

Serious criticism: sub-processor refused to hand over information to the data controller

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Decision

Private companies

Serious criticism

Injunction

Prohibition

Complaint

Data processor

The Danish Data Protection Authority expresses serious criticism that a (sub)data processor refused to return a number of customer details to the data controller.

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Summary

A data controller complained that their former IT system subcontractor would not return the data controller's customer information.

On the basis of the complaint, the Danish Data Protection Authority initiated a case of its own initiative against the company's former IT supplier (referred to in the case as the company's sub-data processor).

In the decision, the supervisory authority expressed serious criticism, issued an order for the return of the data controller's customer information and issued a ban on processing the mentioned customer information, unless the processing takes place in accordance with the instructions of the data controller.

The facts were decisive

It appears from the case that a data processing agreement had been entered into between the sub-processor and the data processor, in which the data processor was listed as the data controller to the sub-data processor (and thus not the original data controller). The sub-data processor denied – with reference to this agreement – having acted in breach of the data protection regulation, by not meeting the data controller's demand for the release of data. They stated that, as the retailer's sub-processor, they were not subject to the data controller's direct power of instruction, which is why the original data controller

could not instruct them to return the customer data.

The Danish Data Protection Authority found in the case that the mentioned customer information was processed de facto by both the data processor and the sub-data processor on behalf of the original data controller. Therefore, the fact that the sub-processor and the data processor had entered into a data processor agreement, in which the data processor is listed as being the data controller, could not lead to a different result.

In that context, the Danish Data Protection Authority noted that the sub-processor had determined the purpose of the storage itself by not complying with the data controller's request for the return of the mentioned customer data and thereby also became an independent data controller for the continued storage of the customer information.

### 1. Decision

After a review of the case, the Danish Data Protection Authority finds that there are grounds for expressing serious criticism that data processor b's processing of personal data has not taken place in accordance with the rules in the data protection regulation[1] article 6, subsection 1, Article 9, subsection 2, and § 11, subsection of the Data Protection Act. 2, cf. the data protection regulation, article 28, subsection 10.

At the same time, the Danish Data Protection Authority finds that there is a basis for notifying data processor b of an order to hand over the data controller's customer data. The Danish Data Protection Authority also informs data processor b of a ban on processing the data controller's customer data after these have been handed over to the data controller, unless the processing takes place according to instructions from the data controller. The order is announced in accordance with the data protection regulation, article 58, subsection 2, letter d. The ban on processing is announced in accordance with the data protection regulation, article 58, subsection 2, letter f.

According to the data protection act [2] § 41, subsection 2, no. 4, anyone who fails to comply with a ban announced by the Data Protection Authority pursuant to Article 58, subsection of the Data Protection Regulation shall be punished with a fine or imprisonment for up to 6 months. 2.

The deadline for compliance with the order is 21 February 2022. The Danish Data Protection Authority must request to receive confirmation that the order has been complied with by the same date. According to the Data Protection Act § 41, subsection 2, no. 5, anyone who fails to comply with an order issued by the Danish Data Protection Authority pursuant to Article 58, subsection of the Data Protection Regulation shall be punished with a fine or imprisonment for up to 6 months. 2.

Below follows a closer review of the case and a rationale for the Data Protection Authority's decision.

## 2. Case presentation

It appears from the case that, in the period from 2017 to 2019, the data controller used data processor a as a supplier and data processor of an IT system that was to store the data controller's customer data, including that information covered by Article 6, subsection of the Data Protection Regulation was to be processed. 1, Article 9, subsection 2, as well as § 11, subsection of the Data Protection Act. 2.

It also appears from the case that data processor a used data processor b as sub-data processor in connection with the IT system.

Finally, it follows from the case that data processor a terminated its agreement with data processor b on 19 November 2019.

### 2.1. The data controller's comments

The data controller has generally stated that the data controller in October 2019 – when data processor a created its own record system – moved over to data processor a's record system.

The data controller has further stated that the data controller, in the same connection, requested data processor b to hand over the data controller's customer data, but that data processor b did not want to return the data controller's customer data in a readable format without payment.

In addition, it appears from the data processing agreement that the data controller has forwarded to the Danish Data Protection Authority that data processor a is a data processor on behalf of the data controller.

With regard to the use of sub-processors, the following appears from point 4.2 of the agreement:

"Before using a sub-processor, the data processor must enter into a written agreement with the sub-data processor, in which the sub-data processor is at least imposed the same obligations as the data processor has assumed in this agreement, including the duty to implement appropriate technical and organizational measures to ensure that the processing meets the requirements in the Personal Data Regulation."

### 2.2. Data processor b's remarks

Data processor b has generally stated that data processor b does not want to hand over the data controller's customer data, as data processor b has no contractual relationship with the data controller.

In addition, it appears from the data processor agreement that data processor b has forwarded to the Danish Data Protection

Authority that data processor b is a data processor on behalf of data processor a, who in this context is indicated as data controller.

Data processor b has further stated that the provision of data directly to the data controller – bypassing the retailer who is responsible to the data controller for the delivery of the [system name omitted] system – constitutes a payable service.

Data processor b has also stated that data processor b has not acted in violation of the rules of the data protection regulation by not meeting the data controller's demand for the release of data, since data processor b as the retailer's sub-data processor is not subject to the data controller's direct authority of instruction, which is why the data controller does not have the opportunity to himself to instruct data processor b to return the data controller's data.

Data processor b has further stated that changes to the instructions must be made via data processor c, who has been handed over the customer relationship with the data controller from data processor a.

### 3. Reason for the Data Protection Authority's decision

#### 3.1. Article 4, No. 7 of the Data Protection Regulation

The Danish Data Protection Authority assumes – on the basis of what was provided by data processors b and the data controller – that X is the data controller and that data processor b is a sub-processor.

Article 4, no. 7 of the Data Protection Regulation defines the data controller as the person who, alone or together with others, decides for which purposes and with which aids the processing of personal data may be carried out.

The processing of personal data that takes place in this case is a storage of information about the data controller's customers. It is the supervisory authority's assessment that the data controller's customer data has been stored solely for the data controller's purposes.

The Danish Data Protection Authority is of the opinion that what is decisive for the assessment of who is the data controller or data processor are the actual circumstances and not what may have been contractually agreed between two data processors. The fact that data processor b and data processor a have entered into a data processing agreement in which data processor a is listed as being the data controller cannot therefore lead to data processor a becoming data controller, since data processor a and sub-data processor b de facto process the information on behalf of the data controller and for the purposes of the data controller.

#### 3.2. Article 28 of the Data Protection Regulation

A data processor may only process personal data according to the data controller's instructions.

A data processor is considered to be an independent data controller for a processing if this goes beyond the given instructions, and the data processor himself determines the purposes and aids, cf. the data protection regulation, article 28, subsection 10.

It is also the Danish Data Protection Authority's assessment that two data processors cannot mutually agree on the instructions given by the original data controller.

In the case, the data controller has requested data processor b to have his customer data returned. This request has not been met by data processor b, with reference to the fact that data processor b, as the retailer's sub-data processor, is not subject to the data controller's direct authority to instruct.

The Danish Data Protection Authority is of the opinion that a data processor (including a sub-processor) may only process personal data in accordance with documented instructions from the data controller.

Furthermore, it is the opinion of the supervisory authority that a data processor who acts outside the data controller's instructions becomes an independent data controller for the processing.

The Danish Data Protection Authority thus finds that data processor b, as a sub-data processor – by not complying with the data controller's request to return X's customer data – has itself determined the purpose of the processing and is thereby also an independent data controller for the continued storage of X's customer information.

In continuation of this, the Danish Data Protection Authority finds that data processor b's processing of personal data has not taken place in accordance with the rules in the data protection regulation, article 6, subsection 1, Article 9, subsection 2, and § 11, subsection of the Data Protection Act. 2, cf. the data protection regulation, article 28, subsection 10.

### 3.3. Summary

On the basis of the above, the Danish Data Protection Authority finds grounds for expressing serious criticism that data processor b's processing of personal data has not taken place in accordance with the rules in the data protection regulation, article 6, subsection 1, Article 9, subsection 2, and § 11, subsection of the Data Protection Act. 2, cf. the data protection regulation, article 28, subsection 10.

The Danish Data Protection Authority finally finds that there is a basis for notifying the data processor b of an order to hand over the data controller's customer data. The Danish Data Protection Authority also informs data processor b of a ban on processing the data controller's customer data after data processor b has handed over the data controller's customer data. The

order is announced in accordance with the data protection regulation, article 58, subsection 2, letter d. The ban is announced in accordance with the data protection regulation, article 58, subsection 2, letter f.

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free exchange of such data and on the repeal of Directive 95/46/EC (general regulation on data protection).

[2] Act No. 502 of 23 May 2018 on supplementary provisions to the regulation on the protection of natural persons in connection with the processing of personal data and on the free exchange of such information (the Data Protection Act).