

Litigation room

Decision on the substance 60/2023 of 24 May 2023

: It

Re

satisfaction survey

viewing camera images

in the context of a

The Disputes Chamber of the Data Protection Authority, composed of Mr Hielke

Hijmans, chairman, and Messrs. Frank De Smet and Christophe Boeraeve, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016

on the protection of natural persons with regard to the processing of

personal data and on the free movement of such data and revocation of

Directive 95/46/EC (General Data Protection Regulation), hereinafter GDPR;

Having regard to the law of 3 December 2017 establishing the Data Protection Authority,

hereafter WOG;

Considering the regulations of

internal order, as approved by the Chamber of

Representatives on 20 December 2018 and published in the Belgian Official Gazette on

January 15, 2019;

Having regard to the documents in the file;

Made the following decision regarding:

The complainant:

Mrs X, hereinafter referred to as “the complainant”;

The Defendant: Y as Counsel Mr. Erik Greeve, with office at 2600 Berchem,

Koninklijkelaan 60, hereinafter referred to as “the defendant.

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I. Facts and Procedure

1.

On 31 May 2022, the complainant submits a complaint to the Data Protection Authority against the defendant.

2. The defendant operates a [...] supermarket as a franchisee. To customer satisfaction

franchisor [...] conducts its own satisfaction surveys. Every customer who has

about a loyalty card, including the complainant, is invited through the application (...)

to give a score of 1 to 10 on satisfaction with the store visit. At a score

of 6 or lower, [...] forwards it to the affected retailer/franchisee who then deems it

will contact the customer to see what is the cause of the low score and

therefore low satisfaction, which has happened in the present case. At the request of the defendant

informed the complainant that the

low score was due to the fact that the

(checkout) employees would not always be friendly. In order to good

services left the responsible employee of the defendant to the complainant

know they will conduct an investigation, without providing more information about the

how this investigation would proceed. To find out where or by whom the complainant

treated unfriendly during her visit

would have been

are, has the

controller consulted the camera images. From these CCTV footage

According to the employee concerned, it could not be concluded that the complainant had been killed by one

whether several members of staff had been treated unkindly. The

The responsible employee also informed the complainant of this and sent her a

image showing both the cashier and the complainant herself smiling

goods. The complainant then sent a complaint to the customer service of [...] and has

she also filed a complaint with the GBA.

3. On 29 June 2022, the complaint will be declared admissible by the First Line Service on the grounds of Articles 58 and 60 WOG and the complaint is dismissed pursuant to Article 62, § 1 WOG submitted to the Disputes Chamber.

4. On 30 June 2022, in accordance with Article 96, § 1 WOG, the request of the Disputes Chamber to carry out an investigation transferred to the Inspectorate, together with the complaint and the inventory of the documents.

5. The investigation by the Inspectorate will be completed on August 16, 2022, it will be report is appended to the file and the file is reviewed by the Inspector General sent to the Chairman of the Litigation Chamber (Article 91, § 1 and § 2 WOG).

The report contains findings regarding the subject of the complaint and decision that there is:

1. a breach of Article 5(1)(a) and Article 6(1) of the GDPR;

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2. a breach of Article 5(2), Article 24(1) and Article 25(1) and (2) of the GDPR; and

3. an infringement of Article 12(1) and (2), Article 13(1) and (2), Article 5(2), Article 24, paragraph 1 and Article 25 paragraph 1 of the GDPR.

6. On 17 August 2022, the Litigation Chamber will decide on the basis of Article 95, § 1, 1° and Article 98 WOG that the file is ready for treatment on the merits.

7. On 17 August 2022, the parties involved will be notified by registered mail of the provisions as stated in Article 95, § 2, as well as those in Article 98 WOG.

They are also informed of the terms for their to file defenses.

As regards the findings relating to the subject matter of the complaint, the

deadline for receipt of the statement of defense from the defendant

recorded on 12 October 2022, this for the complainant's statement of reply on 2

November 2022 and finally those for the defendant's reply on 23

November 2022.

8. On August 18, 2022, the complainant electronically accepts all communication regarding the case and informs the Disputes Chamber that it does not wish to add anything to the investigation report to add.

9. On October 12, 2022, the Disputes Chamber will receive the statement of defense from the defendant. The defendant states that the camera images were consulted with the

best intentions, namely to remediate the complainant's experience

as a customer, but that she realizes that she should not have been allowed the camera images

consult. The defendant maintains that they have taken various security measures

and that this incident was a one-off human error

is. As for the

information obligations regarding the consultation of the images, argues the

defendant that the complainant was indeed not informed in advance about the –

unlawful - use of the camera images in the context of the investigation of the

allegations of the complainant.

10. On October 12, 2022, the Disputes Chamber informs the defendant that the complainant has nothing wish to add to the Inspection Report.

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II. Motivation

II.1. Article 5, paragraph 1, a) (lawfulness) j° Article 6, paragraph 1, and Article 5, paragraph 2, Article 24 paragraph 1 and Article 25(1) and (2) GDPR (accountability)

II.1.1. Article 5, paragraph 1, a) (lawfulness) j° Article 6, paragraph 1 GDPR

II.1.1.1.

Findings in the Inspection Report

11. The Inspectorate comes to the following conclusions during the inspection:

a. During the inspection investigation, the defendant argues that it had not done any personal data were processed in the context of the satisfaction survey.

The employee would only have access to the data that becomes him delivered by [...] Belgium.

b. The claim that the defendant does not process personal data is incorrect.

After all, it appears from the file that at the request of the defendant personal data of the complainant have been processed in the context of the complaint. So let the defendant know during the inspection investigation that the trajectory of the the complainant was followed by the defendant's shop and that a screenshot of the CCTV footage was taken and provided to the complainant.

c. In view of the above elements, the defendant does not demonstrate in its answer on what legal basis the personal data of the complainant were obtained processed in the context of the investigation in response to the aforementioned satisfaction survey.

12. The Inspectorate therefore finds that the defendant has complied with the obligations imposed by has not complied with Article 5 (1) (a) and Article 6 (1) GDPR.

II.1.1.2.

Defendant's position

13. The defendant does not dispute the finding of the Inspectorate per se, but wishes one and others to explain. The facts occurred in the context of a satisfaction survey via the application (...), which only takes place among persons with a loyalty card. Through the privacy conditions of the loyalty card of [...], the data subject informed of the legal bases based on which

[...] the

processes personal data in the context of a satisfaction survey, as well as the retention period. When a score of 6 or less out of 10, then the franchisee is asked by[...] to record this and to to research.

14. First, the defendant points out that it is important to make the distinction between the data processed in response to the request of [...]– through the (...)

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application – to survey the customer through the satisfaction survey on the one hand and on the other hand, the improper use of the camera images for the further follow-up of the score of 6 or less out of 10. For the use of the (...) application, the defendant notes that [...] is the controller who has a contract with (...).

Consequently, the defendant does not claim to be responsible for the collection of the personal data in the context of the satisfaction surveys indicated.

15. Upon receipt of [...]’s report of the complainant’s lower satisfaction score, has the defendant contacted her to find out the reasons for the lower score to know. During this conversation, the complainant indicated that she was not satisfied with the friendliness of the (checkout) employees of the store. Out of genuine concern the authorized employee of the defendant initiated an investigation. He did this by viewing the camera images, in order to determine whether the complainant is indeed was treated unkindly and, if necessary, to be able to take remedial action. Although the involved employee has done this with the best of intentions, realize and acknowledge the defendant and the employee that this resulted in incorrect use of the camera images.

16. For the sake of completeness, the defendant adds that it processes the camera images

for the purpose of monitoring the store, in principle on the basis of consent, by through the placement of the required pictogram with symbol as provided by the Camera Act and the Royal Decree of 10 February 2008 establishing the manner in which indicated that camera surveillance is taking place¹.

II.1.1.3.

Review by the Litigation Chamber

17. First of all, the Disputes Chamber notes that the defendant has argued in its conclusions raises concerns about the lawfulness of the processing of personal data via the app (...) and the placement of the surveillance cameras. Since the object of the complaint is no relates to the lawfulness of these processing operations, and in the absence of a dispute, the Litigation Chamber will not investigate these aspects.

18. In this case, the Disputes Chamber will have to assess whether the camera images of the complainant already were not lawfully consulted.

19. The Litigation Chamber recalls that pursuant to Article 5(1)(a) GDPR personal data must be lawfully processed.

20. As already mentioned above, the object of the complaint concerns the consultation of the camera images in the context of the investigation in response to the lower score on the

¹ In full: Act of 21 March 2007 regulating the installation and use of surveillance cameras and Royal Decree of 10/02/2008 establishing the manner in which it is indicated that camera surveillance takes place, Belgian Official Gazette 21 February 2008.

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satisfaction survey. The Respondent acknowledges that this processing is not based on a legal basis was based on Article 6 (1) GDPR and that this contested processing should therefore not have been allowed take place.

21. According to Article 6.1.f) of the GDPR and the case law of the Court of Justice of the European Union (hereinafter "the Court"), three cumulative conditions must be met for a

controller is valid on this

legal basis

professions.²

22. In order to be able to rely on the legal basis in accordance with Article 6(1)(f) of the GDPR

of the "legitimate interest", the controller must indicate

show that:

a) the interests he pursues with the processing can be considered legitimate

recognized (the "goal test");

b) the envisaged processing is necessary for the pursuit of these interests (de

"necessity test");

and

c) the balancing of these interests against interests, fundamental rights and the

fundamental freedoms of those involved

in favor of the

controller (the "balancing test").

23. The Litigation Chamber is of the opinion that the controller in the context of the

exercise of its commercial activities meets the first condition a priori

fulfilled, namely to pursue customer satisfaction.

24. The second condition also appears to be met, as the camera images

are necessary to get a clear picture of the nature of the interactions of the

complainant with the (checkout) staff.

25. However, the third condition is not satisfied. The complainant's footage was

consulted without its knowledge

(contrary

Article 13 of the GDPR, as indicated below) and without the data subject

processing could be expected. At least for these reasons, the trade-off between the

interests, freedoms and fundamental rights of the complainant and the defendant in favor of the complainer.

26. In view of the above, the Disputes Chamber determines that there has been a violation to Article 5 (1) (a), Article 6 (1) GDPR.

22 See in particular Court of Justice of the European Union (CJEU), judgment of 11 November 2019 (C - 708/18) TK v. Asociația de Proprietari bloc MA-ScaraA, judgments and regard to Article 7 f) of Directive 95/46/EC.

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II.2. Article 5(2) Article 24(1) and Article 25(1) and (2) GDPR (accountability)

II.2.1. Findings in the Inspection Report

27. In the context of the inspection investigation, the Inspectorate asked the defendant which technical and organizational measures have been taken to ensure that the complainant complies with the processing principles to safeguard personal data. In its answer to this question, the defendant states briefly which personal data of the complainant have been processed in the context of the investigation in response to the aforementioned satisfaction survey with a score of 6/10. The Inspection Service notes, however, that this question covers all the basics of the GDPR to be applied by each data controller since 25 May 2018 (that is the date on which the GDPR became applicable based on Article 99(2) of the GDPR GDPR), which makes the answer given incomplete, according to the Inspection Report. The The Inspectorate therefore finds that the defendant has committed an infringement of Article 5, Article 24 (1) and Article 25 (1) and (2) of the GDPR.

II.2.2. Defendant's position

28. The defendant points out that it does indeed have organizational and technical measures has taken regarding the processing of the camera images. Only a very limited number persons, including the employee in question, can consult these camera images.

The persons who have access to the images, including this employee

instructed when and how these images may or may not be consulted. The access to the images is protected by means of passwords, and the necessary backups be present.

II.2.3. Review by the Litigation Chamber

29. Article 24(1) of the GDPR obliges the controller to, account taking into account the nature, scope, context and purpose of the processing, as well as the risks of varying likelihood and severity to the rights and freedoms of natural persons, take appropriate technical and organizational measures to ensure and be able to demonstrate that the processing is in accordance with GDPR is carried out. These measures should also be evaluated and if necessary updated. This article reflects the principle laid down in Article 5(2) of the GDPR by "accountability", according to which "the controller is responsible for compliance with paragraph 1 (accountability) and must be able to do so demonstrate". Article 24(2) of the GDPR states that, when this is proportionate to the processing activities, the measures listed in Article 24(1) of the GDPR, a appropriate data protection policy include that Through the controller is carried out.

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30. It

is also the responsibility of the controller to,
in accordance with Articles 24
(responsibility) and 25 of the GDPR
(data protection by design and by default), the necessary compliance with the
rules of the GDPR in an effective manner
integrate
in the design of his
processing activities and in its procedures.

31. As regards the measures taken before the contested processing, the
defendant that access to the camera images was limited to a few well-defined ones
persons who had received the necessary instructions, and that access to the images
was protected with passwords.

32. The incident involving the unlawful consultation of the camera images by an employee
of the defendant, points out that there are technical and
organizational measures had been taken by the defendant, but that these
were insufficient. An example of a pre
technical and
organizational measure that should have been taken is more thorough information
regarding the processing of personal data to employees.

33. In view of the above, and the established infringement of Article 5(1)(a) (lawfulness)
j° Article 6, paragraph 1 GDPR, the Disputes Chamber determines that there has been a violation of
Article 5 (2) Article 24 (1) and Article 25 (1) and (2) GDPR with regard to the
legality.

34. With regard to the other fundamental principles of Article 5(1)(b) to inclusive. f) sets the
Litigation Chamber finds that the Inspection Report contains insufficient indications or evidence
demonstrating a breach of these principles.

II.3. Article 12(1) and (2) GDPR, Article 13(1) and (2) GDPR

II.3.1. Findings in the Inspection Report

35.

In the context of the Inspectorate investigation, the defendant was asked how the law transparency and information of the complainant was guaranteed by it. The defendant replied that the sticker of the camera surveillance at the entrance of the store is visible.

36. The Inspectorate argues that this answer from the defendant does not demonstrate that it has the the complainant effectively transparently and when obtaining her personal data informed of the information to be provided in accordance with Articles 12 and 13 GDPR. After all, this information had to be provided to the complainant in the context of following the investigation carried out by an employee of the defendant of a satisfaction survey in which the complainant gave a score of 6 out of 10.

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37. The defendant shows according to the Inspection service not to which technical and organizational measures have been taken to exercise the rights of the data subjects (such as the right of access of the complainant) to facilitate and adequately can follow up in accordance with Article 12 of the GDPR. The Inspectorate refers in that related to:

- a. the finding 1 from the Inspection Report showing that the defendants falsely claims that no personal data has been processed;
- b. the fact that the defendant does not mention anything in its answer and copy provides documents that in practice:
 - i. the defendant's management and employees inform and

raising awareness about facilitating and adequately following up on the rights of the data subjects, and;

ii. contribute to preventing infringements and (human) errors regarding the rights of those involved are followed up effectively and efficiently and where necessary be sanctioned.

II.3.2. Defendant's position

38. The defendant reiterates the importance of making a distinction between the data processed in response to the request of [...] – via the (...) application – to question the customer in response to a lesser score on it satisfaction survey on the one hand and the improper use of the camera images for further follow-up.

39. For the use of the (...) application, the defendant remarks once again that [...] the controller who has an agreement with (...).

40. With regard to the camera images, the customer is normally informed of the processing by by means of the pictogram³ as provided for in the Camera Act at the entrance of the store was placed. However, the defendant notes that this is less relevant in this case since the camera images should not have been used here. So that's it correct that the complainant was not informed about the - unlawful - use of the CCTV footage for the investigation of the complainant's allegations. The Defendant emphasizes that camera images will no longer be used under any circumstances for investigating customer complaints or concerns.

41. Furthermore, the defendant wishes to emphasize that as soon as the complainant's complaint – via [...]– became known to her, she immediately took the necessary steps to

³ Act of 21 March 2007 regulating the installation and use of surveillance cameras and Royal Decree of 10/02/2008 establishing the manner in which it is indicated that camera surveillance takes place, Belgian Official Gazette 21 February 2008.

to deal with this complaint and to look for a solution that is satisfactory to the complainant, which was also found. In this context, the defendant refers to an email from the complainant in which she thanks the defendant for the mediation and states that the file may be closed.

II.3.3. Review by the Litigation Chamber

42. The Disputes Chamber notes that the defendant raises arguments with regard to the transparency and information obligations regarding the placement of the camera and the processing via the (...) app. Since the object of the complaint does not concern on the information obligations regarding surveillance cameras by way of the aforementioned icon, nor on the processing via the (...) app, and in the absence of a dispute, the Litigation Chamber does not investigate these aspects.

43. The Litigation Chamber must judge whether the complainant has been adequately informed about the disputed processing, being the consultation of the images in the context of the satisfaction survey, in order to meet the requirements of Articles 12 (1) (2) and 13 (1) and (2) GDPR comply.

44. Article 12, paragraph 1 GDPR prescribes that the controller “appropriate measures” to ensure that the data subject receives the information referred to in Articles 13 and 14 [...] related to processing in a concise, transparent, understandable and easy way accessible form and in clear and plain language, in particular when the information is specifically intended for a child”. Article 12(2) prescribes that the controller must exercise the rights of the data subject facilitate. According to recital 39 of the GDPR, the obligation of transparency means that persons must be informed in an accessible and comprehensible manner, a.o.

about
the
manner
on which
their
rights
exerted
could be.

45. On the basis of the complaint, the Inspection Report and the conclusions of the defendant, the Litigation Chamber, the employee concerned informed the complainant that a investigation would be conducted based on the satisfaction survey, but that the complainant was not informed about the method of this research. After all, the complainant was not informed that the camera images would be consulted by the employee for this investigation, as a result of which the information as stipulated in Article 13, paragraphs 1 and 2 also does not meet the complainant was notified. In view of the above, the Disputes Chamber proposes a infringement of Articles 12 (1) and (2) and Article 13 (1) and (2) GDPR.

III. Corrective Actions and Sanctions

46. Pursuant to Article 100 of the WOG, the Disputes Chamber has the authority to:

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- 1° to dismiss a complaint;
- 2° to order the exclusion of prosecution;
- 3° to order a suspension of the judgment;
- 4° propose a settlement;
- 5° formulate warnings and reprimands;
- 6° to order that the data subject's requests to exercise his rights be complied with to practice;

7° order that the data subject be informed of the security problem;

8° order that the processing be temporarily or permanently frozen, restricted or prohibited;

9° order that the processing be brought into compliance;

10° rectification, restriction or deletion of data and notification

of it

order the recipients of the data;

11° to order the withdrawal of the accreditation of certification bodies;

12° to impose penalty payments;

13° to impose administrative fines;

14° the suspension of cross-border data flows to another State or

to recommend an international institution;

15° transfer the file to the prosecutor's office of the public prosecutor in Brussels, who

informs it of the follow-up given to the file;

16° decide on a case-by-case basis to publish its decisions on the website of

the Data Protection Authority.

47. As regards the penalty, the defendant argues that it realizes that consulting and

using the CCTV footage when examining the complainant's comments to

as a result of the satisfaction survey is inappropriate and in violation of the GDPR. The

The defendant wishes to emphasize that it was a one-off error on the part of one of her

employees who acted without any intention to invade the complainant's privacy

harm. In retrospect, the employee also realizes that viewing the images

was inappropriate and contrary to the

internal agreements. The defendant requests the

Litigation Chamber in its assessment and possible sanctions

to take into account.

48. When assessing the appropriate sanction and/or corrective action, the

Litigation Chamber takes into account the admission by the defendant of a human error that caused the disputed processing. The Disputes Chamber also has an account taking into account the measures taken by the defendant before and after the occurrence of the disputed fact has taken, namely the limited access to the camera images, both restricted in terms of the number of people, or limited through the use of passwords, and the instructions of the defendant to the employee with regard to the use of the

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camera images. The Disputes Chamber also notes that discussions have taken place with the involved employee afterwards. The defendant also demonstrates good will by state that it refuses to use the aforementioned application for the satisfaction surveys pending the decision of the Litigation Chamber. The the defendant also contacted the complainant to apologize and to find an amicable solution, and that it was found. The

Litigation Chamber also takes into account the mitigating circumstances of the processing involved. In this context, the defendant cites as mitigating circumstances firstly, the fact that it was a one-time human and not a technical incident, and that there was no malicious intent. Finally, the Disputes Chamber notes that the contested processing is not carried out systematically and on a large scale and that it does not forms part of the main activities of the defendant.

49.

In these circumstances, the Litigation Chamber decides to award the defendant accordingly to reprimand article 100, § 1, 5° of the WOG as consulting camera images on unlawfully, and without complying with applicable transparency and information obligations constitutes a breach of the GDPR.

IV. Publication of the decision

50. Given the importance of transparency with regard to decision-making by the

Litigation Chamber, this decision will be published on the website of the

Data Protection Authority. It

however, it is not necessary that the

identification data of the parties are disclosed directly.

FOR THESE REASONS,

the Disputes Chamber of the Data Protection Authority decides, after deliberation, to:

- formulate a reprimand based on article 100, §1, 5° WOG with regard to the consulting camera images in an unlawful manner, without complying with the applicable information obligations, which constitutes an infringement of Article 5(1)(a).

2, Article 6 (1), Article 12, Article 13, Article 24 (1) and Article 25 (1) and (2) GDPR.

Pursuant to Article 108, § 1 of the WOG, within a period of thirty days from the notification against this decision may be appealed to the Marktenhof (court of Brussels appeal), with the Data Protection Authority as defendant.

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Such an appeal may be made by means of an inter partes petition

must contain the information listed in Article 1034ter of the Judicial Code⁴. It

a contradictory petition must be submitted to the Registry of the Market Court

in accordance with Article 1034quinquies of the Ger.W.⁵, or via the e-Deposit

IT system of Justice (Article 32ter of the Ger.W.).

(get). Hielke HIJMANS

Chairman of the Litigation Chamber

⁴ The petition states under penalty of nullity:

1° the day, month and year;

2° the surname, first name, place of residence of the applicant and, where applicable, his capacity and his national register or

3° the surname, first name, place of residence and, if applicable, the capacity of the person to be

enterprise number;

summoned;

4° the object and brief summary of the means of the claim;

5° the court before which the action is brought;

6° the signature of the applicant or his lawyer.

5 The petition with its appendix is sent, in as many copies as there are parties involved, by registered letter sent to the clerk of the court or deposited at the clerk's office.