case as stated. that one

identification of the complainant (see Art. 11 GDPR) would not have been possible,

the Respondent has not further asserted.

Result

The Respondent has failed to complete the subject matter

Procedure to provide proper information, which is why a violation of the law

for information and the Respondent to issue a complete

information was to be requested.

It was therefore to be decided accordingly.