GZ: DSB-D123.495/0007-DSB/2018 from February 5th, 2019

[Note editor: names and companies, legal forms and product names, addresses (incl.

URLs, IP and email addresses), file numbers (and the like), etc., as well as their initials and

Abbreviations may be abbreviated and/or changed for reasons of pseudonymization.

Corrected obvious spelling, grammar, and punctuation errors.]

NOTICE

S P R U C H

The data protection authority decides on the data protection complaint from Mr DI Walter A***

(complainant) of September 17, 2018 against N***Reisen GmbH (respondent)

due to violation of the right to erasure as follows:

1. The complaint is dismissed.

Legal basis: § 1 paragraph 1 and paragraph 3, § 4 paragraph 1, § 24 paragraph 1, § 24 paragraph 6 Data Protection Act -

DSG, Federal Law Gazette 165/1999 as amended, Article 6 Paragraph 1 Letter d), Article 6 Paragraph 4, Article 17 Paragraph 1

Basic Regulation – GDPR L 119, p.1.

REASON

A. Submissions of the parties and course of the proceedings

1.) With a procedural submission dated September 17, 2018, the complainant complained

Violation of the fundamental right to data protection. He stated that the Respondent told him on

September 1, 2018, a mailing with a catalog and September 6, 2018, an advertising mail

would have sent, although he had requested the deletion of his data at the

Respondent requested.

2.) With completion of September 28, 2018, GZ: DSB-D123.495/0001-DSB/2018, demanded the

Data Protection Authority on the Respondent to comment on the allegations of the Complainant

gain weight.

3.) With the submission of October 25, 2018, the Respondent took through its designated

Representative position: It is correct that the Respondent sent an email at the beginning of June 2018 regarding the

sent out the General Data Protection Regulation and that from the email address of

complainant had been answered. By postal letter dated June 12, 2018, the

Respondent informed that they used to identify the complainant

require proof of identity. After that, the complaint was received before the data protection authority.

The Respondent has the necessary data to exercise the personal right to erasure

to ensure identification and the identity cannot be established in any other way. the

The complaint was therefore premature or unjustified. Regardless, one will come

The right to erasure is only possible if there is no reason for processing or if this is subsequently

would be dropped. However, these requirements were not met in the complainant's case

there is a separate storage obligation, which would result from the federal tax code,

especially since the last statement is from the end of 2017. Nonetheless, have the

Respondent restricted the processing of the data and marked in such a way that a

processing cannot go beyond what is necessary. This circumstance is so

Complainant also informed by letter dated October 24, 2018.

4.) With the completion of November 12, 2018, GZ: DSB-D123.495/0006-DSB/2018, the

data protection authority to listen to the complainant.

5.) With a submission dated November 26, 2018, the complainant commented and stated that he

the letter with which he was asked for a clear identification has not yet been received

have received. In addition, it is not understandable why this letter was not registered

been sent, or in parallel via e-mail. In addition, it is very interesting that by means of informal e-

Mail had been asked whether deletion was desired, but nothing further

procedure will be communicated. The complainant can certainly understand that not all

data would have to be deleted, but he never consented to the processing of the data for advertising purposes.

B. Subject of Complaint

The object of the complaint is the question of whether the data is being used unlawfully for advertising purposes.

C. Findings of Facts

In a letter dated November 8, 2017, the complainant registered for a language stay in

Edinburgh on. The Respondent organized the language stay in the period from April 5, 2018

until April 12, 2018. Consent to data processing for advertising purposes was not obtained

given.

On June 1, 2018, the Respondent requested in connection with the entry into force of the

General Data Protection Regulation for consent to data processing for advertising purposes.

In an email dated June 1, 2018, the complainant requested the deletion of his data.

In a letter dated June 12, 2018, the Respondent requested the clear identification of the

proof of identity for the complainant in order to be able to comply with the request for deletion.

It was not possible to determine whether the letter was sent to the complainant. the

Appellant did not reply to Respondent's message.

On September 1, 2018, the Respondent sent a mailing with a catalog and

sent a promotional email to the complainant on September 6, 2018.

On September 17, 2018, the complainant lodged a complaint with the Data Protection Authority

regarding the violation of the fundamental right to data protection in accordance with Section 1 of the Data Protection Act - DSG

During the proceedings before the data protection authority, the respondent provided information

Registered letter of October 24, 2018 to the complainant that the data is no longer available

processed for advertising purposes.

The data will continue to be processed for the purpose of retention.

Evidence assessment:

The statement regarding the consent to data processing is based on the correct and genuine

Certificate of registration for the language trip - provided by the complainant.

The statement regarding the e-mail for consent to data processing is based on

matching arguments and the evidence offered by both parties.

The statement regarding the letter to prove identity is based on the submissions of

Respondent who submitted the underlying letter of June 12, 2018 in the proceedings.

The complainant denied the service, but received according to his own information and evidence

Delivery of identically addressed consignments. However, since the letter was sent without proof of delivery

was made, it cannot be determined whether the delivery actually took place at that time.

The remaining findings are undisputed and are based on the unanimous submissions of the

Complaints Parties.

D. In legal terms it follows that:

Regarding the right asserted:

In the submission initiating the proceedings, the complainant states, without defining this in more detail,

the fundamental right to data protection as a violated right and states that he has unwanted

receive advertising. He sent the respondent a request in which he stated that

Respondent may delete his data. Later in the proceedings, with a filing dated November 26

2018, the Respondent states that he is satisfied with a partial "deletion" by

stated that he had already understood that not all data could be deleted because of

special retention periods.

According to stRsp of the VwGH, party declarations (i.e. also attaching

[Walter/Kolonovits/Muzak/Stöger9 Rz 152]) in the process exclusively according to their objective

Explanatory value to be interpreted (cf. also VwGH 6. 11. 2006, 2006/09/0094; with further reference). What matters is how

the declaration (cf. VwGH 28. 7. 2000, 94/09/0308 uA) taking into account the concrete

legal regulation, the purpose of the procedure and the state of the files must be understood objectively

(VwGH January 24, 1994, 93/10/0192; November 6, 2001, 97/18/0160; January 19, 2011, 2009/08/0058; cf

VfSlg 17.082/2003). If an attachment has unclear content, the authority after

Rsp of the VwGH by bringing about a corresponding declaration (VwSlg 11.625 A/1984 verst Sen)

determine the true will of the intervener (VwGH February 20, 1998, 96/15/0127; July 28, 2000,

94/09/0308; 19. 1. 2011, 2009/08/0058), i.e. asking them to clarify

(VwGH February 26, 1991, 90/04/0277; November 19, 1998, 98/19/0132; October 3, 2013, 2012/06/0185;

VfSlg 14.965/1997) or to agree on the content (VwGH April 30, 1999, 95/21/0931; June 30, 2004,

2004/04/0014; 2010-06-28, 2008/10/0002; Schopf, right 191; cf. also Wessely, Eckpunkte 208 f).

In the present case, it could be assumed that, even if the complainant did not

expressly so designated, he - although he submitted his input under § 1 DSG and not under the

Data protection deletion according to Art. 17 DSGVO subsumed - primarily a "partial" deletion

of his personal data. He stated that it was about the processing

advertising purposes and not about the fact that the Respondent - possibly other entitled

has an interest in the further processing of the data. Accordingly, the procedure could

improvement order to be continued.

On the possibility of determining an infringement:

According to the case law of the data protection authority on Section 1 (3) and Section 4 (1) DSG,

Implementing standards of Art. 2 Data Protection Act to Art. 1 Data Protection Act according to clear

legal order to see the standards of the General Data Protection Regulation. Accordingly, for the

Assertion of the subjective violation of rights in the fundamental right to data protection according to § 1 DSG

Standards of the General Data Protection Regulation are relevant, in this specific case Art. 17 (1) lit. d) GDPR.

The complainant has demonstrated that he never consented to data processing

given for advertising purposes. However, it is also beyond dispute that the Respondent used the data

lawfully collected and processed for the implementation of the language trip to Edinburgh.

As a result, the Respondent used the data for advertising purposes and on

September 1, 2018 a mailing with a catalog and on September 6, 2018 a promotional email

communicated to the complainant. The data was therefore processed without consent within the meaning of Art. 6 Para. 1

lit. a) GDPR for a purpose other than that originally collected and is relevant

the processing for advertising purposes is also not covered by another justification. the

The Respondent should therefore have assumed that they used a (not

existing) consent would have needed.

In the further proceedings, the Respondent clarified in a message dated October 24, 2018 that

the data was blocked by a note on processing for advertising purposes and restricted to

the purposes of the originally - undisputed - lawful data processing have been restricted.

Although, as previously pointed out, the complainant is alleged to have breached the right

Deletion emanated and a note stating that the data were not to be processed at a specific time

Purpose (advertising) is not a deletion within the meaning of Art. 17 GDPR

(see Ehmann/Selmayr General Data Protection Regulation2, Kamann/Braun on Art. 17 para. 35), is the

Complainant in the present case as if it had actually been deleted:

Since the complainant's address data continues to be based on legitimate interest or due to

legally required to be processed in a legitimate manner, there is a physical

Deletion not to be considered, but care must be taken to ensure that the processing

The purpose of sending advertising is no longer possible. The Respondent has one

corresponding note.

In its case law, the data protection authority assumes that in the event of violations of the law in

connection with the right to erasure, this until the end of the first instance proceedings

must continue to exist. § 24 para. 6 DSG standardizes the possibility of discontinuing the procedure,

if the consequences of the infringement are eliminated during the proceedings. One

Determining the past infringement of the right to erasure is out of the question (cf

DSB, B 08/27/2014, DSB-D121.876/0005-DSB/2014). The data protection authority has to

stated that if the complaint is upheld, the application is to be dismissed.

(Gantschacher/Jelinek/Schmidl/Spanberger, Data Protection Act, Suda to § 24 16) ff.)

The complainant is placed by the setting of the note as if the request of the

Complainant was originally followed.

The appeal was accordingly dismissed.