

Litigation Chamber

Decision on the merits 04/2019 of

May 28, 2019

File number: DOS-2018-05808 and DOS-2018-05815

Subject: Complaint for incompatible use of e-mail addresses for propaganda purposes

electoral

The Litigation Chamber of the Data Protection Authority, made up of Mr. H. Hijmans,

Chairman, and Messrs. D. Van Der Kelen and F. De Smet, 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 the

data protection, hereinafter "GDPR");

Considering the law of December 3, 2017 creating the Data Protection Authority;

Having regard to the internal regulations as approved by the House of Representatives on

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

Considering the documents in the file;

.

.

Decision on the merits ANO 04/2019 - 2/2

1. Facts and procedure

- On December 12, 2018, the plaintiffs lodged a complaint, each separately, with the Autorité de

data protection against the defendant in his capacity as mayor.

The subject of the complaint concerned in both cases the use of e-mail addresses obtained in the

framework of a modification of subdivision, for the sending of electoral propaganda by the defendant.

Specifically, it was an e-mail that the architect had sent to the defendant on behalf of the

complainants in order to set up an appointment to discuss a request for modification of
subdivision. The e-mail addresses of the complainants had been mentioned alongside that of the
respondent. Subsequently, the email was used by the defendant, using the reply function,
to send electoral propaganda to the plaintiffs on the eve of the communal elections of
October 14, 2018.

- On January 3, 2019, the complaint was declared admissible in both files on the basis of articles
58 and 60 of the law of December 3, 2017, the plaintiff is informed by virtue of article 61 of the law
of December 3, 2017 and the complaint is forwarded to the Litigation Chamber under Article 62,
§ 1 of the law of December 3, 2017.

- On January 9, 2019, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and Article 98
of the law of December 3, 2017, to combine the two files and that they can be processed on the
fund.

- On January 9, 2019, the parties involved are informed by registered letter of the provisions
as set out in article 95, § 2 as well as in article 98 of the law of December 3, 2017. They are
also informed, pursuant to article 99 of the law of December 3, 2017, of the deadlines for
report their findings. The deadline for receipt of the submissions in response from the
respondent was set for February 11, 2019, that for the complainants' reply submissions to the
March 11, 2019 and that for the defendant's reply submissions on April 11, 2019.

- On January 15, 2019, the defendant requests a copy of the file (article 95, § 2, 3° of the law of
December 3, 2017). In addition, the defendant asks to be heard (article 98, 2° of the law
of December 3, 2017).

- On January 15, 2019, a copy of the file is sent to the defendant.

Decision on the merits ANO 04/2019 - 3/2

- On February 11, 2019, the Litigation Chamber receives the submissions in response from the
respondent. He claims to have acted in good faith. He acknowledges having used the e-mail addresses
but claims that the email in question was sent following a discussion with the complainants

about a subdivision file during the home visit on September 4, 2018. The addresses□
e-mail have not been processed in any other way or passed on to third parties. He recognizes□
also not being sufficiently aware of the legislation on the protection of□
data but rejects any intention to violate the regulations in this area.□

The Respondent also submits that the Complainants also forwarded the e-mail subject to the□
this procedure to the group leader of another political party, who lodged a complaint with the□
Council of Electoral Disputes on the basis in particular of the e-mail in question. By judgment of□
January 7, 2019, the respondent was issued a warning by the Council. For those whom it concerns□
this part of the complaint, the considerations that led to this warning are□

GDPR-based. The Respondent therefore asserts that the non bis in idem principle is□
of application. He adds that if the Litigation Division considers that the non bis in idem principle□
does not apply, the principle of proportionality requires that the measure imposed cannot exceed a□
warning or reprimand, taking into account the low gravity of the facts.□

- On March 11, 2019, the Litigation Chamber received the complainants' submissions in reply in□
which the latter formally refute that the defendant came to their home during□
his election campaign and allegedly had a personal conversation with one of the complainants. There are□
only had an interview with the defendant on September 4, 2017. This leads the plaintiffs to□
argue that the defendant is not acting in good faith at all. The complainants add that the fact that□
the e-mail in question (besides other e-mails and facts) has also been the subject of a procedure□
before the Council for Electoral Disputes is not relevant.□

- On April 3, 2019, the Litigation Division received the defendant's submissions in reply□
the same argument as in the submissions in response, but adding that the allegation of the□
complainants, that the fact that the e-mail in question is already the subject of proceedings before□
the Council of Electoral Disputes is irrelevant, can not be met. The defendant□
repeats that he has already been sanctioned for the same facts.□

- On May 15, 2019, the parties are informed that the hearing will take place on May 28, 2019.□

- On May 28, 2019, the two parties are heard by the Litigation Chamber.□

Decision on the merits ANO 04/2019 - 4/2□

2. Legal basis□

- Article 5.1.b) of the General Data Protection Regulation□

“Personal data must be: [...] b) collected for the purposes□

determined, explicit and legitimate, and not to be further processed in a way□

incompatible with these purposes; further processing for archival purposes in the interest□

public, for scientific or historical research purposes or for statistical purposes is not□

considered, in accordance with Article 89, paragraph 1, as incompatible with the purposes□

initials (limitation of purposes);”□

- Section 6.4. of the General Regulations on□

data protection□

“When processing for a purpose other than that for which the data was collected□

is not based on the consent of the data subject or on Union law or the□

law of a Member State which constitutes a necessary and proportionate measure in a society□

democratic to ensure the objectives referred to in Article 23(1), the person responsible for the□

processing, in order to determine whether processing for another purpose is compatible with the purpose□

for which the personal data was originally collected, takes into account,□

among others: a) the possible existence of a link between the purposes for which the□

personal data was collected and the purposes of further processing□

considered; b) the context in which the personal data was collected,□

in particular with regard to the relationship between the data subjects and the controller□

processing; c) the nature of the personal data, in particular if the□

processing relates to special categories of personal data, pursuant to□

of Article 9, or if personal data relating to criminal convictions□

and offenses are dealt with, under Article 10; d) the possible consequences of□

further processing envisaged for data subjects; e) the existence of guarantees□

appropriate, which may include encryption or pseudonymization."□

3. Motivation□

With regard to the non bis in idem principle, the Litigation Chamber notes that on the basis of□

Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Freedoms□

fundamental¹, the condition that the facts on which the Council of□

1 No one may be criminally prosecuted or punished by the courts of the same State for an offense for which he has□

already been acquitted or convicted by a final judgment in accordance with the law and criminal procedure of that State.□

Decision on the merits ANO 04/2019 - 5/2□

Election challenges ruled are the same as those subject to this ruling.□

The facts which are now subject to the decision of the Litigation Chamber have not been taken into□

consideration by the Council of Electoral Disputes only to determine whether there had been a□

irregularity likely to influence the distribution of seats between the lists within the meaning of Article 204 of the□

local and provincial electoral decree of July 8, 2011. Council sanctions are explicitly□

imposed in the judgment for other facts relating to the rules on the declaration of expenditure□

elections (see points 1. and 2. of the judgment concerning the sixth plea). The defendant is not□

therefore not prosecuted or punished for the same acts as referred to in Article 4 of Protocol No. 7 to the□

Convention for the Protection of Human Rights and Fundamental Freedoms. No violation of□

non bis in idem principle cannot therefore be established.□

Since the facts show that the e-mail addresses that were used to send an e-mail to the□

defendant as mayor in the context of a request for modification of subdivision□

been reused by the defendant to send electoral propaganda to the plaintiffs and that there is□

therefore a misuse of purpose, the Litigation Chamber considers that the violation of Article 5.1.b)□

and section 6.4. of the GDPR is established and proceeds to the imposition of a reprimand.□

The Litigation Chamber also considers that compliance with the GDPR implies an obligation which must□

be taken seriously. It is indeed a question here of rules which must guarantee the fundamental right of the□

citizen to the protection of his personal data.□

This applies to any data controller and a fortiori to the holder of a public office such as a□

mayor. The citizen must have the certainty that the data which he entrusts to the holder of a mandate□

public in the exercise of its functions will not be used for other purposes, in violation of the law.□

What is more, this is a case of use for the personal purposes of the holder of this mandate.□

We must be able to expect a mayor to be aware of the obligations arising from the GDPR□

or that he is properly informed about it. The fact that the media are very attentive to the application□

GDPR is also important. The Litigation Chamber considers that a mayor must□

lead by example when it comes to obeying the law.□

The Litigation Chamber concludes that this is a serious violation of the GDPR.□

Since this is gross negligence, an administrative fine is also imposed. In this□

regard, the nature, gravity and duration of the violation are also taken into account and the Chamber□

Contentious believes in this regard that the impact of the violation is rather low and, insofar as one□

know, the number of people involved is limited.□

The decision will be published, after anonymization.□

Decision on the merits ANO 04/2019 - 6/2□

FOR THESE REASONS,□

the Litigation Chamber of the Data Protection Authority decides with regard to the defendant, after□

deliberation:□

-□

-□

-□

to formulate a reprimand, pursuant to Article 100, § 1, 5° of the law of December 3, 2017;□

to impose an administrative fine of EUR 2000, pursuant to article 101 of the law of□

December 3, 2017;□

to publish this decision on the website of the Authority for the protection of□

data, by virtue of article 100, § 1, 16° of the law of December 3, 2017, admittedly after
anonymization.

Under article 108, § 1 of the law of December 3, 2017, this decision may be appealed
within thirty days of the notification, to the Court of Markets.

(Sr.) Hielke Hijmans

President of the Litigation Chamber