

GZ: DSB-D550.185/0002-DSB/2019 from 11.7.2019□

[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 may be abbreviated and/or changed for reasons of pseudonymization.□

Corrected obvious spelling, grammar, and punctuation errors.]□

penal decision□

Accused: Thomas N****, born on *. ** 19**□

As the person responsible within the meaning of Art. 4 Z 7 of Regulation (EU) 2016/679, you have to protect□

of natural persons in the processing of personal data, to the free movement of data□

and repealing Directive 95/46/EC (General Data Protection Regulation, hereinafter:□

GDPR), OJ No. L 119 of May 4th, 2016 S 1, on October 2nd, 2018, on the premises of the *verein□

"XY", ***strasse in **** W*****, inside cabin no. * (ladies changing room with integrated□

shower systems), a secret image processing was carried out.□

In the course of this, you received information from two female persons - namely from Ms. Susi A***, nee.□

. **. 19, and from Mrs. Claudia B***, born **. **. 19**, - without their knowledge and without their□

Consent while they are in the women's locker room after football practice and□

shower, made a twenty-minute video recording with your mobile phone,□

whereby the persons recorded were naked in this video.□

This gives you an image recording without the consent of the persons concerned in their□

highly personal area of life and thereby against the processing principles□

and finally violate the legal permissions of the GDPR.□

By doing so, you have breached the following legal provisions:□

Article 5 paragraph 1 lit. a and lit. b in conjunction with Article 6 paragraph 1 GDPR in conjunction with Section 12 paragraph 4 n

– DSG, Federal Law Gazette I No. 165/1999, in the currently applicable version.□

The following penalty will be imposed on you for this administrative offence(s):□

fine of euros□

If this is irrecoverable, ☐

substitute imprisonment of ☐

according to ☐

€ 10,000.00 ☐

14 days ☐

Article 83 paragraph 5 lit. a GDPR in conjunction with ☐

§ 16 VStG ☐

Any other statements (e.g. on crediting prior detention, on forfeiture or on ☐

claims under private law): ☐

Furthermore, you have to pay according to § 64 of the Administrative Penal Act 1991 - VStG: ☐

1,000.00 ☐

Euro as a contribution to the costs of the criminal proceedings, that is 10% of the fine, ☐

but at least 10 euros (one day imprisonment equals 100 euros); ☐

Euro as a replacement for the cash expenses for ☐

The total amount to be paid (penalty/costs/cash expenses) is therefore ☐

11,000.00 ☐

Euro ☐

Payment term: ☐

If no complaint is lodged, this penal decision is immediately enforceable. the ☐

In this case, the total amount must be paid within two weeks after the entry into force of law ☐

Account BAWAG P.S.K., Georg-Coch-Platz 2, 1018 Vienna, IBAN: AT460100000005490031, ☐

BIC: BAWAATWW, ☐

made payable to the data protection authority. When ☐

The reference number and the completion date may be given ☐

will. ☐

If no payment is made within this period, the total amount can be dunned. In ☐

In this case, a flat-rate contribution to costs of five euros must be paid. He follows
still no payment, the outstanding amount will be enforced and in the event of his
uncollectibility, the penalty of imprisonment corresponding to this amount is enforced.

Reason:

I

following

decision-relevant fact

stands

because of

of

carried out evidentiary proceedings:

1. Thomas N**** (hereinafter: the accused), born on *. ** 19**, resident

*strasse */*/*, **** W*****, represented by attorney Dr. M**** K***** in **** W*****,

** place *, has at least on October 2, 2018 by the females mentioned in the saying

persons, without their knowledge and without their consent, while they are after the

training

in the women's dressing room and

were in the shower, an approx

20 minute video recording. Ms. Susi A*** and Ms. Claudia B*** are up

this video naked - with a towel in hand - to see them from the

Go from the dressing room to the shower room and back again to get dressed there.

2. In any case, the women concerned had been playing for four up until the incident in question

Years active women's football in the above football club. The accused was

during this time her team coach.

3. The accused has secretly in the

hidden video recordings of the women's dressing room.

4. The accused took the photos relevant to the proceedings on October 2, 2018□

with the intention of having a look at them for yourself.□

5. The accused has a net earned income of €1,857.70 per□

Month.□

[Evidence: Findings of fact by the data protection authority of the decision dated□

24.04.2019 Complaint procedure to DSB-D124.273/0003-DSB/2019,□

Prosecutor's statement of justification ** dated February 4, 2019, more justifying□

Brief of the accused to DSB-D550.185/0002-DSB/2019 including attachments ha.□

received on June 6, 2019]□

6. One of those affected, Ms. Susi A***, has a mental illness as a result of the act□

suffered impairment with illness value. she□

suffers since finding the□

Video recordings of massive sleep disorders and therefore came□

in□

psychotherapeutic treatment, whereby the treating therapist□

adjustment disorder was diagnosed.□

[Evidence: Continuation application of the persons concerned to the public prosecutor ** from 20.02.2019,□

Attachments to the complaints procedure before the data protection authority for DSB-□

D124.273/0001-DSB/2019: Confirmation of the medical examination of Susi A***,□

Invoice receipts for psychotherapeutic treatments from the 7th or 20th□

November 2018]□

II.□

The determinations are made on the basis of the following assessment of evidence:□

1. The findings regarding the making of the photographs of the two□

Affected on October 2, 2018 while posing naked in the women's dressing room□

and have found in the shower, results indisputably from the findings of the□

Data protection authority in the context of the complaint procedure to DSB-124.273/0003-

DSB/2019 and the existing files. The crime was committed by the accused

admitted in the course of a police investigation. The now confessed submission of

accused in the context of the present administrative penal proceedings

whose responsibility before the investigating authorities and before the data protection authority in

previous complaints procedures. Literally, the accused leads

his motive for the crime in his written justification, among other things: "It will be, however

admitted that the accused wanted to watch the video after it was recorded,

but that wasn't possible because the recording from his cell phone was taken by the

complainants had been deleted."

2. That the accused already in the past, i.e. before October 2, 2018,

during his time as a football coach, several photos

within the

Women's dressing room has made, while players to change and

Have stopped showers, is undisputed based on the by the public prosecutor's office

** Statement reproduced as part of the statement of reasons for hiring dated February 4, 2019

of the accused for this.

3. The fact that one of those affected by the picture taken on October 2, 2018

has suffered psychological impairments as a result of the act, which also

resulted in psychotherapeutic treatment based on the credible and

in itself coherent submissions of those affected, which through the evidence of a medical

Examination and bills placed for psychotherapeutic treatments as

Attachments to the continuation application to the public prosecutor **, considered proven

will.

III.

Legally it follows:

1. Article 83(5)(a) GDPR stipulates that in the event of violations of the provisions of the

Art. 5 and 6 GDPR fines of up to 20,000,000 euros or in the event of a

Company of up to 4% of its total worldwide annual sales

previous financial year may be imposed, depending on which of the

amounts is higher. According to § 22 para. 5 DSG, the responsibility for the imposition of

Fines against natural and legal persons for Austria as a national

supervisory authority at the data protection authority.

2. Regarding the saying: The GDPR defines the term processing in Art. 4 Z 2 GDPR

the enumeration of a number of possible uses. These are included

Collection, recording, organization, ordering, storage, adaptation

or modification, retrieval, use, disclosure by

transmission, distribution or any other form of provision, comparison or

association, restriction, deletion or destruction. By making

of the image data that is the subject of the proceedings is the material scope of Art. 2

GDPR opened. The accused's argument that in the – by this

conceded - no data processing can be seen in the creation of the image recordings, since

the recorded data was deleted upon discovery by the two women concerned

have been and thus could never be considered by himself, is capable of

legal qualification

of data processing

Nothing

to

to change. the

Data processing operation was carried out - regardless of which group of people did it

Image material could be viewed later - completed.

3. In any case, the recorded image data constitutes personal data within the meaning of Art. 4 Z

1 GDPR and is also processing due to the storage of the same

is Art. 4 Z 2 GDPR given. The accused is responsible for the

to qualify the present data processing within the meaning of Art. 4 Z 7 DSGVO, since this - as above

determined under point I. - his mobile phone using the video recording function

placed in the women's dressing room consciously and of his own accord

obtain nude photographs of the soccer players concerned; so became means and

Purpose of data processing determined by the accused.

4. Art. 5 GDPR sets out the principles for the processing of personal data

and determines its paragraph 1 lit. a that personal data in a lawful manner,

in good faith and in a manner that is comprehensible to the person concerned

must be processed ("lawfulness, fair processing,

Transparency"). The clandestine production of the images in the as stated above

Women's changing room was naturally not foreseeable for those affected and provides

This already constitutes a violation of the principle of Article 5 (1) (a) GDPR.

According to Article 5(1)(b) GDPR, data may only be collected for "legitimate" purposes.

Accordingly, the processing of the data must be legally permissible for the purposes in question

being; ie there must be a relevant legal basis for them and the processing

for these purposes must not violate applicable legal norms. The secret

Taking the nude photos of the two people concerned without their consent is a violation

in any case against the conclusively standardized permissions of Art. 6 Para. 1

GDPR, since consent within the meaning of Art. 6 Para. 1 lit. a GDPR - as under

Point I. determined - not available, the image processing that is the subject of the proceedings

justifying weighing of interests is not accessible and otherwise none of the

other permissions of Art. 6 Para. 1 GDPR come into play. According to Art.

6 GDPR, processing is only lawful if at least one of the following

conditions are met:

a) The data subject has given their consent to the processing of data relating to them ☐

personal data given for one or more specific purposes; ☐

b) the processing is for the performance of a contract to which the data subject is party ☐

Person is required or to carry out pre-contractual measures on request ☐

of the data subject; ☐

c) the processing is necessary for compliance with a legal obligation imposed by the ☐

Controller is subject to; ☐

d) the processing is necessary to protect the vital interests of the data subject ☐

or to protect another natural person; ☐

e) the processing is necessary for the performance of a task carried out in the public domain ☐

interest or in the exercise of official authority, which the person responsible ☐

was transferred; ☐

f) the processing is to protect the legitimate interests of the person responsible or ☐

of a third party required, unless the interests or fundamental rights and freedoms ☐

of the data subject, which require the protection of personal data, prevail, ☐

especially when the data subject is a child. ☐

On the lawfulness of processing operations with regard to Article 6 (1) (f) GDPR ☐

Recital 47 explains, among other things, that this is done by the legitimate ☐

Interests of a person responsible can be justified, provided that the interests or the ☐

fundamental rights and freedoms of the data subject do not prevail; there they are ☐

reasonable expectations of the data subject based on their relationship with the ☐

those responsible are to be taken into account. In any case, existence is one ☐

legitimate interest to be weighed up particularly carefully, whereby it must also be checked whether a ☐

data subject at the time the personal data was collected and ☐

reasonably foresee, given the circumstances in which it occurs ☐

processing for this purpose may take place. In particular, ☐

when personal data are processed in situations where a data subject

person does not reasonably have to expect further processing

Interests and fundamental rights of the person concerned the interest of the person responsible

predominate. In any case, being secretly filmed in a shower is not a situation

that can reasonably be expected.

5. In addition, the present data processing violates the explicit prohibition of § 12

Para. 4 Z 1 DSG, according to which a picture can be taken without the express consent of

affected person is not permitted in their highly personal area of life. ID

the ErlAB on §§ 12 and 13 in the version of the Data Protection Adaptation Act 2018 (1761

BlgNR 25. GP 8 f) fall under the prohibition of § 12 para. 4 no. 1 DSG in any case

Photographs, with which in the most personal area of life of an affected

Person is intervened and should such interventions only with express

consent may be allowed. Apart from the core area of privacy should therefore

even a disproportionate intervention beforehand may be inadmissible. Undoubtedly

falls under

the

procedural

image recording

inside

the

Women's changing room and shower facility in the prohibited area of § 12 Para. 4 Z 1 DSG, da

Sportswomen regularly dress and undress in this place, use the shower and

legitimately assume that their privacy will be protected.

6. In application of the requirements and obligations under Article 5 Paragraph 1 lit. a and lit. b

in connection with Art. 6 Para. 1 DSGVO and § 12 Para. 4 Z 1 DSG on the present

Facts, the recognizing authority comes to the conclusion that the accused

Under no circumstances should the subject of the proceedings be taken without the consent of the persons concerned
should have carried out.

7. Against the background of the facts established as proven, the accused

as the person responsible according to Art. 4 Z 7 DSGVO therefore the objective factual side of the
administrative violation of Article 83 (5) (a) GDPR.

8. On the part of the accused, the completion of the act with the intention of

(at least) to look at the images that are the subject of the proceedings

and therefore there is fault on the subjective side of the crime in the form of intent within the meaning of

Article 83 (2) (b) GDPR.

IV

The following should be noted for sentencing:

1. Pursuant to Art. 83 Para. 1 GDPR, the data protection authority must ensure that the

Imposing fines for violations referred to in paragraphs 5 and 6 in each individual case

is effective, proportionate and dissuasive. In more detail, paragraph 2 leg cit determines that

the decision to impose a fine and its amount in each

On a case-by-case basis, due consideration should be given to:

a) Nature, severity and duration of the violation, taking into account the nature, scope

or the purpose of the processing in question, as well as the number of persons affected by the processing

affected persons and the extent of the damage suffered by them;

b) intentional or negligent breach;

c) any made by the controller or processor

Measures to mitigate the harm caused to data subjects;

d) level of responsibility of the controller or processor below

Taking into account the technical made by them in accordance with Articles 25 and 32

and

organizational measures;

e) any relevant previous breaches by the controller ☐

or the processor; ☐

f) Extent of cooperation with the supervisory authority to remedy the breach ☐

and mitigate its potential adverse effects; ☐

g) categories of personal data affected by the breach; ☐

h) How the violation became known to the supervisory authority, in particular whether ☐

and if necessary ☐

to what extent the person responsible or the ☐

Processor has notified the breach; ☐

i) ☐

j) ☐

[...] ☐

[...] ☐

k) any other aggravating or mitigating circumstances in the case at hand, such as ☐

financial benefits obtained directly or indirectly as a result of the violation; or ☐

avoided losses. ☐

2. According to Section 19 (1) of the VStG, the bases for assessing the penalty are the ☐

Importance of the criminally protected legal interest and the ☐

intensity of his ☐

impairment by the act. Moreover, according to the purpose of the threat of punishment, the in ☐

Considerable aggravating and mitigating reasons, insofar as they do not already exist ☐

determine the threat of punishment, weigh them against each other. On the extent of the fault ☐

should be given special consideration. Taking into account the nature of ☐

Sections 32 to 35 of the Criminal Code are analogous to administrative penal law ☐

apply. The income and financial circumstances and any duties of care ☐

of the accused must be taken into account when assessing fines; this ☐

however, only to the extent that those not directly applicable are not

Provisions of the GDPR supersede the provisions of the VStG and to the extent

which of Art. 83 para. 8 GDPR and recital 148 with regard to the

ensuring procedural guarantees is ordered.

3. Art. 83 (3) GDPR regulates this in deviation from that set out in Section 22 (2) VStG

Accumulation principle arranged that in cases of equal or related

Processing operations that are intentional or

negligent against several

provisions of the GDPR is violated, the total amount of the fine does not

amount for the most serious violation. Thus, in the scope

of the GDPR - as applied in the present case - the absorption principle

of Art. 83 (3) GDPR.

4. Based on the facts at hand, the following was the sentencing

considered aggravating:

- Secretly taking the nude photos of the two people involved in one

Women's dressing room interferes with the provisions of Art. 8 in an extremely serious manner

EMRK and Art. 7 EuGRC protected legal interests of the private and intimate sphere

both women, one of those affected suffering from mental illness as a result of this intervention

impairments that require psychotherapeutic treatment

moved (Art. 83 para. 2 lit. a DSGVO and § 19 VStG in conjunction with § 32 para. 3 StGB);

- The photographs were taken by the accused for the purpose of

to (at least) look at oneself; the act was thus committed intentionally.

- No significant measures were taken by the accused

to reduce the damage caused to the two affected, rather it is of it

to assume that the generated nude photos from October 2, 2018 - would be these

remained undiscovered - by the accused at least for a certain period of time

would have been saved and viewed. This can also come from the accused

self-admitted behavior from the past are concluded, after which

this in the last few years already several pictures taken within the

made a women's changing room (Article 83 (2) (c) GDPR).

5. The following was taken into account as a mitigating factor in sentencing:

- The accused has participated in administrative penal proceedings before the data protection authority

involved and admitted to having made the recordings, he has thereby to

contributed to finding the truth;

- To date, there have been no complaints against the accused at the data protection authority

relevant criminal record.

6. The actual penalty imposed therefore appears in the light of those established

Income of the accused with regard to the actual value of the crime

measured against the available penalties of Art. 83 Para. 5 GDPR of up to

€ 20,000,000 commensurate with the crime and guilt and its imposition required to the

suspects and third parties from committing the same or similar criminal acts

to hold