Litigation chamber

Decision on the merits 72/2021 of 14 June 2021

File number: DOS-2019-02726

Subject: Complaint against a public authority for transmission of a report to third parties

and lack of response within the legal deadline

The Litigation Chamber of the Data Protection Authority (hereinafter DPA), made up of

Mr Hielke Hijmans, chairman, and Messrs C. Boeraeve and R. Robert, 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 the free movement of such data, and repealing Directive 95/46/EC (General Regulation

on Data Protection), hereinafter GDPR;

Having regard to the Law of 3 December 2017 establishing the Data Protection Authority (hereinafter

ACL);

Having regard to the internal rules of the Data Protection Authority as approved by the

Chamber of Representatives on December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

Made the following decision regarding:

The complainant :

Mr. X, (hereinafter the complainant), represented by Mr. Jean-Yves Gyselinx

The defendant:

Y Agency,

I. Facts and after-effects of the procedure

Beslissing as to substance 72/2021 - 2/21

1. On May 15, 2019, the complainant filed with the Data Protection Authority

(hereafter

DPA) a request/complaint form in

which

he criticizes

the

communication by the data controller of a report dated 3 April 2019 to the

trade union representatives, due to the fact that it contains personal data

personnel about him and in particular his salary. He complains in particular about the fact that the

union representatives reportedly forwarded the information to many other

trade union colleagues, who allegedly used the information against him in meetings.

2. The report, dated April 3, 2019 and entitled “Complaint Conclusion Report” (hereafter

afterwards, “the audit report” or “the report”) comes from the Audit & Control Department,

[…]of

the defendant. The report concerns

ASBL Z (hereinafter

the ASBL), a

establishment which benefits from a care authorization issued by Y for

95 people with disabilities, day and night reception. The

beneficiaries have an intellectual disability or mental disorders,

some with significant multiple disabilities. Part of the population present

complex needs.

3. The audit report responds to three clusters of complaints that were filed between the

December 22, 2018 and February 21, 2019, against the ASBL on behalf, respectively,

about twenty workers from the ASBL, a collective of educators and trade unions

[…] and […].

4. The audit examines grievances such as the financial structure of the institution, the

lack of supervision,

the incompetence of the management as well as

problems in the quality of care for residents. Of nine grievances

mentioned, the report considers that five are justified or generally justified, the four

others subject to varying assessments. The complainant is informed as

being the director of the association.

5. This audit report was emailed on April 3, 2019 to the Complainant and two

union representatives (identified as the managers respectively

and complainants). The report is also sent to the social conciliator "with a view to

to support the lines of thought that will be discussed during the meeting of this

afternoon in an attempt to resolve this dispute.

1 Email dated April 3, 2019.

Beslissing as to substance 72/2021 - 3/21

6. On the same day, the complainant replied to the e-mail indicating that he had noticed different

errors in the report and want to write a right of reply. On May 8, 2019, he sends

by e-mail a series of grievances and questions to the defendant concerning

elements of the report. He also complains that the report contains his data

salaries that have been forwarded to union representatives. He asks for

explanations on what he considers to be the breach of data confidentiality

personal. On May 14, 2019, he emailed a document titled “Right to

responnse ".

7. On May 15, 2019, the complainant submitted his request form to the Authority.

8. Initially, the AMF, through the Frontline Service, intervenes

with the plaintiff in a mediation phase during which it invites him to exercise

his right of access to the defendant (letter of May 27, 2019).

9. On June 14, 2019, the complainant replied to the DPA that he had never received a response to his

communications of May 8 and 14, 2019. By letter dated July 22, 2019, the DPA

informs the complainant that the email sent by the complainant on May 8, 2019 does not constitute

not really an access request. She invites him to exercise this right with the

defendant asking for the legal basis on which the transfer of

data.

10. The Complainant made this request to the Respondent on July 23, 2019. The

August 26, he informed the APD of the lack of response from the defendant. The 10

September 2019, the DPA sends a letter to the defendant asking it to

respond to the applicant and send a copy of this response to the DPA. The

defendant confirms receipt of the request on September 18, 2019 and indicates

that a response will follow as soon as possible.

11. The respondent's response is dated September 26, 2019. In it, the

defendant apologizes for its late reply. She then indicates that

the purpose of the data processing was to investigate a complaint lodged against

of the complainant, in accordance with article 1369.84 of the Walloon Regulatory Code of

Social Action and Health of July 4, 2013 (hereinafter: the regulatory code). She

directs the complainant to the Privacy Policy which indicates that the data

are transmitted to third parties when participation in the investigation of the file so requires. The

defendant also provides elements of contextualization of the situation

Beslissing as to substance 72/2021 - 4/21

by evoking an abnormally long social conflict posing risks to the well-being

be beneficiaries of the establishment.

12. By email of September 27, 2019,

the complainant replies to the letter from

the

defendant. He contests the legality of the transmission of his data to the unions,

given that they are also authors of the complaint to Y and that the

transfer was not based on his consent. He indicates that this transfer allowed

unions to use their data for a purpose other than that for which they were

had been collected. He also raises the exceeding of the legal deadline for

respond to their access request. He asks the DPA to record his complaint and declare it

admissible.

13. On October 18, 2019, the ODA Frontline Service, having seen the latest

communication from the complainant, finds that the mediation initiated was unsuccessful and

seeks the complainant's agreement for the file to be sent as a complaint to the

Litigation chamber. On November 5, 2019, after obtaining the agreement of the

complainant, the Frontline Service declares the complaint admissible on the basis of the

articles 58 and 60 of the LCA and forwards it to the Litigation Division pursuant to

Article 62, § 1 of the LCA.

14. On December 3, 2019, the Litigation Chamber decides that the file can be processed

on the merits and inform the parties thereof. It establishes that the complainant's grievances against

of Y concern on the one hand, compliance with the data protection rules of the

communication of the report containing personal data

the

concerning (his salary) to trade union representatives, including with regard to

the information that Y communicates to data subjects about the processing

their personal data (Articles 5 and 6 of the GDPR and Articles 12 to 14 of the

GDPR), and on the other hand, the compliance of the response given to the complainant by Y, following

the exercise by the latter of his right of access (articles 12 and 15 of the GDPR).

15. On the same day, the Litigation Chamber informs the parties of its decision to deal

the file on the merits and establishes a timetable for the exchange of conclusions.

16. On December 12, 2019, the Respondent confirms receipt of the letter from the Chamber

litigation and asks to receive a copy of the documents in the file of which it does not

not yet have. The secretariat of the Litigation Chamber sends the documents

requested the same day.

Beslissing as to substance 72/2021 - 5/21

17. On December 24, 2019, the Respondent sent these submissions to the Chamber

contentious. She first explains that normally, the analysis reports,

such as the audit report of April 3, 2019, are never communicated to the complainants.

They only receive a letter informing them of the result of the investigation. The

defendant adds that the case of the ASBL is quite special since it

was the subject of a large-scale labor dispute, including a strike that would have

lasted seven weeks. According to the defendant, the role of social consultation was

therefore become essential if we hope to find a solution to the conflict. The report of the

defendant was eagerly awaited since it made it possible to objectify the grievances brought

by the complainants, which included the trade unions. These grievances

related, among other things, to the method of governance and financial practices. It is

in this context that the report was transmitted to the conciliator and to the organizations

so that he could serve in the conciliation meeting which took place after

noon even. The defendant considers that it was not possible for it not to process

the subject of the complainant's compensation in such a context.

18. As to the exercise of the right of access, the defendant acknowledges the late nature of the

response, emphasizing however that a response providing

the elements

necessary was finally transmitted.

19. About

disclosure of the amount of

the complainant's remuneration,

the

defendant recognizes a clumsiness and a lack of precaution but specifies

many elements. It recalls the exceptional nature of the situation and the

need to find solutions, which prompted her to carry out a balance of

interests, particularly in view of its key role in this sector. She explains

also not to consider itself responsible for the actions carried out a posteriori by the

unions. She also adds that her outgoing email of April 3, 2019 contained a

disclaimer.

20. On January 3, 2020, the plaintiff informed the Litigation Chamber and the defendant

having given a mandate to Me. Gyselinx to represent him. On January 28, 2020, the latter

sends its conclusions to the Litigation Chamber and to the defendant2. There's

explains that the report contained not only the salary of the concluding party but

also the invoicing of [the company …] (a service provider). He points out that the

defendant admitted its own clumsiness. He also argues that this

2 The Litigation Chamber notes that the plaintiff's lawyer refers to the Litigation Chamber as the "tribunal".

The Litigation Chamber reminds the parties that it is a body of administrative authority and not an institution.

of the judiciary.

disclosure of the salary caused enormous damage in terms of images and forced the

complainant to withdraw and then leave the management of the non-profit organization. On the principles, it

stresses that the defendant does not rely on any basis of lawfulness provided for by the

GDPR (referred to as Complainant Causes) and explains why it

considers that neither Article 6.1.d) nor Article 6.1.e) applies in this case.

21. On February 10, 2020, the defendant sent its submissions in reply to the

Litigation chamber. Beyond the points already mentioned in its first

conclusions, the defendant considers that the complainant minimizes the situation in

which the non-profit organization was at the time of the events and stresses the importance of

look at executive compensation and other budgetary aspects. She

adds that the plaintiff in no way demonstrates the damage that would have been caused to him and that

the distribution of the report was supervised and limited to the only stakeholders

identified.

22. With regard to the basis of legality, the defendant states that it is based on Article 6.1.d)

since the disastrous living conditions of the beneficiaries of the establishment are

in connection with the notion of vital interest provided for in this article. The defendant indicates

also rely on Article 6.1.e) because the seriousness of the grievances affected

considerably the quality of life and reception of the residents as well as their safety.

23. On July 1, the plaintiff's lawyer wrote to the Litigation Chamber to inquire about

the status of the file. The defendant asks a similar question on November 25, 2020.

On December 10, 2020, the Litigation Chamber replied to both parties that the

file is still being processed and that the decision will be communicated

when it is adopted. The Litigation Chamber regrets the delay it has put

to send a response to the parties.

PLACE

II. On the reasons for the decision

1) Regarding the grievances

Beslissing as to substance 72/2021 - 7/21

24. In accordance with the grievances set out by the complainant, as well as the exchanges

conclusions between the parties, the Litigation Chamber considers that several

issues need to be analyzed.

25. The first question relates to the basis of lawfulness of the data processing

personal data of the complainant (Articles 5 and 6 of the GDPR). The second relates to the

further processing of the data which would have been carried out by certain recipients of the

audit report. The last question relates to the exercise of the right of access by the

complainant and the respondent's response (Articles 12 and 15 of the GDPR).

26. Beyond these questions, in its minutes of 3 December 2019, the Chamber litigation had considered that the case also concerned the information that the respondent communicates to data subjects about the processing of their personal data (Articles 12 to 14 of the GDPR). These grievances not having been addressed neither by the plaintiff nor by the defendant during the exchanges of conclusions, the Litigation Chamber has few elements allowing it to examine that question. It will therefore not be examined by bedroom contentious.

2) As regards the disputed data processing

27. It appears from the documents in the file that the complainant objects to the fact that the audit report contains some of his personal data. According to the access request of the complainant, this personal data relates to:

-
data concerning his salary;

- information about the company […] (the fact that the complainant is also the manager of this service provider of the institution as well as the fees and overall billing amount);

- “hasty conclusions” on management.

28. In his conclusions, the complainant only refers to the first two elements. The Litigation Division therefore considers that the dispute relates to these two different data in the report.

29. In its submissions in reply, the defendant objected to the fact that the question of data concerning the company […] be addressed, for two reasons. First of all, it considers that it is a legal person whose data is not

therefore not covered by the definition of personal data in Article 4.1

of the GDPR. Then, she feels that this element was never brought to her attention

before the complainant's conclusions.

30. The data concerning the company […] appears in the audit report under the

"financial package" grievance. In particular, it is stated that "The designation of

Mr. X coincided with the arrival of a new subcontractor of which he is none other than

the manager. ". This sentence is followed by several others that describe the tasks of

this company within the ASBL as well as elements relating to invoicing. In this

that the quoted sentence refers directly to the complainant, who is a natural person

identified, and to the fact that he is the manager of this company, the Litigation Chamber

considers that these are indeed personal data within the meaning of Article 4.1 of the

GDPR. On the other hand, the amounts of fees and global annual invoicing

cannot be understood as personal data since they do not

do not refer to an identified or identifiable natural person. Bedroom

litigation also points out that this information was already included in the request

access of July 23, 2019. The defendant cannot therefore maintain that it

was unaware that it was data that was the subject of the dispute.

31. The Litigation Division also considers that the disputed processing bears

on the one hand on the collection and integration of the aforementioned personal data

in the audit report and on the other hand on the transmission of this audit report to the

union delegates. Even if this is not part of the grievances put forward by the complainant,

the Litigation Chamber notes that the second processing (transmission of the report)

concerns not only union delegates but also the conciliator

social. The analysis of the Litigation Chamber will therefore focus on these two processing operations.

3) As to the lawfulness of the processing (Article 6 of the GDPR)

Section 6

Lawfulness of processing

1. Processing is only lawful if and insofar as at least one of the following conditions

is fulfilled:

Beslissing as to substance 72/2021 - 9/21

a) the data subject has consented to the processing of his or her personal data for

one or more specific purposes;

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

or the execution of pre-contractual measures taken at the latter's request;

c) processing is necessary for compliance with a legal obligation to which the data controller

treatment is submitted;

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

of another natural person;

e) processing is necessary for the performance of a task carried out in the public interest or falling within the

the exercise of official authority vested in the controller;

f) the processing is necessary for the purposes of the legitimate interests pursued by the data controller

processing or by a third party, unless the interests or freedoms and rights

fundamentals of the data subject which require protection of personal data

personal, in particular when the person concerned is a child.

Point f) of the first paragraph does not apply to processing carried out by public authorities

in the execution of their missions.

2. Member States may maintain or introduce more specific provisions for

adapt the application of the rules of this Regulation with regard to processing for the purpose of

comply with paragraph 1, points c) and e), determining more precisely the requirements

applicable to the processing as well as other measures aimed at guaranteeing processing

lawful and fair, including in other specific processing situations as provided for in the

chapter IX.

3. The basis for the processing referred to in points (c) and (e) of paragraph 1 is defined by:

(a) Union law; Where

(b) the law of the Member State to which the controller is subject.

The purposes of the processing are defined in this legal basis or, with regard to the

processing referred to in point (e) of paragraph 1 are necessary for the performance of a task of interest

public or subject to the exercise of official authority vested in the person responsible for the

processing. This legal basis may contain specific provisions to adapt

the application of the rules of this regulation, among others: the general conditions governing the

lawfulness of processing by the controller; the types of data that are the subject of the

processing; the people concerned; the entities to which the personal data

Beslissing as to substance 72/2021 - 10/21

may be disclosed and the purposes for which they may be disclosed; the limitation of

purposes; retention periods; and processing operations and procedures, including

measures to ensure lawful and fair processing, such as those provided for in other

special processing situations as provided for in Chapter IX. Union law or

law of the Member States serves an objective of public interest and is proportionate to the objective

legitimately prosecuted.

[…]"

32. When exercising the right of access by the complainant, he requested from the

defendant, the legal basis for the processing of this data. In his response to the right

access dated September 26, 2019, the defendant explained that the purpose of the

processing "was aimed at investigating a complaint lodged against you, in accordance with

Article 1369/84 of the Walloon Regulatory Code for Social Action and Health of 4

July 2013. "

33. In the exchanges of conclusions, it appeared that the defendant claims the

Articles 6.1.d) and 6.1.e) of the GDPR as bases for the lawfulness of the processing (referred to as

justification by both the plaintiff and the defendant). The complainant has

meanwhile had the opportunity to challenge the applicability of its bases of lawfulness.

34. It follows from recital 46 that “the processing of personal data

based on the vital interests of another natural person should in principle not take place

only when the processing cannot manifestly be based on another basis

legal." 3

35. The Litigation Chamber will therefore examine the basis of lawfulness of Article 6.1.e) in a

first place. It will only examine that of Article 6.1.d) if Article 6.1.e) proves to be

inapplicable to the present case.

36. The defendant argues that the grievances raised against the ASBL and their impact on

the quality of life and the reception of the residents justified its intervention. The complainant

considers that the processing of the complainant's personal data was in no way

useful for the execution of the mission.

3 “The processing of personal data should also be considered lawful where it is necessary for

protect an interest essential to the life of the person concerned or that of another natural person. The treatment of

personal data based on the vital interest of another natural person should in principle only take place

where the processing clearly cannot be based on another legal basis. Some types of treatment may

be justified both by important grounds of public interest and by the vital interests of the data subject, for example

where the processing is necessary for humanitarian purposes, including to monitor epidemics and their spread, or in

humanitarian emergencies, including natural and man-made disasters. »

Beslissing as to substance 72/2021 - 11/21

37. The defendant is a regional public authority responsible for [matters

in the social and health sector]. In this capacity, it notably issued a

authorization to take over for the benefit of the ASBL. In the context of the litigation at

examination, the defendant investigated a complaint lodged against the

defendant, which led to the conclusion of the audit report. It is therefore established that

the defendant exercises public authority, in the sense that it is the institution

in charge of large areas of social action at the regional level and that by

For example, in this capacity, it issues authorizations and investigates complaints. The part

defendant therefore rightly argues that the processing can be based on Article

6.1.e) GDPR.

38. As already explained in its decision 55/20214, the Litigation Chamber must

however, check that the conditions provided for in Article 6.1.e) are met by

the species. Pursuant to Article 6.3.b) and recital 45 of the GDPR, processing

based on Article 6.1.e) must meet two conditions:

o The data controller must be entrusted with the execution of a

task in the public interest or in the exercise of official authority

under a legal basis, whether under European Union law

or under the law of the Member State;

o The processing must be necessary for the performance of the mission of interest

public or the exercise of public authority.

A legal basis

39. It appears from the documents in the file that the defendant's audit report was drawn up

based on article 1369/84 of the regulatory code. This article is written as

follows:

“Article 1369/84. Any complaint relating to care in a service may be

made in writing to the Agency. The Agency shall inform the

organizing authority taking into account the needs of the examination of this request.

The Agency carries out this examination as soon as it receives the complaint and formulates its

4 Decision on the merits 55/2021 of 22 April 2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-

fund-n-55-2021.pdf)

conclusions within a maximum period of six months. The Agency informs the complainant, the

management, the service manager and the authorities responsible for the placement and/or

funding, the follow-up to this complaint. »

40. The Litigation Chamber therefore considers that this article establishes a legal basis which

frame the exercise of the public authority of the defendant for the processing

contentious, being extended that the general framework of the exercise of the public authority of the

complainant is much broader. For the Litigation Chamber, it therefore appears that

the exercise of public authority has a legal basis in national law. The

Litigation Chamber will therefore examine whether this legal basis fulfills the prescribed

of the GDPR.

Processing necessary for the exercise of official authority

41. In order for the processing to be lawful on the basis of Article 6.1.e), the purposes of the processing

must therefore be necessary for the exercise of official authority. As she already has

developed in its decision on the merits 38/20215, the criterion of necessity is

essential.

42. In its judgment in Huber, the Court of Justice of the European Union (CJEU) considered

of this condition of necessity, specified: that “in view of the objective consisting in ensuring

an equivalent level of protection in all Member States, the concept of

necessity as it results from Article 7(e)6 of Directive 95/46, which aims to

precisely delimit one of the hypotheses in which the processing of

personal data is lawful, cannot have a variable content in

function of the Member States. Therefore, it is an autonomous concept of law

community which must be interpreted in such a way as to respond fully

subject matter of that directive as defined in Article 1(1) thereof’7.

43. According to the conclusions8 he submitted in this case, the Advocate General

makes explicit in this regard that "the concept of necessity has a long history in law□

community and it is well established as an integral part of the criterion of□

5 Decision on the merits 38/2021 of 23 March 2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-□

at-the-bottom-n-38-2021.pdf)□

6 Member States shall provide that the processing of personal data may only be carried out if: (...) e) it is□

necessary for the performance of a task in the public interest or in the exercise of official authority vested in the□

controller or the third party to whom the data is communicated.□

7 CJEU, December 16, 2008, judgment Heinz Huber v. Bundesrepublik Deutschland, C-524/06, para. 52.□

8 Conclusions of Advocate General Poiares Maduro presented on April 3, 2008 in the context of the procedure before the CJU h

resulted in the judgment cited in footnote 15 above (C-524/06).□

proportionality. It means that the authority which adopts a measure which undermines□

a fundamental right in order to achieve a justified objective must demonstrate that this□

measure is the least restrictive to achieve this objective. Furthermore, if the□

processing of personal data may be likely to infringe the right□

fundamental to respect for privacy, Article 8 of the European Convention on□

safeguard of human rights and fundamental freedoms (ECHR) which guarantees□

respect for private and family life also becomes relevant. As the Court has□

set out in the Österreichischer Rundfunk and Others judgment, if a national measure is□

incompatible with Article 8 of the ECHR, this measure cannot satisfy□

the requirement of Article 7(e) of the directive. Article 8(2) of the ECHR□

provides that an interference with privacy may be justified if it relates to one of the□

objectives listed therein and "in a democratic society, is necessary" to□

one of these goals. The European Court of Human Rights has ruled that the concept□

of “necessity” implies that a “pressing social need” is involved”.□

44. The Article 29 Group also referred to the case law of the Court□

European Court of Human Rights (Eur. Court D.H.) to define the requirement of

necessity9 and concludes that the adjective “necessary” does not have the flexibility of terms

such as “permissible”, “normal”, “useful”, “reasonable” or “timely”.10

45. In his judgment Michael Schwarz v. Stadt Bochum, the Court of Justice of the Union

European Union, considers that with regard to “the examination of the necessity of a

such processing, the legislator is in particular required to verify whether measures less

prejudicial to the rights recognized by sections 7 and 8 of the Charter are conceivable

while contributing effectively to the aims of Union regulation by

cause »11

46. Following the foregoing, it is therefore up to the Litigation Chamber to determine

if the processing was necessary for the exercise of official authority. As she has

previously established (see point 31), for the Litigation Chamber the dispute in question

concerns two processing operations: the processing of the complainant's personal data

for the completion of the audit report, as well as the sending of the audit report to

various parties, including union representatives and the social conciliator.

9 “Article 29” Data Protection Working Party, “Opinion 06/2014 on the notion of legitimate interest pursued by

the data controller within the meaning of Article 7 of Directive 95/46/EC”, adopted on April 9, 2014.

10 Eur. H.R., March 25, 1983, Silver et al. United Kingdom, para. 97.

11 CJEU, October 17, 2013, judgment Michael Schwarz v. Stadt Bochum, C-291/12, para.46.

47. With regard to the processing of the complainant's personal data for the

writing of the report,

the Litigation Chamber notes that this concerns

only the complainant's salary as director of the ASBL and his position as

manager of a subcontractor (see points 27 and 28). These data were discussed in the

report during the analysis of the grievance mentioned "financial package" which is under the

Title A “Management”.

48. For the Litigation Chamber, there is no doubt that the processing of data

salaries of the director as well as his position as manager of a subcontractor are

information that must be examined during an audit relating, among other things, to the

management and the financial structure of an institution. Therefore, the treatment of these

data is necessary for the exercise of the public authority of the defendant which

consists of dealing with complaints received against the ASBL.

49. The second processing submitted for examination by the Litigation Division consists of

sending the audit report to various parties, including union delegates from

the ASBL, who were among the people who lodged a complaint with the

defendant, as well as to the social conciliator. This is the treatment that is

principally challenged by the plaintiff in this case. The complainant

considers that this processing was in no way necessary for the mission of the

defendant.

50. The defendant, for its part, considers that this dispatch was entirely justified in view of

the specific circumstances of the non-profit organization and the ongoing social conflict. The transfer of

report to the union delegates and the conciliator was intended to promote the

consultation and provide a solution to the dispute (see point 17).

51. For this processing too, the Litigation Division must examine whether it was

necessary for the exercise of the public authority of the defendant. The criterion of

“necessity” as already specified (see points 41 et seq.) restricts the margin

appreciation of the data controller, since he does not authorize him to carry out

treatments that would only be useful or desirable.

52. It is apparent from the defendant's submissions that the purpose of this processing was to

allow the use of the report during the social conciliation meeting so that

this one can objectify the situation. The aim was therefore to promote the resolution of the

ongoing social conflict.

Beslissing as to substance 72/2021 - 15/21

53. The defendant justifies the treatment in question by the exceptional situation in

which the non-profit organization was located, due to an abnormally long labor dispute. The

Litigation Chamber notes that the extent of the social conflict is underlined in the

conclusions of the audit report. There are also findings from

the

defendant, that “the analysis and conclusions that the agency would bring to the complaint

tabled by the trade union organizations in a common front, became essential

since they would give a neutral look at the alleged facts” and that “the

conclusions of the agency were eagerly awaited in order to carry out a final

attempt at reconciliation. The purpose of this specific processing was therefore to facilitate the

ongoing social reconciliation.

54. It is also apparent from the defendant's explanations that this treatment

did not correspond to an ordinary exercise of his public authority, since this

emphasizes that “the case of the complainant’s institution is quite specific and

fortunately exceptional.

55. The Litigation Chamber recalls that the legal basis governing the exercise of authority

Defendant's public service limits it to receiving and processing complaints.

It does not appear from this legal basis that support for social reconciliation or

social conflict resolution is part of the exercise of the public authority of the

defendant. It follows that the disputed processing operation, consisting in transferring the

audit report to union representatives and the social conciliator, cannot be

considered necessary for the exercise of the public authority of the defendant.

56. Even if the defendant justifies the treatment by its desire to support the process

of social conciliation in progress, the Litigation Chamber notes all the same that the

legal basis provides that the defendant "informs the complainant, the management, the
manager of the service and the authorities responsible for the placement and/or
funding, of the follow-up to this complaint", which could have been used by the
defendant to justify the sending of the audit report to the union representatives
in particular, since they were also complainants. Force is however to
find that according to the defendant's own conclusions, "the reports
analysis are never communicated to complainants". It therefore seems that this
provision only obliges the defendant to inform certain categories of
persons "of the follow-up to the complaint" and in no way obliges the defendant
forward the report in question. It follows that the processing in question cannot
either be justified by this information obligation provided for in the legal basis and
that it is therefore not necessary for the exercise of the public authority of the defendant.
Beslissing as to substance 72/2021 - 16/21
57. Based on the above elements, the Litigation Chamber considers that the
defendant cannot rely on Article 6.1.e) as a basis of lawfulness for the
processing consisting of sending the report to different recipients, since this
was not necessary for the exercise of his public authority.
58. Respondent also indicated that it relies on Article 6.1(d) as the basis for
lawfulness of the processing, which would imply that the processing is necessary for the
safeguarding the vital interests of the data subject or of another person
physical. The Litigation Chamber recalls in this regard that this basis of lawfulness is
refers to processing that is clearly and directly necessary to preserve
the health of a data subject. A treatment intended to help
resolution of a social conflict cannot therefore rely on this basis of
legality.
Additional remarks concerning the transmission of the report

59. If the defendant considered that its intervention in the conciliation was absolutely

indispensable, it would have been entirely open to him to transmit to the unions and to the

social conciliator a version of the report purged of personal data

staff, or the simple observation that the level of salary "is somewhat

higher than the maximum scale of scale 29 (director >60) of the C.P. […]"13 . Asset

the least, the defendant could have ensured compliance with the principle of minimizing

data (article 5.1.c) of the GDPR) when transmitting the report. A track of this

type was moreover mentioned by the defendant itself in its pleadings,

since it indicates, for example, that it would have been "wiser not to mention

precisely the amount of salary.

4) As to the further processing of the complainant's personal data by the union

60. In its request for information of 15 May 2019, as well as in letters

subsequent reports, the complainant indicates that the members of the trade unions to which the report

12 Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interest pursued by

the data controller within the meaning of Article 7 of Directive 95/46/EC", adopted on April 9, 2014, p. 20.

13 Audit report of April 3, 2019 p. 5.

was sent forwarded this same document to colleagues who

finally transmitted to the staff of the ASBL. The complainant considers that this caused him

"an extremely complex situation" during the joint committee which took place

shortly after the report was sent. The complainant also indicates that he suffered

damage as a result of this further processing of this data (see point 20).

61. The defendant maintains in its submissions that it cannot control, and a fortiori

to be responsible for the actions of the unions and that it does not condone them. She

draws attention to the disclaimer in the email (see point

19). In its submissions in reply, it considers that the complainant does not demonstrate

in any way its damage, nor their possible link with the transmission of the report.

62. Based on the elements described above, the Litigation Chamber arrives at several

conclusions. First of all, it finds that the complainant does not provide any proof of

this further processing by the trade unions. Indeed, he repeatedly states that

the unions would have transferred the report to their colleagues, who would in turn have it

transferred (see point 1). However, this account is not supported by any element of the

file, apart from the complainant's statements.

63. Moreover, even if this further processing were proven, the Chamber

litigation notes that the plaintiff does not link it to any specific violation of the

GDPR. However, the Litigation Chamber considers, prima facie and in the absence

of contrary elements brought by the plaintiff, that the defendant does not seem

be considered responsible for further processing carried out by a

or more of the report recipients.

64. Indeed, the Court of Justice has confirmed that for the identification of the responsible person(s)

of the processing required a factual assessment of the natural person(s) or

of the legal person(s) who determine "the purpose" and "the means" of the

processing, the concept being broadly defined in order to protect the

persons concerned14. The Court also held that a natural person

who, for reasons concerning him, has an influence on the processing of

personal data and thus participates in determining the purpose and

means of this treatment can be considered as a person responsible for the

treatment15. In this case, it is indeed the trade union delegates to whom the report is

14 CJEU judgment of 13 May 2014, Google Spain and Google, C-131/12, ECLI:EU:C:2014:317, par.34; CJEU judgment of June

Wirtschaftsakademie Schleswig-Holstein, C-210/16, ECLI:EU:C:2018:388, par.28.

15 CJEU judgment of 10 July 2018, Jehovan todistajat, C-25/17, ECLI:EU:C:2018:551, par.65

who passed it on to other colleagues. They have thereby themselves

determined the purposes and means of this new processing. So they would be

have become data controllers within the meaning of Article 4.7) of the GDPR.

65. The Litigation Chamber cannot therefore examine possible offenses in the

head of the defendant as to this additional salary. However, it notes two

additional elements. First of all, if the email sending the audit report contains

a confidentiality clause specifically providing for this prohibition of

transfer to third parties, this in no way frees the data controller from

possible liability. Next, compliance with the principle of minimizing

data (see point 59) could have limited the risks relating to the data

complainant's personal information.

5) As to the response to the exercise of the right of access by the complainant

66. Pursuant to Article 15.1 of the GDPR, the data subject has the right to obtain

controller confirmation that personal data the

concerning are or are not processed. When this is the case, the person concerned

has the right to obtain access to said personal data as well as to a series

information listed in Article 15.1 a)-h) such as the purpose of the processing of its

data, the possible recipients of his data as well as information

relating to the existence of his rights, including the right to request the rectification or

erasing their data or filing a complaint with the DPA.

67. The Litigation Chamber recalls, as it had already established in its decision

15/202116, that the right of access is one of the essential requirements of the right to

data protection, since it constitutes the “front door” which allows the exercise

other rights that the GDPR confers on the data subject.

68. Although not expressly listed in Article 15.1, the basis of legality

undeniably constitutes information that the data subject may request

from the data controller, being specifically included in Article 13.1.c)

as information to be provided to the data subject at the time of collection of

its data.

16 Decision on the merits 15/2021 of 9 February 2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-

au-fond-n-15-2021.pdf).

Beslissing as to substance 72/2021 - 19/21

69. As it has already had occasion to explain in its decision 41/202017, the Chamber

litigation recalls that Article 12 of the GDPR relating to the procedures for exercising

their rights by the persons concerned provides in particular that the

controller must facilitate the exercise of his rights by the data subject

concerned (Article 12.2 of the GDPR) and provide it with information on the measures taken

following his request as soon as possible and at the latest within one

months from its request (article 12.3 of the GDPR). According to the same article, the period

may be extended by an additional month, at the request of the controller.

70. Although he does not mention it in his conclusions, the complainant reproached

on several occasions to the defendant the belated nature of its response to its request

access, exercised on the basis of article 15.1 of the GDPR (see point 12). It appears parts

of the record that the respondent's response was sent more than two months after the

request (see points 10 and 11).

71. In the present case, the defendant did not make use of this possibility

extend the response time. In its pleadings, the defendant acknowledged that it

had not respected this deadline, since she indicated that she “cannot question

the complainant's claim as to the lateness in which the response was

communicated”, even if it emphasizes that an answer was ultimately provided.

On the basis of these elements, the Litigation Division finds a violation of Article 15.1 of the

GDPR attached to Articles 12.3 and 13.1c).

6) Regarding corrective measures and sanctions□

72. Under Article 100 LCA, the Litigation Chamber has the power to:□

1° dismiss the complaint without follow-up;□

2° order the dismissal;□

3° order a suspension of the pronouncement;□

4° propose a transaction;□

(5) issue warnings or reprimands;□

6° order to comply with requests from the data subject to exercise these rights;□

(7) order that the person concerned be informed of the security problem;□

17 Decision on the merits 41/2020 of 29 July 2020 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-□

au-fond-n-41-2020.pdf), §16.□

8° order the freezing, limitation or temporary or permanent prohibition of processing;□

9° order the processing to be brought into conformity;□

10° order the rectification, restriction or erasure of the data and the notification of□

these to the recipients of the data;□

11° order the withdrawal of accreditation from certification bodies;□

12° to issue periodic penalty payments;□

13° to impose administrative fines;□

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

international body;□

15° forward the file to the public prosecutor's office in Brussels, which 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 Authority of□

Data protection.□

73. The Litigation Chamber points out that under Article 221.2° of the Law of 30 July□

2018 on the protection of individuals with regard to data processing

personal data, it cannot impose a fine on the defendant,

since it is a public authority within the meaning of article 5.1° of this same law.

74. The Litigation Division found that the Respondent had violated Article 15.1 of the

GDPR attached to articles 12.3 and 13.1.c) by not responding to the access request of the

plaintiff within the legal deadline. This point has also been explicitly recognized by the

defendant.

75. The Chamber also found that the Respondent violated Rule 6.1(e) of the

GDPR by performing data processing, consisting of sending the report

audit to union representatives and the social conciliator, while the latter

was not necessary for the exercise of his public authority.

76. In conclusion from the foregoing, and in view of all the circumstances of the case, the

Litigation Chamber considers that the reprimand (i.e. the call to order referred to in Article

58.2.b) of the GDPR) is in this case the effective, proportionate and dissuasive sanction

which is binding on the defendant.

77. It recalls that in its capacity as data controller, the defendant is required

to respect the principles of data protection and must be able to

18 As it has already had the opportunity to specify in several decisions, the Litigation Chamber recalls here that

the warning sanctions a failure which is likely to occur: see. Article 58.2.a) of the GDPR in this respect.

Beslissing as to substance 72/2021 - 21/21

demonstrate that these are respected. It must also implement all

the necessary measures for this purpose (principle of responsibility – articles 5.2. and 24 of the

GDPR)19. The Litigation Chamber therefore invites the defendant to ensure that the

process put in place to deal with requests to exercise the rights provided for by the

GDPR ensure a response within the legally prescribed deadlines.

7) Publication of the decision

78. Given the importance of transparency with regard to the process

decision-making and the decisions of the Litigation Chamber, this decision will be published

on the website of the Data Protection Authority by deleting

direct identification data of the parties and the persons cited, whether they

be physical or moral.

FOR THESE REASONS,

THE LITIGATION CHAMBER

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Pronounce against the defendant a reprimand on the basis of article 100.1, 5°

LCA, for violation of Article 15.1 of the GDPR attached to Articles 12.3 and 13.1.c) and for

violation of Article 6.1.e) of the GDPR.

Dismiss the complaint for the other aspects on the basis of article 100.1, 1° LCA.

Under Article 108 § 1 LCA, this decision may be appealed to the Court of Justice.

contracts (Brussels Court of Appeal) within 30 days of its notification, with

the Data Protection Authority as defendant.

(Sé). Hielke Hijmans

President of the Litigation Chamber

19 Decision on the substance 41/2020 of 29 July 2020 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-

au-fond-n-41-2020.pdf), §16.