GZ: 2021-0.101.211 from February 15, 2021 (case number: DSB-D124.3158)

[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 the data protection complaint of Dr. Walter A***

(complainant), represented by Dr. Josef B***, lawyer in ****, from October 22nd

2020 (ha. received on October 27, 2020) against the N*** medical center - Dr. U*** & Co

GmbH (respondent) for violation of the right to secrecy as follows:

- The complaint is dismissed as unsubstantiated.

Legal basis: Article 4 no. 15, Article 6 paragraph 1 letter c, Article 9 paragraph 1 and paragraph 2 letter i and Article 77

Paragraph 1 of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter:

GDPR), OJ No. L 119 of 4.5.2016 p. 1; §§ 1 para. 1 and para. 2 as well as 24 para. 1 and

Paragraph 5 of the Data Protection Act (hereinafter: DSG), Federal Law Gazette I No. 165/1999 as amended; §§ 1 para. 1

Z 1 and para. 2, 2 para. 1, 3 para. 1 Z 1, Z 1a and para. 2 as well as 4 of the Epidemics Act 1950 (im

Following: EpiG), Federal Law Gazette No. 186/1950

idgF; Sections 1 and 2 of the Ordinance of the

Federal Minister of Health regarding electronic laboratory reports in the register

notifiable diseases, Federal Law Gazette II No. 184/2013 as amended.

A. Submissions of the parties and course of the proceedings

REASON

1. The complainant, represented by a lawyer, asserted in his submission of October 22nd

(ha. received on October 27, 2020), supplemented on November 6, 2020 (ha. received on November 10, 2020)

November 2020), a violation of the right to secrecy.

In summary, it was submitted that on September 28, 2020

in the

Respondent's primary care center a voluntary PCR test (SARS

CoV-2) had it done. With SMS dated September 28, 2020 he was with the following

Wording was informed that the result of his PCR test was available: "Your result is

accessible! Download at https://befunde.***labor.at. With your SV number (10 digits) and

register with this TAN: XXX". As a result, he asked for the findings and found that

the finding was negative. The following day he received an SMS with the following wording: "You

Test result of the sampling of September 28, 2020 has been received. COVID-19 testing for

Walter, born 19** is NEGATIVE. your district administrative authority".

A query to the Respondent showed that this on the point of view

stand that they are concerned with the data based on the ordinance of the Federal Minister of Health

Electronic laboratory notifications in the register of notifiable diseases, Federal Law Gazette II

No. 184/2013 as amended by Federal Law Gazette II 323/2020. However, this is disputed. It

I am therefore being asked to establish that his rights have been violated.

2. With statement dated December 4, 2020 (ha. received on December 22, 2020).

the Respondent, represented by T*** Laborbetriebs GmbH ("on behalf of Dr.

U*** & Co GmbH"), summarized as follows:

As a specialist medical laboratory, it is obliged to comply with the reporting requirements of the EpiG.

You have acted in accordance with the applicable laws. Next will be on a dated

Federal Ministry on October 13, 2020 published "Austrian test strategy for

SARS-CoV-2". Point 3.1 (page 19 and page 20) states that a

Transmission of negative test results in accordance with the Laboratory Reporting Ordinance

in the

Epidemiological Reporting System (EMS) has to take place.

3. The complainant then replied - according to the parties to the results of the

investigation – in his statement of February 5, 2021 (ha. received on

February 9, 2021) summarized the following:

The ordinance of the Federal Minister for

Health-related electronic laboratory reports in the register of notifiable

Diseases are not a suitable basis for the data use relevant here. the

Registration of a negative test in the register of notifiable diseases

not provided for in the law. Thus, there is also a statutory obligation to

Registration of negative test results in the register of notifiable diseases

inadmissible.

B. Subject of Complaint

Based on the submissions, it follows that the subject of the complaint is whether the

Respondent thereby violated the complainant's right to secrecy

has,

by these the

Information that on September 28, 2020 at the

Complainant's PCR test (SARS-CoV-2) carried out by the Respondent negative

was forwarded to a district administrative authority.

C. Findings of Facts

1. The Respondent operates a primary care center. Under

of their

Among other things, PCR tests for SARS-CoV-2 are carried out.

2. The Complainant

has

at the

September 28th

2020

in the

mentioned

Respondent's primary care center carried out such a PCR test.

3. The complainant then received the following text message on September 28, 2020

received to his phone number (formatting not reproduced 1:1):

[Editor's note: the one reproduced at this point as a graphic file (screenshot).

SMS cannot be pseudonymised with reasonable effort. She has the one in the

Complaint (see above 1.) specified content.]

4. Subsequently, on September 29, 2020, the complainant sent the following message by

Receive SMS to his phone number (formatting not reproduced 1:1):

[Editor's note: the one reproduced at this point as a graphic file (screenshot).

SMS cannot be pseudonymised with reasonable effort. She has the one in the

Complaint (see above 1.) specified content.]

5. A query to the Respondent showed that they had the information that

the PCR test carried out by the Respondent on September 28, 2020

complainant was negative, forwarded it to a district administrative authority.

Evidence assessment: The findings made are based on the input of the

complainant of October 22, 2020 (ha. received on October 27, 2020) and to the

screenshots provided therein. In this respect, the complainant's submission was

not disputed by the Respondent. This also implicitly confirmed the transfer of the

negative test result to a district administrative authority by providing comments on

lawfulness of the data transfer relevant here. Also from the FAQ of

Respondent shows that this (at least in the case of a positive test) a

Official report submitted, see https://www.***aerztezentrum***.at/sars-cov-2-pcr-

testung***/ under "What happens if I test positive?" (accessed on

February 12, 2021).□

D. In legal terms it follows that:□

1. Applicable legislation:□

Section 1 para. 1 no. 1 and para. 2 EpiG reads as follows, including the title (emphasis added by the□

Data Protection Authority):□

§ 1. (1) The following are subject to the notification obligation:□

Notifiable diseases.□

1. Suspected cases of illness and death from cholera, yellow fever, virus-related□

hemorrhagic fever, infectious hepatitis (hepatitis A, B, C, D, E), canine tapeworm□

(Echinococcus granulosus) and fox tapeworm (Echinococcus multilocularis), infections□

with the influenza virus A/H5N1 or another bird flu virus, polio,□

bacterial and viral food poisoning, leprosy, leptospiral diseases, measles,□

MERS-CoV (Middle East Respiratory Syndrome Coronavirus/"new corona virus"),□

Anthrax, psittacosis, paratyphoid, plague, smallpox, rickettsiosis caused by R. prowazekii, glanders,□

transmissible dysentery (amoebic dysentery), SARS (Severe Acute Respiratory Syndrome),□

transmissible spongiform encephalopathies, tularemia, typhus (abdominal typhoid),□

Puerperal fever, rage disease (Lyssa) and bite injuries caused by rage or -□

suspicious animals,□

(2) The Federal Minister of Health and Women may, if this is epidemiological□

reasons justified or required by international obligations□

Ordinance subject other communicable diseases to the reporting obligation or existing ones□

Expand reporting requirements.□

Section 2 (1) EpiG, including the title, reads as follows:□

reimbursement of the complaint.□

§ 2. (1) Any illness, any death from a notifiable disease, in the cases□

of § 1 Para. 1 Z 1 also□

is the

District administrative authority (health authority) in whose area the sick person or

suspected of being ill or death has occurred, stating the name,

Age and residence and, as far as possible, with a description of the illness within

24 hour display.

any suspicion of such a disease,

Section 3 para. 1 no. 1, no. 1a and para. 2 EpiG reads as follows, including the heading (emphasis added

the data protection authority):

Persons obliged to report.

§ 3. (1) The following are obligated to submit the report:

1. The consulted doctor, in sick, maternity and other humanitarian institutions the leader

the institution or the board of directors who are obliged to do so by special regulations

Department;

1a. any laboratory that diagnoses the causative agent of a reportable disease;

[...]

(2) The obligation to report is only incumbent on the persons named under nos. 2 to 8

if an obligated party named earlier in the above list under nos. 1 to 7 does not

is available.

Section 4 EpiG, including the title, reads as follows:

Register of notifiable diseases

§ 4. (1) The federal minister responsible for health care has an electronic

Register relating to notifications pursuant to Section 1 (1) and (2), Section 2 (2), Section 28c and the notifications

according to §§ 5 and 11 of the Tuberculosis Act, Federal Law Gazette No. 127/1968. The one for that

Federal minister responsible for health

is responsible. With regard to the

Processing of personal data according to this federal law does not exist

Right of objection according to Art. 21 of Regulation (EU) 2016/679 for the protection of natural persons

persons in the processing of personal data, on the free movement of data and on

Repeal of Directive 95/46/EC (General Data Protection Regulation), OJ No. L 119 of

05/04/2016 p. 1.

(2) The register of advertisements serves to fulfill the tasks of the district administrative authorities

to carry out surveys on the occurrence of notifiable diseases (§ 5

of this Federal Act and Section 6 of the Tuberculosis Act) and to prevent

Spreading and combating notifiable diseases (§§ 6 to 26a of this

federal law and §§ 7 to 14 and 23 Tuberculosis Act) and the fulfillment of the tasks

of the provincial governors as part of their coordination function pursuant to Section 43 (6) and (7).

(3) The district administration authorities are obliged to use the data from advertisements according to § 1 paragraph 1

and 2 and § 2 para. 2, § 28c, the data obtained in the context of surveys on the occurrence

notifiable diseases are collected and the data related to

measures taken are to be processed in the register. The district administrative authorities

are also obliged to use the data from reports according to Sections 5, 10 and 11 of the Tuberculosis Act,

the data collected as part of surveys on the occurrence of tuberculosis

are, and the data related to the measures taken, in the

to process registers.

(4) The following data categories are processed in the register:

1. Data for the identification of sick people, suspected diseases, bitten people,

Deceased or resigning (name, gender, date of birth, place of residence, if

present phone number and email address, social security number and

Area-specific personal identifier (§ 9 E-GovG, Federal Law Gazette I No. 10/2004)),

2. If necessary, death dates (date, cause of death, autopsy status),

3. the clinical data relevant to the notifiable disease (history and

course of the disease) and laboratory data,

4. Data on the environment of the sick person, suspected illness, bitten person,

Deceased or expelled, insofar as they relate to the notifiable illness

are available, as well as data for the identification of contact persons (name, telephone number, e-mail

address, place of residence) and

5. Data on the precautionary measures taken.

(5) When processing data in accordance with paragraphs 2 to 4, the use of the name and

Area-specific personal identifier GH permitted.

(6) Any use of the data processed in the register may only be used in the execution of this

federal law,

in fulfillment of

Zoonoses Act, Federal Law Gazette I No. 128/2005.

in enforcement of the Tuberculosis Act or

(7) The district administrative authority may, within the scope of its competence for the purposes of

Surveys on the occurrence and prevention and control of a notifiable

Illness under this federal law and under the Tuberculosis Act all dates of a

Person in the register who, in connection with a specific suspected, disease

or death, process personal data. The governor may in the context

his coordination function according to § 43 para. 5 and 6 all data of a person in the register,

in connection with a specific suspected case, illness or death

stand, process personal. Provided that the person responsible for the veterinary system

Federal Minister according to § 3 Para. 7 of the Zoonoses Act or from

for the

Federal minister responsible for the health sector in accordance with Section 5 (4) of this federal law

an expert for the clarification of cross-state zoonoses outbreaks or

outbreak cluster has been ordered, this may contain all data of persons in the register who are

related to this zoonotic outbreak or outbreak cluster,

process personal data, insofar as this is necessary to clarify this zoonoses outbreak or□

outbreak cluster is required. A transfer of personal data to third parties□

and further processing of personal data for other purposes□

not permitted. The federal minister responsible for the health system may, in order to fulfill the□

Obligations according to Art. 15 and 16 General Data Protection Regulation the data of a person□

process personal data in the register.□

(8) The Federal Minister responsible for the health system may, for the purposes of□

epidemiological surveillance, quality assurance and to comply with EU law□

resulting reporting obligations, the data in the register in pseudonymised form□

process. The federal minister responsible for the health system can appoint a third party for this purpose□

bring in processors. The district administrative authority and the provincial governor□

may use the data for epidemiological surveillance purposes□

in□

process in pseudonymised form.□

in the register□

(9) The federal minister responsible for health care, family and youth□

ensure that anyone accessing the register is only permitted upon proof of unambiguous□

Identity (§ 2 Z 2 E-GovG) and authenticity (§ 2 Z 5 E-GovG) is possible. He must□

ensure that appropriate, dem□

respective state of the art□

Precautions are taken to prevent the destruction, alteration or retrieval of the data□

of the register by unauthorized users or systems, and that all□

performed usage operations, such as□

in particular entries, changes,□

Queries and transmissions are logged to the extent necessary.□

(10) The confidentiality of data transmission is based on the state of the art□

to ensure encrypted transmission procedures.

(11) The data in the register are to be deleted as soon as they are required to fulfill the tasks of the

District administrative authorities in connection with the survey on the occurrence and im

related to the prevention and control of a notifiable disease

are no longer required under this Federal Act and under the Tuberculosis Act.

(12) The district governor, the provincial governor and the governor for health care

competent federal ministers are obliged to grant access authorization for the individual

Assign and document users individually. Authorized persons are from the

to prevent further exercise of their access authorization if they use it for further

fulfillment of the tasks assigned to them or they no longer need the data

process according to their purpose.

(13) The district administrative authorities and the state governor have passed

organizational and technical precautions to ensure that access to rooms,

in which there is a possibility of access to the register, in principle only

officials of the authority is possible. Is it necessary that in rooms with a

possibility of access to the register of party traffic takes place, it must be ensured in any case

that it is not possible for outsiders to inspect the register data.

(14) Is the communication device that allows access to the register

enabled, removed from the authorities, it must be ensured that an unauthorized

Inspection and use is excluded.

(15) Laboratories have their reporting obligation (§ 1 in connection with § 3 para. 1 Z 1a of this

Federal Act and Section 5 (2) of the Tuberculosis Act) electronically by entering the

report to the register. The person in charge of health care

The Federal Minister has to specify the details of these reports by ordinance.

(16) The Austrian Agency for Health and Food Safety as national

The reference center and reference laboratory for tuberculosis has fulfilled its reporting obligation according to § 1 in

Connection with § 3 Para. 1 Z 1a (laboratory results) electronically by entering the report in

comply with the register. Furthermore, the results of the resistance test and

Enter typing electronically into the register.

(17) The federal minister responsible for the health system can issue an ordinance

Subject to the technical possibilities, provide that those subject to the reporting obligation pursuant to Article 3 para. 1 no. 1

their obligation to report according to § 1 also electronically by entering the report in the

Register can comply. The persons required to report are those in the

to take the data security measures provided for in paragraphs 12 to 14.

§§ 1 and 2 of the VO regarding electronic laboratory reports reads as follows:

§ 1. (1) Laboratories within the meaning of this ordinance are facilities that contain pathogens that are notifiable

Diagnosing diseases in humans directly or indirectly.

(2) Laboratories are obliged to

their reporting obligation according to § 3 Para. 1 Z 1a des

Epidemics Act 1950, Federal Law Gazette No. 186/1950, in the currently valid version, electronically

in the register of notifiable diseases.

(3) The report includes the following types of data:

1. Data to identify sick, deceased or excreting persons (name,

Gender, date of birth, place of residence, telephone number and e-mail address if available

and social security number),

2. type of pathogen,

3. examined material,

4. details of the examination method,

5. Details of the analysis result, at least all of them in the case of a pandemic with COVID-19

negative and invalid results and.

6. Category of the sample.

(4) In the event of a technical failure of the register, the report must be submitted within 24

hours in another suitable way (e.g. by telephone).

§ 2. (1) The electronic transmission has exclusively via a from the Federal Ministry

interface for laboratory information systems provided for health.

(2) Laboratories are obliged to use the currently valid version of the laboratory interface description,

provided by the Federal Ministry of Health for the transmission of the

to use data.

2. Right to Confidentiality

2.1 Scope of the Right to Confidentiality

According to § 1 Para. 1 DSG, everyone has the right to confidentiality of the data concerning him

personal data, insofar as there is a legitimate interest in it. The existence

such an interest is excluded if data as a result of their lack

Traceability to the person concerned is not accessible to a non-disclosure claim.

The GDPR and in particular the principles enshrined therein are to interpret the

Right to secrecy (cf. the decision of the DSB of October 31, 2018,

GZ DSB-D123.076/0003-DSB/2018).

In the present case, the scope of § 1 Para. 1 DSG is open, since the

information relevant here – namely, that the complainant's PCR test result

is negative - according to Art. 4 Z 1 DSGVO undisputedly refer to this.

2.2 General Restrictions on the Right to Confidentiality

Restrictions on the right to secrecy are then in accordance with Section 1 (2) DSG

permissible if personal data is in the vital interest of the person concerned

are used, the data subject has given his or her consent (or in the terminology of the GDPR:

consent) if there is a qualified legal basis for use

exists, or if the use is due to overriding legitimate interests of a third party

is justified.

2.3 Regarding the negative test as a health date

Before checking the admissibility of the limitation of the right to secrecy is

however, to question whether a negative test - i.e. the finding that a person (up to

at a certain point in time and with a certain probability) not with SARS-CoV-2

is infected - is to be qualified as a health date according to Art. 4 Z 15 DSGVO.

This is relevant because according to § 1 Para. 2 DSG and Art. 9 Para. 1 DSGVO the use of

Data categories that are particularly worthy of protection by their nature, only under strict conditions

conditions is allowed.

In this regard, it should first be noted that the wording of Art. 4 Z 15 GDPR does not apply

a certain (minimum) impairment of physical or mental health

connects, which speaks for a broad interpretation of the term "health date".

This becomes even clearer in recital 35 of the Regulation, according to which personal

Health data should include all data from which information about the previous,

current and future physical or mental health of those affected

emerge person.

These considerations are also covered by the case law of the ECJ, according to which the term

"Health date" is to be interpreted broadly (cf. on the comparable legal situation according to

Guideline 95/46, the judgment of the ECJ of November 6, 2003, C 101/01, Rs Lindqvist, Rz 50 f).

As an intermediate result

therefore

to hold that

(also) the negative test des

Complainant is to be qualified as a health date in accordance with Art. 4 Z 15 GDPR and

the scope of protection of Art. 9 Para. 2 leg. cit. as a benchmark in the following review of

legality must be observed.

2.4 On the Lawfulness of Data Sharing

The data transfer relevant here - i.e. the transmission of the negative test of the

Complainant to a district administrative authority - is not in the vital□

The complainant's interest and consent are also not given.□

Also on the facts of the legitimate interest according to Art. 6 Para. 1 lit. f GDPR□

within the scope of Art. 9 Para. 2 leg. cit. cannot be resorted to.□

However, the question arises as to whether a qualified legal basis, specifically a□

Legal obligation of the Respondent to pass on the data relevant here,□

consists.□

From a synopsis of the (above) provisions of Article 9(1)(i).□

GDPR in conjunction with Section 3 Para. 1 Z 1, Z 1a and Para. 2 EpiG, it follows that the responsible institution□

or subsidiary, the responsible laboratory that has identified the causative agent of a notifiable disease□

(such as the coronavirus) diagnosed for reporting to the□

respectively responsible□

District administrative authority (as a health authority) is obliged. To fulfill this□

Conversely, as a legal obligation, it is necessary (and therefore permissible) that□

the respective body submits an official notification of a positive PCR test.□

In the present case, however, an official report about a negative□

PCR test submitted.□

The obligation to submit an official report about a negative PCR test is□

cannot be derived from the wording of § 3 para. 1 no. 1 and no. 1a EpiG.□

The obligation to submit an official report specified in Section 3 (1) EpiG can be□

Section 1 (2) leg. cit. However, this was then extended by the Federal Minister of Health□

be when justified for epidemiological reasons or due□

international obligations is required.□

This option to expand the reporting requirements was discussed in the current□

Pandemic around COVID-19 made use of:□

The regulation of the Federal Minister□

for health regarding electronic

Laboratory reports in the register of notifiable diseases, Federal Law Gazette II No. 184/2013 as amended,

was amended with an amendment by Federal Law Gazette II No. 323/2020 in such a way that according to

whose § 1 para. 3 facilities are obliged to, in the event of a pandemic with COVID-

19 also all negative and invalid results to the district administrative authority

to transfer.

The ordinance relevant here, with which the reporting obligation was extended, is based on the

legal basis of § 3 para. 1 EpiG and binds the respective medical

facilities alike. In addition, according to ErwGr. 41 first sentence GDPR

Neither is the legal basis based on Article 9(2)(i) GDPR (which is relevant here).

necessarily on a legislative act adopted by a Parliament

based.

Furthermore, there are also no concerns with regard to the determination requirement of

Standard regulations:

Unlike the Wiener contact tracing objected to by the data protection authority

Ordinance (see the decision of November 19, 2020, GZ 2020-0.743.659), are the

Scope and application of Section 3 (1) EpiG in conjunction with Section 1 (3) of the aforementioned ordinance

of the Minister of Health clear and precise and is verbatim for data subjects

of these standards it can be seen that negative and invalid PCR tests are also exempt from reporting

to the district administrative authority (cf. recital 41 second sentence GDPR).

The extension of the obligation to report under Section 3 (1) EpiG is also part of the fight against COVID-19

useful because the data material (i.e. country and federal specific information about

negative and invalid PCR tests) relevant for the orientation of the pandemic strategy -

especially the test strategy – is.

Although this was not objected to by the complainant, it is - in due course

Briefly – it should also be noted that the norms of the EpiG and the cited regulation

of the Minister of Health also requirements with regard to earmarking, data minimization

and data security included.

It is also a PCR test (i.e. the determination of whether a person is infected)

no special data processing operation - such as profiling in accordance with Art. 4 Z 4

GDPR - so that it cannot be assumed that the data set out in Art. 9 (2) lit. i leg. cit.

contain reference to national standards, "reasonable and specific protective measures"

to standardize would be violated.

3. Result

Against the background of all these considerations, the data protection authority therefore comes to this

The result is that the data transfer relevant here is based on the provisions of Section 3 (1) EpiG in conjunction with Section 1 (3

the statutory obligation of the Minister of Health standardized in the aforementioned regulation

respondent,

also

negative PCR test results

on

the

responsible

Submit district administrative authority can be supported.

The data transfer relevant here therefore proves to be lawful and is not from anyone

breach of the complainant's right to secrecy.

It was therefore to be decided accordingly.

On the question of whether it was permissible that the relevant district administrative authority in a row

informed about the negative test result via SMS was not to be received, as this was not

more covered by the object of the complaint.