GZ: DSB-D123.978/0003-DSB/2019 from 13.12.2019

[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 and/or changed for reasons of pseudonymization.

Corrected obvious spelling, grammar, and punctuation errors.]

NOTICE

S P R U C H

The data protection authority decides on the data protection complaint of Heinrich A***

(Appellant), represented by attorney Mag. Paul B***, on January 4, 2019 against

Mag. Waltraut M*** (first respondent) and Dipl.-Ing. Sebastian N*** (second respondent),

both represented by B*** & C*** Rechtsanwälte OG, due to violation of the right to secrecy

and deletion as follows:

1. The complaint against the first respondent is dismissed.

2. The complaint against the second respondent is partially granted and it is

found that the second respondent entitled the complainant to

Breached confidentiality by at least April 6, 2017 to May 16, 2018

Video camera installed in the residential building at the property address H***straße *7/T***gasse 6*

to make video recordings of the complainant.

3. The complaint against the second respondent against a violation of the right to erasure

is dismissed as unfounded.

4. The complainant's request that the Data Protection Authority impose a penalty within the meaning of the

GDPR impose against the respondents is rejected.

Legal basis: Section 24 (5) of the Data Protection Act – DSG, Federal Law Gazette I No. 165/1999 as amended; §§ 1

Para. 1, 7 Para. 3, 50a ff Data Protection Act 2000 (DSG 2000), Federal Law Gazette I No. 165/1999 as amended to Federal La

No. 83/2013; Art. 17 of Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR), OJ.

No. L 119 of 04.05.2016, p. 1.

A. Submissions of the parties and course of the proceedings

REASON

1. With a submission dated January 4, 2019, the complainant lodged a complaint with the

Data Protection Authority and submitted the following: The Respondents lead to

AZ: *3 C *31/18r against the complainant termination proceedings related to an apartment in

1*** Vienna, T***gasse 6*, Top *3b. In this case, the Respondents argued that

the complainant had moved out of this apartment for several decades and therefore no

have an urgent need to live in the apartment. In support of this argument, the

Respondents submitted that they had installed a video camera since September 2017

in order to be able to document that the complainant no longer lived in the apartment.

By means of this monitoring, a table was then created which shows the incoming and outgoing

should represent the complainant.

The subject matter is an interference with the fundamental right to data protection

video surveillance. The video surveillance was carried out by a video camera in front of the apartment

of the complainant had been attached, at least since September 2017 up to and including May

2018. In the Respondents' preparatory brief of September 28, 2018, under

Point 4 clearly stated that this "in September 2017 in the stairwell a video camera

attached". A lawful purpose for video surveillance is only under the conditions

of § 12 para. 2 and para. 3 DSG, this requires above all the consent of the person being monitored or

an important interest ahead. This is not the case in the present case, since the monitoring is solely and

served the sole purpose of monitoring the complainant and subsequently his

Track stays in the apartment. General protection has surveillance

in any case not served, since the complainant's apartment had only been specifically monitored

and not the stairwell in general to protect against possible burglars. Next show the

Documentation that the surveillance is personal – namely to the complainant

limited - had taken place. The designation "M" should obviously identify the tenant. the

corresponding + or - next to the "M" would mean entering or leaving the apartment

represent. It is precisely documented here on which day and at what time the

complainant entering and leaving the apartment. In own notes in the table

would the applicant's activities be recorded, such as the removal of

plants or the microwave.

It follows from a further preparatory statement by the Respondent dated

December 12, 2018 clearly that the relevant video recordings exist.

The data protection authority may determine the violation of the fundamental right to data protection, in any case

impose a penalty within the meaning of the GDPR and the deletion of the personal data

Instruct.

The two aforementioned preparatory briefs on the

Dismissal proceedings before the district court W***. In the brief of December 12, 2018 is

documentation of the days and times at which the complainant enters the home

or leaves again.

2. In their statement of January 31, 2019, the respondents stated that the video surveillance

using a technical image recording device was at least from September 2017 to May 2018.

The image recording device was removed on May 16, 2018 and the video surveillance ended. the

The data protection violation alleged by the complainant therefore came into force before the beginning of the validity period

of the GDPR and the entry into force of the Data Protection Adaptation Act 2018 and is

also completed before this date.

According to Section 69 (5) DSG, violations of the Data Protection Act 2000 that occurred at the time of

entry into force of the Data Protection Amendment Act 2018 have not yet been made pending

to assess the legal situation of the DSG as amended, so that in principle the provisions of the DSGVO

are applicable (§ 4 Abs. 1 DSG idgF).

The Respondents each own half of the property EZ *45, KG *****, BG W***

the property address H***straße *7/T***gasse 6* including the residential building built on it. tenant

and was the sole occupant of apartment Top *3b of the apartment building in question, up to her

Deceased on 18 March 2018, Ms Marianne A***, who had been the applicant's mother. in the

As part of a house inspection on the occasion of the takeover of the property management by the now

entrusted real estate management in 2016 with a representative of the company

the complainants who were staying at that time were identified as residents of apartment Top *3b,

although, according to the Respondents, he does not actually live in the apartment

has been. Before the mother's death, the respondents suspected that the

Complainant intended to rely on a right of entry into Ms

Marianne A*** to be appointed in accordance with Section 14 (3) MRG, although the requirements for this are not met

passed. In order to substantiate this suspicion, the second respondent, in consultation with

the first respondent hired a private detective to find out where the complainant was

live. This did not provide any concrete investigation results. The second respondent has

then decided to install video surveillance to verify whether the

Complainant actually resides in Apartment Top *3b and, if applicable,

to be able to document that this is not the case. After the passing of his mother on March 18, 2018

did the complainant actually attempt to assert a right to

Claiming entry into his late mother's lease, claiming he intended to

used to the death with his mother as the previous tenant in the common household. the

Respondents would dispute this. About this between the complainant and the

Respondents two proceedings before the BG W*** (to the AZen: *4 C *46/18b and *3 C *31/18r)

pending.

The video surveillance was from the second respondent on April 6, 2017 in the stairwell of

Residential building H***straße *7/T***gasse 6* has been installed. The surveillance is using an ABUS

HD digital recorder takes place. The door at which the video camera was pointed must

necessarily have to be crossed in order to get to apartments Top *3 and *3b. A

Insight into the two apartments can be ruled out from this perspective. The recorded ones

Video data is stored on the digital recorder's specially initialized hard drive, which is not
commercially available devices can be read, has been filed. Access to the filed
Data is only known by entering a secret, known only to the second respondent
password possible.
The second respondent had the decision to carry out the video surveillance
consultation with the first respondent. Furthermore, the decision on the
system to be used, as well as the location and manner of installing the
Video surveillance system by the second respondent. Also control over the
The second respondent had the facility. responsible for data protection
exclusively and solely the second respondent.
The purpose of the video surveillance was to obtain evidence to clarify whether
the complainant actually lived in the apartment. The reason was that
complainant had planned to exercise a right of step under Section 14 by alleging incorrect facts
Para. 3 MRG in the tenancy law of his mother, Ms. Marianne A***.
The more narrowly worded provision of § 12 DSG compared to Art. 6 (1) (f) GDPR is not
applicable because it is not compatible with the final regulatory nature of the GDPR. One
Regulatory competence of the national legislature for image recordings that are not exercised
serving exclusively personal or family purposes does not exist. Article 6 paragraph 1 lit. f GDPR goes
Accordingly, the provision of § 12 DSG – insofar contrary to Union law. In case the
If the data protection authority doubts that § 12 DSG violates Union law, the
Respondent raises the question of the compatibility of the relevant national provision with the
DSGVO to the ECJ for clarification by way of a preliminary ruling procedure according to Art. 267 TFEU
to submit. The video surveillance and the further processing of the data obtained from it
based on a legitimate interest of the respondent pursuant to Article 6 (1) (f) GDPR.
The legitimate interest consisted (and still consists) in unjustified claims of the
to fend off the complainant regarding the right to rent the apartment or to enforce the

Respondent's right to termination of the rental agreement in accordance with § 30 Para. 5 Z 5 MRG
to secure. This legitimate interest already existed at the time the
Video surveillance existed, since the complainant's behavior infringed the respondent
immediately given cause for the reasonable suspicion that he intends to
Wrong to claim a right of entry under Section 14 (3) MRG. The legitimate interest in
Processing of the data obtained through the to the AZen: *4 C *46/18b and *3 C *31/18r at
BG W *** pending evidence exists for the purpose of refuting the - in the opinion of the
Respondent contrary to fact - allegations of the complainant and defense of
claims asserted against him. There are no legitimate interests of the respondents
superior interests of the complainant or other data subjects. the
Video surveillance alone provides information about the times at which people entered the door
have passed.
A marking of the video surveillance did not take place, as such was the goal
of the same would have thwarted or at least seriously jeopardized (Article 14 (5) (b) GDPR).
The video recordings made and the data obtained from them are necessary in order to
the BG W*** to *4 C *46/18b and *3 C *31/18r pending proceedings by the complainant
asserted claim to entry into the tenancy rights of Ms. Marianne A*** according to § 14 para. 3
MRG and to defend the Respondents' right to terminate the rental agreement under Section 30
to enforce para. 2 no. 5 MRG. In this sense, the complainant is entitled under Article 17(3).
lit. e GDPR no right to erasure.
3. In his statement of February 18, 2019, the complainant stated that there are
objectively neither overriding legitimate interests of the respondent or a third party,
the required proportionality is still given. The one conceded by the Respondents
Image recording from April 2017 to May 2018 should therefore be qualified as inadmissible. in the
In the present case, the Respondents themselves stated that they already had one
private detective on the "living behavior" of the complainant, but none

could deliver concrete results. Furthermore, it should be noted that the first respondent to the

same address as the complainant. It would therefore be her personal perceptions

been possible without the need for illegal image recording. Of

Furthermore, the daughter of the second respondent also lives on the same floor as him

complainant.

The Supreme Court has already dealt with such issues and could

his remarks can also be used as a question of interpretation. Accordingly, secret

Image recordings in the private sphere, ongoing unwanted surveillance and persecution

constitute a breach of secrecy. Based on the protection of the secret sphere have a tenant

a legitimate interest in him entering or leaving the apartment, his

roommates or guests is not continuously monitored and recorded. It could

summarized that, on the one hand, the interest put forward by the Respondents

the absolutely protected legal interests of the complainant under no circumstances outweigh and - in particular

with regard to the application of more lenient means - the proportionality is not given. It lies

therefore in any case an inadmissible image recording.

It is unclear whether the Respondents ended the images of interest in the subject matter

to have. The complainant encloses a photograph in this regard with his statement and leads

to the fact that an object could be seen on this, which was on the apartment door of the daughter of the

Second respondent is mounted. This matches the image detail shown in the photo on page 4 of the

Respondents' comments can be seen.

B. Subject of Complaint

The subject of the complaint is the question of whether the respondents to the complainant

thereby violated the right to secrecy by being in the stairwell of the property

EZ *45, KG *****, BG W***, with the property address H***straße *7/T***gasse 6* in any case

have installed a video camera between April 6, 2017 and May 16, 2018, which

complainant recorded.

Furthermore, the object of the complaint is the question of whether the complainant is in his right to erasure

was violated by the data obtained from video surveillance by the respondents

have not been deleted.

C. Findings of Facts

The Respondents each own half of the property EZ *45, KG *****, BG W***

the property address H***straße *7/T***gasse 6* including the residential building built on it.

Evidence assessment: This results from the insofar undisputed submissions of the Respondents in

their statement of January 31, 2019.

The Respondents had a video camera on them at least from April 6, 2017 to May 16, 2018

Staircase of the house with the property address H***straße *7/T***gasse 6* installed.

The recording range of this camera can be seen in the following image:

[Editor's note: the graphic file (digital photograph) was removed as it was not in the RIS

can be represented.]

The door visible in the picture must be passed through to get to the apartment, among other things

to reach Top *3b. The tenant of this apartment was, until her death, the mother of

complainant.

Assessment of evidence: These findings are based on the submissions of the respondents in their

Statement of January 31, in which you can see the photo above, which the

Shooting range of the camera shows submitted. They also stated, on April 6, 2017, that

Video camera mounted and removed on May 16, 2018. That beyond this period a

The data protection authority was unable to determine whether video surveillance was carried out.

From the photographs submitted by the complainant in his submission of February 18, 2019

this does not appear with sufficient probability.

The video camera was installed to prove that the applicant died before

his mother did not live with her in the same household in the same apartment and him

no right of entry according to § 14 para. 3 MRG and the respondents therefore have a right to

Termination of the rental agreement according to § 30 Para. 2 Z 5.□

There are two procedures between the complainant and the respondents before the□

District Court W*** (to the AZen: *4 C *46/18b and *3 C *31/18r) pending.□

Evidence assessment: This results from the synopsis of the submissions of the parties to the proceedings and□

the complaint of January 4, 2019 settled regarding the existing proceedings□

preparatory briefs of the respondents.□

The Respondents intend to use the data obtained through video surveillance by□

legally binding settlement of the before the district court W*** to the AZen: *4 C *46/18b and *3 C *31/18r□

not to delete pending proceedings.□

Evidence assessment: This results from the submissions of the Respondents in their statement of□

January 31, 2019.□

The decision to carry out video surveillance was made by the second respondent□

consultation with the first respondent. The video camera was then dated□

Second Respondent installed on April 6, 2017. This has about the applicable□

system as well as the place and way of installing the video surveillance system□

decided. Had control of the system and the data stored on the digital recorder□

always only the second respondent. This also has the duration of the video surveillance and the□

Evaluation of the recordings decided.□

Evidence assessment: These findings are based on the credible information provided by the□

Respondent in its statement of January 31, 2019, which is undisputed by the complainant□

stayed.□

Documentation has been prepared showing which days and which dates□

times the complainant enters and leaves the home. The documentation captures the□

Months September 2017 to March 2018. For each month there is a table in which activities□

of the complainant are recorded, such as "Removal Microwave" or□

"Halloween Party".□

Evidence assessment: These findings are based on the complaint of January 4, 2019

attached preparatory brief of the respondents in the termination proceedings

AZ: *3 C *31/18r before the W*** district court on December 12, 2019. This brief was submitted by the

Respondent attached the mentioned documentation.

D. In legal terms it follows that:

On the applicable legal situation:

According to Article 99(2), the GDPR became generally effective on May 25, 2018

applicable ("valid"). A retrospective application to matters prior to that date

have occurred and have already been completed, the GDPR - as set out below - is not applicable

remove:

Art. 99 GDPR is according to paragraph 2 leg. cit., like all parts of the regulation, in all member states

binding and immediately valid. The provision therefore stands in accordance with the as fundamental

The principle of the primacy of application of Union law that applies to the interpretation of the Treaties

against any national law that contradicts it (cf. ECJ, Rs 6/64,

1964 ECR, p. 1251 – Costa/ENEL, ECLI:EU:C:1964:66, etc.). Unclear national legislation

in turn, are to be interpreted in accordance with Union law (cf. ECJ, case C-106/89, ECR 1990, p. I-04135 -

Marleasing, etc.). Art. 99 GDPR is an “acte claire” within the meaning of the

Case law of the ECJ (see especially ECJ, October 6, 1982, case 283/81, ECR 1982, 3415 - CILFIT,

etc.), ie. a provision of which there can be no doubt.

Section 69 (4) and (5) sentence 1 DSG therefore states in an interpretation of the provision that conforms to Union law that

from May 25, 2018 decisions of the data protection authority and the Federal Administrative Court,

which have a performance and legal effect (e.g. regarding an illegal

omitted data deletion), the substantive provisions of the GDPR and the DSG

foundations are to be laid.

An interpretation according to which these provisions also apply to decisions relating to the determinations

include events in the past that have had their effects completed,

would be applicable, in any case, Union law prohibits events insofar as, as in the present case, events
are to be assessed before May 25, 2018, since the Union legislature the temporal scope of the
GDPR, as set out above, made binding for all Member States and all subjects
has.
The video surveillance took place until May 16, 2018 and thus before the GDPR came into force
and the entry into force of the Data Protection Adaptation Act enacted to implement the GDPR
instead of.
The complaint about violation of the right to secrecy is thus procedurally correct
new legal situation (DSG as amended from Federal Law Gazette I No. 165/1999 as amended from Federal Law Gazette I No. 1
DSG to decide. In terms of substantive law, however, the matter is based on the legal situation at the time of the
Video recordings, thus according to the provisions of the DSG 2000, Federal Law Gazette I No. 165/1999 as amended up to
Federal Law Gazette I No. 83/2013, why on the basis of the meeting led by the respondents
The problem of the compatibility of § 12 DSG with the GDPR will not have to be discussed in detail.
On the other hand, regarding the complaint, you have the right to deletion, against the background of § 24
Para. 6 DSG, the substantive provisions of the GDPR should be used.
Regarding point 1:
The alleged infringement (here: the allegedly inadmissible video surveillance of the
Complainant) is not attributable to the first respondent, since she is not the
Client, i.e. the person who, according to § 4 Z 4 DSG 2000 "alone or together with others,
made a decision to use data" (here: video surveillance) was.
Rather, the investigative procedure revealed that the data protection client was only
Second respondent is. This has - albeit in consultation with the first respondent -
the decision to carry out the video surveillance was made and about the application
upcoming system as well as the location and manner of installing the
Video surveillance system decided. Furthermore, had control of the video camera and
the data stored on the digital recorder was only ever shared with the second respondent.

The complaint against the first respondent was therefore already for this reason in accordance with the verdict

to reject.

Regarding point 2:

In § 50a paragraph 1 DSG 2000 video surveillance is defined as the systematic, in particular

continuous detection of events affecting a specific object (monitored object) or a

affect a specific person (monitored person), through technical image recording or

image transmission devices.

In any case, this applies to the camera that is the subject of the proceedings and was

Parties to the proceedings also not questioned.

If people are also recorded by video surveillance, personal (image) data iSd

DSG 2000 - according to § 4 Z 1 DSG 2000, identifiability is already sufficient - and it is therefore included

Intervention in the right to secrecy according to § 1 paragraph 1 DSG 2000 (Dohr/Pollirer/Weiss/Knyrim,

DSG² § 50a, as of November 26, 2015, rdb.at; cf. also the judgment of the ECJ of December 11, 2019,

C-708/18).

As noted, the video camera captured the aisle area in front of the door, which necessarily

has to be walked through to get to Apartment 1*** Vienna, T***gasse 6*, Top *3b.

As the Respondents themselves indicate and it was also established that

Appellant actually made and stored video recordings. It's a thing

interfering with the complainant's right to secrecy.

In a second step, it must be examined whether the encroachment on the right to secrecy is justifiable

is. The legislature has in particular in § 50a DSG 2000 - in the light of Art. 7 lit. f of the directive

95/46/EG is to be interpreted (cf. again the judgment of the ECJ of December 11, 2019) - the

Video Surveillance by Private Declared Allowed for Certain Purposes.

The installation of a camera (with or without a motion detector) in front of the entrance area

Dwelling with the intention of storing digital image data of the people entering this dwelling

and leave, and may use this data as evidence in a court dismissal dispute

use (termination of the lease for the important reason of § 30 para. 2 no. 4

MRG), is a video surveillance according to § 50a DSG 2000, since it is the systematic

Determination of events affecting a specific object (apartment) by a technical

image capture device.

However, the video surveillance in question proves to be disproportionate and therefore

unlawful:

As the ECJ emphasizes in the already cited judgment of December 11, 2019, each

Data processing based on Article 7 lit. f of Directive 95/46/EC (such as video surveillance in

private area), on the principle of data minimization according to Art. 6 Para. 1 lit. c of the Directive 95/46/EG

to be measured (cf. margin no. 47 f of the judgment).

However, it cannot be said that a - secret - video surveillance spread over several

Months and meticulously recorded when the complainant walks through a door and partially

the purpose for which this is done corresponds to this principle.

In this respect, this circumstance already leads to the fact that § 50a DSG 2000, interpreted in the light of Art. 7 lit. f

of Directive 95/46/EC, cannot be used as a legal basis (cf. again the

Judgment of December 11, 2019, margin no. 40 and margin no. 48 f).

Apart from that, such video surveillance is also not permitted because the extraction

of evidence for a civil dispute under any of the lawful grounds for such a dispute

Intervention in the right to secrecy of the persons concerned falls, which is exhaustive in § 50a para. 3 and 4 DSG 2000

are listed (arg "exclusively" in § 50a para. 4 DSG 2000).

Another legal basis, in particular within the meaning of Section 8 (3) DSG 2000, does not come into play

Consider and is also not apparent.

From the existence of a civil emergency within the meaning of § 1306a ABGB, which is a "dangerous

Situation" (cf. OGH E 10. 5. 1979, 8 Ob 50/79, ZVR 1980/277 S 280, RS0027175), can in

There is no question of a mere lack of evidence (cf. the decision of the data protection authority of

August 22, 2014, DSB-D215.463/0006-DSB/2014; cf. further the decision of the Supreme Court,

RIS RS0132122).

Regarding point 3:

As noted, the Respondents continue to store personal data of the

complainant, which they generated through the video surveillance that was carried out.

In accordance with Article 17 GDPR Paragraph 1 lit. d, a person responsible has a data subject

to delete personal data immediately upon request if they are processed unlawfully

will.

As already explained, in the course of the video surveillance of the complainant, a

unlawful data processing of his personal data, which is why this in principle

would be deleted.

In the specific case, however, Art. 17 (3) lit. e GDPR must be observed, which states that Art

Para. 1 and 2 DSGVO do not apply if the processing is for the assertion, exercise or

Defense of legal claims is required.

In terms of time, the regulation applies in any case if the assertion, exercise or

Defense of legal claims is already taking place or is imminent (cf. Herbst in

Kühling/Buchner, General Data Protection Regulation, Art. 17, margin no. 83).

The findings show that two civil court proceedings are pending before the BG W***

are, which deal with inventory disputes. The personal data of

complainants, which were obtained through video surveillance, are evidence in

these procedures, which is why this data does not have to be deleted for the time being.

Regarding point 4:

It should be noted that a subjective right to initiate criminal proceedings against a

certain persons responsible cannot be derived from Art. 77 Para. 1 DSGVO or § 24 Para. 1 and 5 DSG

and in addition, according to Section 25 (1) VStG, the principle of official expediency applies (cf. Fister in

Lewisch/Fister/Weilguni [editors], VStG comment2 [2017] § 25 margin no. 1).

Administrative penal proceedings can therefore only be initiated by a person concerned

However, there is no entitlement to such an initiation.

It was therefore to be decided accordingly.