GZ: 2021-0.285.169 from May 3, 2021 (case number: DSB-D124.3448)

[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 for reasons of pseudonymization

and/or changed. Obvious spelling, grammar and punctuation errors

have been corrected.]

NOTICE

S P R U C H

The data protection authority decides on Markus A***'s data protection complaint

(Appellant) of December 29, 2020, ha. received on January 7, 2021, against

Claudia N*** (Respondent) for violation of the right to secrecy as follows:

- The complaint is dismissed as unsubstantiated.

Legal basis: Article 2 paragraph 2 letter c, Article 4 no. 1, no. 2 and no. 15, Article 51 paragraph 1, Article 57 paragraph 1

lit. f and Article 77 (1) of Regulation (EU) 2016/679 (General Data Protection Regulation, im

hereinafter: GDPR), OJ No. L 119 of 04/05/2016 p. 1; § 1 paragraph 1, § 4 paragraph 1, § 18 paragraph 1

and Section 24 Paragraph 1 and Paragraph 5 of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amend

Art. 8 and Art. 52 Para. 1 of the Charter of Fundamental Rights of the European Union (EU-GRC), OJ.

No. C 202 of 7.6.2016, p. 389.

A. Submissions of the parties and course of the proceedings

REASON

1.

With the filing of the proceedings, the complainant alleged an infringement

in the Respondent's right to secrecy and brought together

proposes that the Respondent filed a court order on December 16, 2020 with the

sensitive health data concerning the complainant to a third party via WhatsApp

person, namely Erika A***.

2.

In its submission of January 26, 2021, the Respondent replicated that it

and the applicant had been divorced since December 2015. She is alone

custody of their son Andreas. Erika A*** is about the

the applicant's biological mother and the former mother-in-law of the

Respondent.

Since the contested divorce in 2015, the Respondent has at times

telephone contact with her former mother-in-law. These would often contact the

visiting weekends that were actually granted to her ex-husband (the complainant).

take care of Andreas, the whole weekend and also the winter and summer week

spend with his grandparents. As far as the Respondent is aware, the

Complainant has good and regular contact with his parents, which is why the

Respondent assumes that this about his state of health in

be pictures.

The transmission of the message in question to Erika A*** in connection with the request

with regard to the complainant's resilience arises solely from concern for the

common son Andreas, since the Respondent was not sure whether it was for her

the complainant's health situation, which sounds dramatic as a layman, is a reliable one

Care of Andreas, which due to his special needs (e.g.

hyperactivity, medication, etc.) is necessary. After between the

Respondent and the complainant hardly have a solid basis for discussion

is present, it would be far from the Respondent, the complainant with the im

Court order to confront the diagnosis held. To protect health

as well as the physical and mental integrity of Andreas have the

Respondent obtained certainty by asking her former mother-in-law

wish to obtain whether the complainant is still able to have their son

to supervise.

The Respondent also points out that on the

provided screenshot of the transmitted message was only the "child's father".

and neither the name nor other personal data of the

find the complainant.

3.

The complainant did not provide any further information during the hearing of the parties

Mention.

B. Subject of Complaint

Based on the submissions of the complainant, the subject of the complaint is:

the question of whether the Respondent violated the Complainant's right to

Breached secrecy by using a court order containing the health information of the

complainant via WhatsApp to a third party, namely Erika A***

has.

C. Findings of Facts

The parties to the proceedings have been divorced since December 2015. The Respondent has

sole custody of their son Andreas. Erika A*** is the biological mother

of the complainant, Andreas' grandmother and the former mother-in-law of the

Respondent and often takes care of their son

parties to the proceedings.

Evidence assessment: The findings on the

family relationships as well as

care situation regarding the common son of the parties to the proceedings

from the information provided by the Respondent, which is undisputed in this respect.

The Respondent sent the following message via WhatsApp in December 2020

Erika A*** submitted (formatting not reproduced 1:1):

[Editor's note: at this point in the form of graphic files (screenshots)□

inserted documents cannot be pseudonymised with reasonable effort.□

They are presented here as a text document with an approximate rendering of the formatting□

reproduced.]□

[Screenshot from court order]□

The father is currently 13 PU**** due to the decision of the District Court *** of July 4th, 2018□

obligated to a monthly maintenance payment of EUR 3**.00 for the mj. Andreas.□

The minor is in the care and upbringing of his mother and according to the records□

without income and assets.□

The child's father suffered a leisure accident on July 2nd, 2013. Until 2014 he worked as a ****. The□

Employment was terminated during sick leave (duration 1 year).□

The child's father is in relation to unemployment assistance in the amount of EUR 4*.67 per day and is also with□

an income of EUR *34.00 incl. special payments at the facility **** slightly□

employed. The child's father's income is therefore around EUR 1***.00 per month.□

The following clinical pictures were last diagnosed on 05.06.2019:□

□□

□ Narcissistic or anxious avoidant personality structure□

chronic depressive disorder□

[Screenshot WhatsApp message]□

Dear Erika, I had no idea how□

it's bad for Mark!! This explains□

quite a bit... but unfortunately also raises the question□

on how much Andreas rely on him□

or Mark can watch out? 12:56□

[Screenshot from court order]□

□ Hypercholesterolaemia□

□ Rapid mental exhaustion/excessive demands, so that the father on a□

specially created daily structure with many breaks.□

He is also 60% handicapped and it is no longer reasonable for him to work as a ****. According to□

Salary compass is the income as **** between EUR 1.***.00 and EUR 2.***.00 gross.□

The child's father is currently under psychiatric treatment.□

The child's father is also legally responsible for Andreas N***, born 1*.0*.1995, who□

now studying at the FH in ******.□

Evidence assessment:□

The income of the child's father results from the submitted salary documents.□

The clinical pictures of the child's father could be found in the patient's letter of May 13, 2019□

will. The psychiatric report from 06.03.2015, which was in the file, could□

can be inferred that a chronic course must be assumed and with none□

improvement in health can be expected. This report also shows that he□

the job at that time as a **** can no longer practice. The court considers it so□

credible and comprehensible if the child's father states in his statement that no one is involved□

Being able to work full-time and only have a part-time job□

(rapid mental exhaustibility/overtiredness). With the ID presented, the 60%□

Disability of the father can be proven. That the father is undergoing psychiatric treatment□

located could be credibly demonstrated by the father and was on the part of the□

District authority *** also not disputed. The average earnings of a **** could□

can be taken from the AMS salary compass. That the child's father is now back for his□

Son Andreas is legally responsible for custody, could be proven by confirmation of enrollment□

will.□

Evidence Assessment: The Findings□

to the□

contents□

such as

to send the

The WhatsApp message that is the subject of the proceedings result from what is undisputed in this respect

Submissions of the complainant in his submission initiating the proceedings.

D. In legal terms it follows that:

D.1. For personal reference and the processing of data

In his submission initiating the proceedings, the complainant criticized disclosure

of his health data by the Respondent to a third person. the

Respondent brings

in this context, that on the dated

The screenshot provided by the complainant is only spoken of by the "child's father" and

neither the name nor other personal data of the complainant is visible

be. input

Therefore, the question to be clarified is whether there is any processing at all

personal data of the complainant by the respondent.

According to Art. 4 Z 1 GDPR, "personal data" is all information relating to

relate to an identified or identifiable natural person (“data subject”); as

identifiable is a natural person who directly or indirectly, in particular

by association with an identifier such as a name, an identification number

location data, an online identifier or one or more specific

characteristics expressing the physical, physiological, genetic, psychological,

economic, cultural or social identity of this natural person

can be.

The European Court of Justice (ECJ) has in relation to Art. 2 lit. a of Directive 95/46/EC

already stated that the term "personal data" has a broad meaning

underlying. Accordingly, the term does not refer to sensitive or private information

limited, but potentially includes all types of information both objective and

also of a subjective nature in the form of opinions or assessments, under which

Provided that the information is “about” the person in question.”

(cf. the judgment of the ECJ of December 20, 2017, C-434/16 [Nowak]).

These considerations can be transferred to the current legal situation according to the GDPR

since the definition of "personal data" according to Art. 2 lit

Directive 95/46/EG was taken over in Art. 4 Z 1 DSGVO.

A person is uniquely identified if the identity of the person can be derived directly from the

information itself (cf. in this respect the judgment of the ECJ of October 19, 2016,

C-582/14 [Breyer], para. 38). On the other hand, a person is identifiable if the information is

taken by itself is not sufficient to assign it to a person, but this succeeds as soon as

the information is linked to other information. In other words: will the

data subject, for example, not mentioned by name, but can nevertheless use

If reference data is determined, this is referred to as personal data (cf. Ernst in

Paal/Pauly

[Ed.], General Data Protection Regulation. Commentary, Art. 4, para. 8th). Around

Furthermore, all means shall be used to establish whether a natural person is identifiable

take into account that by the person responsible or another person according to general

Discretion likely to be exercised directly or indirectly to the individual

identify (cf. Recital 26 GDPR).

Applied to the present case, personal data of the

complainant, since it is attached to the WhatsApp message in question

Document taken by itself is spoken only by the "father" or "child's father", the

However, the text message that is also transmitted also expressly refers to "Mark" - is meant

thus the complainant Markus A*** - takes. In this context, the

Respondent herself that she by means of the subject of the proceedings

wanted to ask her former mother-in-law Erika A*** if her son

(the complainant) based on the state of health attested to him

care obligations

with regard to Andrew

(the common son of

parties to the proceedings). Consequently, for both the Respondent,

as well as for the recipient of the WhatsApp message, Erika A***, no question to whom

obtain and was the information or diagnoses contained in the attached document

the complainant is clearly identifiable to them as a result.

After the WhatsApp message that is the subject of the proceedings, without a doubt, too

Information can be seen that relates to the physical or mental health of the

complainant and from which information about the state of health of the

Complainant emerge, are also health data iSd. Art. 4 Z 15 GDPR

before.

The transmission of the WhatsApp message in question, i.e. the notification to individual

particular

addressees

(see.

rhymer

in

Sydow

[Ed.],

European

General Data Protection Regulation. Hand commentary, Art. 4, margin no. 69) also clearly represents one

Processing iSd. Art. 4 Z 2 GDPR.

D.2. General information on the fundamental right to secrecy

The basic right to secrecy enshrined in § 1 DSG, according to its first paragraph

everyone, particularly with regard to respect for their private and family life

is entitled to confidentiality of the personal data concerning him, insofar as

there is a legitimate interest in this, includes the protection of the data subject

the determination of their data and the disclosure of the data determined about them. The fundamental right

However, secrecy is not absolute, but may be breached by certain permissible interventions

be restricted.

It should be noted that in the present case a violation of the right to secrecy

according to § 1 paragraph 1 DSG and limitations of this claim from paragraph 2

leg. cit., but not from Art. 6 Para. 1 (or Art. 9 Para. 2) GDPR.

According to § 1 paragraph 2 DSG restrictions of the right to secrecy are, as far as the

Use of personal data not in the vital interest of the

Affected or with his consent, only to protect overriding legitimate

Interests of another permissible, whereby in the event of intervention by a state authority, this only

may take place on the basis of laws resulting from those mentioned in Art. 8 Para. 2 ECHR

reasons are necessary.

However, the GDPR and in particular the principles anchored in it are

Interpretation of the right to secrecy must be taken into account in any case (cf. the

Notification of July 4, 2019, GZ DSB-D123.652/0001-DSB/2019).

As a preliminary step, it must therefore first be examined whether the facts of the case at hand are dated at all

material scope of application of the GDPR (and subsequently the DSG).

D.3. On the (non-)applicability of the GDPR and the so-called "household exception"

According to Art. 2 Para. 2 lit. c, the GDPR does not apply to the processing

personal data by natural persons to exercise exclusively

personal or family activities (colloquially also known as "household exception"

designated).

The standardization of the "household exemption" represents a weighing decision by the
Union legislator in relation to the right laid down in Article 8 EU-GRC under primary law
Protection of personal data. According to Art. 52 Para. 1 EU-GRC
Restrictions on the rights and freedoms they guarantee must therefore be
as provided by law and the essence of these rights and
respect freedoms.
According to the prevailing view, this exception must therefore be interpreted restrictively (cf. on
largely identical content provision of Art. 3 para. 2 second indent of
Directive 95/46/EC the judgment of the ECJ of 6 November 2003, C-101/01 [Lindqvist]).
The delimitation criterion is the absence of any reference to a professional or
economic activity. I.e. the central criterion
for the applicability of
"Household exception" - and thus for the non-applicability of the GDPR - is the
Attributability of data processing to the private sector (cf. Heissl in Knyrim [ed.],
DatKomm Art. 2 GDPR, para. 70).
It should be noted here that the terms "personal" and "family" refer to the activity
of the individual processing personal data and not the individual whose data
to be processed. (cf. the judgment of the ECJ of July 10, 2018, C-25/17 [Jehovan
todistajat], margin no. 41 mwN.).
In this regard, the GDPR itself mentions, for example, the conduct of correspondence or the
Use of social networks and online activities in the context of a personal or family
Activity (see recital 18 GDPR). However, this only applies to the extent that data is in closed
Groups are exchanged that have no relation to professional or economic
activities of the users have
(cf. Ennöckl
in Sydów

[Ed.], European

General Data Protection Regulation. Hand commentary, Art. 2, margin no. 13; see also the one cited above

Judgment of the ECJ of July 10, 2018, C-25/17, para. 42 with additional references, according to which an activity is then “not

be considered strictly personal or family within the meaning of this provision

[may], if it has as its object, personal data of an unlimited number of

to make them accessible to persons, or if they relate even partially to the public

extends space and thereby to an area outside the private sphere of that person

who processes the data”). The exclusively private use of services such as

WhatsApp will, provided that there is no unrestricted publication of personal

data on the Internet is covered by the scope of the "household exemption" (cf.

Bergauer in Jahnel [ed.], GDPR. Commentary, Art. 2, para. 27).

The term "family" is not to be interpreted strictly in accordance with family law, but encompasses it

regardless of marriage and parentage, also other, from the public opinion as "family"

designated relationships. In this respect, it is irrelevant whether there is a formal bond or not

whether personal relationships exist on a purely informal basis (cf. Ernst in Paal/Pauly

[Ed.], General Data Protection Regulation. Commentary, Art. 2, para. 18).

Based on these considerations, it should therefore be noted in an intermediate step that

that in the present case the exception provision of Art. 2 Para. 2 lit c GDPR

is applicable because the transmission of the WhatsApp message in question to a

individually determined recipient (and not to an indefinite or unlimited

public addressee) on the occasion of a personal and at least indirectly

correspondence between the Respondent and her family

former mother-in-law, which often den

in the sole custody of

Respondent's son cared for, has taken place.

The next step is then to the relationship between the GDPR and the DSG in

with reference to the exceptions mentioned in Art. 2 Para. 2 GDPR.

According to Art. 16 Para. 2 TFEU, there is a Union competence to issue regulations on

the protection of natural persons in the processing of personal data by the

Member States in the exercise of activities falling within the scope of the

fall under Union law.

Insofar as a situation falls within the scope of Art. 8 EU-GRC, have

any constitutional provisions that offer the same guarantee, to the extent

of this agreement to remain "dormant in force" and the assessment is based on this

exclusively according to the provisions of Union law (cf. the recent decision of the

German Federal Constitutional Court of November 6, 2019, GZ 1 BvR 276/17, margin no. 47 ff;

see also VfSlg. 19.632/2012, where the Constitutional Court has already pronounced

has that he is guaranteed in the event of conformity of constitutional law

rights with the EU-GRC using the latter as a control standard).

In the present case it cannot be said that the scope of protection of § 1 DSG over

goes beyond those of Art. 8 EU-GRC, so that § 1 DSG does not apply at all.

But even if one were to see an application of § 1 DSG, it would be

Complaint unsuccessful:

The (simple legal) provision of § 4 Para. 1 DSG explains the GDPR in addition to the DSG

for the fully or partially automated processing of personal data, as well as for

the non-automated processing of personal data stored in a file system

are stored or will be stored,

for applicable without specifically referring to the

Exceptions in Art. 2 Para. 2 GDPR.

In this regard, however, the provisions of the GDPR at national level

fundamentally unrestricted material scope (cf. Kunnert in

Bresich/Dopplinger/Dörnhöfer/Kunnert/Riedl, DSG § 4, note 3), so that due to Art. 2

paragraph 2

lit. c GDPR

from the scope

the GDPR

exempted

Processing operations are also not covered by the DSG (see ErlAB, 1761 BlgNR. XXV

GP, p. 4).

The data protection authority does not overlook the fact that the standardized in Art. 2 Para. 2 lit. c GDPR

"Budget exemption" essentially identical in content to the previous provision of Art. 3

Para. 2 second indent of the guideline 95/46/EG (DS-RL) and according to the

related Rsp. of the ECJ, the Member States were not prevented by this

Scope of national legal provisions, which implement the DS-RL

were enacted to areas not covered by the scope of the DS-RL

to extend, insofar as no other provision of Community law

to the contrary (cf. the already cited judgment of the ECJ of November 6, 2003, C-101/01,

para. 98). The Austrian legislator had of this - created under the DS-RL -

made use of the opportunity and put in place specific data protection regulations for

Processing activities for private or family purposes in the previous provision of the

§ 45 DSG 2000 (cf. original version of Federal Law Gazette I No. 165/1999). The one just quoted

Provision did not provide for a general exception to the fundamental right to data protection, what

would not have been possible at all due to its simple legal character (cf.

Jahnel, Data Protection Law Manual, p. 433 ff).

With regard to the current legal situation, it should be emphasized that the GDPR itself - due to

the provision of the "household exemption", which was adopted essentially word for word -

does not fall behind the scope of protection of the GDPR, a similar to § 45 DSG 2000

Provision of the Austrian legislature in the DSG, however, no longer (more)

was provided.

From this it can be concluded that the Austrian legislature has extended the scope of protection of the

DSG did not want to extend to facts that are exclusively personal or

relate to family matters.

D.4. Result

On the basis of the above considerations, the determination of Art. 2

Paragraph 2 lit. c GDPR also in connection with an alleged violation of Section 1 Paragraph 1

DSG to apply and is therefore not the scope of the GDPR or the DSG

opened. Consequently, the right of appeal pursuant to Section 24 (1) DSG also stands for the

communication that took place via WhatsApp as part of a personal and

family activities not allowed.

It was therefore to be decided accordingly.