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Litigation Chamber

Decision

as to

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08/2019

from

September 17, 2019

File number: DOS-2018-03587

Subject: **Complaint for non-deletion of personal data obtained in the**
part of an application

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 the "GDPR");

Having regard to the law of 3 December 2017 creating the Data Protection Authority, hereinafter the LCA

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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;

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1. Facts and procedure□

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On July 10, 2018, the complainant filed a complaint with the Data Protection Authority□

against the defendant.□

The subject of the complaint concerned the lack of response by the defendant to the request to delete□

the personal data provided by the complainant as part of his application□

with the defendant. In the context of the exercise by the complainant of the right to the deletion of□

data, he received the response from the defendant: "The message below is not□

not a mailing but a response to your own application".□

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On July 23, 2018, the complaint was declared admissible on the basis of articles 58 and 60 of the LCA, the□

complainant is notified under Article 61 of the LCA and the complaint is forwarded to the Chamber□

Litigation under article 62, § 1 of the LCA.□

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On November 14, 2018, the Litigation Chamber decides to request an investigation from the Service□

of Inspection, pursuant to articles 63, 2° and 94, 1° of the LCA.□

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On November 21, 2018, in accordance with Article 96, § 1 of the LCA, the Chamber's request□

Litigation to proceed with an investigation is transmitted to the Inspection Department, as well as the□

complaint and the minutes of this decision.□

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On May 27, 2019, the investigation by the Inspection Service was closed, the report was attached to the file and□

this is forwarded by the Inspector General to the President of the Litigation Chamber (article 91, § 1 and § 2 of the LCA).

The report contains findings relating to the subject matter of the complaint and concludes that the respondent has not complied with the obligations regarding the right to erasure of data (Articles 12.3 and 4 and Article 17 of the GDPR).

The report also includes findings that go beyond the subject of the complaint.

The Inspection Service notes, in general terms, that:

1.
the defendant has not complied with the obligations arising from Articles 5.1.e) and 5.2 of the GDPR as well as Article 6 of the GDPR;

2.
the defendant has not complied with the obligations imposed by Articles 12.1. and 12.2. GDPR as well as Articles 13.1.b) and 13.2.b) of the GDPR;

3.
the defendant has not complied with the obligations imposed by Articles 24.1., 28.1. and 30.1. GDPR;

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4.
the defendant has not complied with the obligations imposed by articles 37.5. and 37.7. of the GDPR.
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On June 11, 2019, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and Article 98 of the ACL, that the case can be dealt with on the merits.

Based on the report of the Inspection Service, the Litigation Chamber decides to split the case into two separate cases:

1. Pursuant to Article 92, 1° of the LCA, the Litigation Chamber will take a decision on the merits with respect to the subject matter of the complaint

2. Pursuant to Article 92, 3° of the LCA, the Litigation Chamber will make a decision on the substance following the findings made by the Inspection Service outside the framework of the complaint.

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On June 13, 2019, the parties concerned are informed by registered letter of the provisions as set out in article 95, § 2 as well as in article 98 of the LCA. They are also informed, pursuant to Article 99 of the LCA, of the deadlines for transmitting their conclusions.

For findings relating to the subject of the complaint, the deadline for receipt of complainant's submissions in response was set for July 11, 2019, that for submissions in

Respondent's reply dated August 12, 2019.

For findings going beyond the subject matter of the complaint, the deadline for receipt of the respondent's submissions in response was set for July 11, 2019.

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On June 13, 2019, pursuant to Article 48, paragraph 2 of the internal rules, the Service of Inspection is informed of the letter sent to the defendant following the findings made in outside the scope of the complaint.

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On June 21, 2019, the defendant requests a copy of the file (article 95, § 2, 3° of the LCA).

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On June 28, 2019, a copy of the file was sent to the defendant.

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On July 10, 2019, the Litigation Chamber received the defendant's submissions in response regarding findings that go beyond the subject matter of the complaint. He manifests his wish to have recourse to the possibility of being heard (article 98, 2° of the LCA).

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On July 23, 2019, new deadlines are set for conclusions on findings

concerning the subject of the complaint, given that following his change of address, the complainant did not
received the timetable initially set for the conclusions. The last date to receive the
submissions in response from the complainant was thus set for August 6, 2019 and that for the submissions
in reply of the defendant on August 26, 2019.

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The complainant does not submit any submissions in response to the Litigation Chamber in this regard.
concerning the findings made by the Inspection Department relating to the subject of the
complaint.

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On August 21, 2019, the Litigation Chamber receives the defendant's submissions in reply
concerning the findings of the Inspection Service relating to the subject of the complaint. This one there
also expresses its wish to have recourse to the possibility of being heard (article 98, 2° of the LCA).

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On September 6, 2019, the parties are informed that the hearing will take place on September 17
2019.

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On September 17, 2019, the parties are heard by the Litigation Chamber.

2. Legal basis

- Articles 12.3. and 12.4. GDPR

"3. The controller shall provide the data subject with information about the
measures taken following a request made pursuant to Articles 15 to 22, in the
as soon as possible and in any event within one month of receipt of the
request. If necessary, this period may be extended by 2 months, taking into account the complexity and
number of requests. The controller informs the data subject of this
extension within one month of receipt of the request. When the

data subject submits their request in electronic form, the information is

provided electronically where possible, unless the data subject

request otherwise.

4. If the data controller does not comply with the request made by the person

concerned, he informs the latter without delay and at the latest within 1 month from the

receipt of the request for the reasons for its inaction and the possibility of lodging a complaint

before a supervisory authority and to lodge a judicial appeal."

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- Article 13.2.b) of the GDPR

"In addition to the information referred to in paragraph 1, the controller shall provide the data subject

data subject, at the time the personal data is obtained, the information

following additional information that is necessary to ensure fair and transparent processing:

[...]

b) the existence of the right to request from the controller access to personal data

personal information, rectification or erasure thereof, or limitation of processing relating to the

data subject, or the right to object to processing and the right to data portability;

- Article 30.1.d) and g)

1. Each controller and, where applicable, the controller's representative

keep a record of the processing activities carried out under their responsibility. This register

includes all of the following information:

[...]

d) the categories of recipients to whom the personal data have been or will be

communicated, including recipients in third countries or international organisations;

[...]

g) as far as possible, a general description of the technical security measures and

organizational arrangements referred to in Article 32(1).

In this decision, the Litigation Chamber only repeats the provisions of the GDPR for

which a breach is established, not the other provisions discussed below.

3. Motivation

A. The subject of the complaint essentially concerns the exercise of the right to erasure of data by the complainant.

The complaint therefore relates first of all to the violation of Article 17 of the GDPR allegedly committed by the

respondent by not complying with the request for deletion of personal data

provided by the complainant as part of his application. Since the defendant however firmly denies

to have ever recorded the complainant's data in his data file and only for the Chamber

Litigation, it has not been demonstrated in any way that these data would still be included therein, the

personal data cannot therefore be erased, as requested by the complainant,

and the Litigation Chamber cannot establish a violation of Article 17 of the GDPR.

However, the Litigation Chamber then examined to what extent the plaintiff had been informed

in accordance with GDPR requirements. The Respondent acknowledges that the wording of the response to the

Data erasure request could have been clearer. The Respondent argues that by the formula

used, it meant that the person concerned had received the e-mail in question only in response

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to his application and in the context of it and that for the rest, the data of the person concerned

had not been processed by the defendant, nor stored in its data file.

The Litigation Chamber considers that only unambiguous information on the outcome reserved for

the request to erase data can be accepted. In addition, this information should be

provided within the time limit set out in Article 12.3. of the GDPR. This deadline was not respected by the defendant.

If the data controller does not comply with a request to erase the data, he is required

to inform the person concerned of the reasons for their inaction (article 12.4. of the GDPR). Rather than declare

not having been able to delete the complainant's personal data, due to the

the fact that the data of the data subject has not been recorded in his data file,

the defendant should also have informed the plaintiff of this element, which was however not done.

The Litigation Chamber decides that the violation of articles 12.3. and 12.4. of the GDPR is proven and that the sanction mentioned below is appropriate.

B. For each of the findings of the Inspection Service going beyond the subject of the complaint, the Chamber Litigation examined to what extent there was a question of a violation of the relevant provisions of the GDPR.

1. With regard to the lawfulness of processing (Article 6 of the GDPR) and liability (Article 5.2. of the GDPR)

The Inspection Service asserts that the defendant does not substantiate what is or was the basis legal for the collection of personal data of candidates whose data is

were already in the defendant's database before the entry into force of the GDPR.

The defendant replies that all those who have an interesting profile for future missions are included in its database. They were explicitly informed of this and gave their unequivocal consent.

Since the entry into force of the GDPR, this consent is requested from candidates when they apply. The persons concerned also receive immediately after their application an e-mail offering them the possibility of unsubscribing.

Candidates who were already in the database before the entry into force of the GDPR have received a mailing inviting them to give their explicit consent to continue to be included in the database. These candidates have also been informed of the privacy statement of the defendant.

A sufficient legal basis therefore clearly underlies the processing, namely consent candidates, and no violation of Articles 6 and 5.2. of the GDPR cannot be established. In this concerning the data of the candidates which were already included in the database before

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the entry into force of the GDPR, the Litigation Chamber further notes that although a basis legal was necessary for any data processing even before this entry into force, the

Litigation Chamber is not competent to decide on the way in which the collection of

data had taken place at the time.

With regard to the principle of limitation of storage (article 5.1.e) of the GDPR)

The Inspection Service affirms that the defendant does not justify the need to retain the data

personal data of the data subject for 10 years after the last use if no

contract is not concluded.

The defendant explains that the retention period of 10 years after the last use corresponds

the limitation period for contractual actions. The database includes not only

data of people who have applied for a specific project and who have not

been assigned, but also of people who have already been hired for a project and to whom the deadline

contractual prescription applies. For the sake of clarity, the relevant passage in the declaration of

confidentiality has been adapted.

Since it appears from the documents that the retention period is legitimate and has been sufficiently differentiated

depending on whether they are unsuccessful candidates or people hired for a specific project, in

explicitly indicating that the 10-year retention period only applies to the latter,

no violation of Article 5.1.e) of the GDPR can be established.

2. With regard to the transparency of information, communication and methods of

the exercise of the rights of the data subject (articles 12.1. and 12.2. of the GDPR)

The Inspection Service finds that the defendant's declaration of confidentiality contains a

disclaimer to limit damages caused by information on the site

Internet. The privacy statement also states that content on the site may at any time

time be adapted, modified or extended without prior announcement or notification.

The respondent asserts that its privacy statement relates to the use of the website and has not

no relation to the rights that may be exercised by the persons concerned in the context of

the regulations relating to the protection of personal data.

The documents presented by the defendant indicate that the provisions relating to the use of the site

Internet have been included in a separate document and deleted from the privacy statement.□

The internal procedure in the context of a request from a data subject to unsubscribe has□

also been included in a written notice, which leads the Litigation Chamber to note that,□

given the details provided by the defendant, there is no question of any violation of articles□

12.1. and 12.2. of the GDPR.□

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With regard to the information to be provided when personal data is collected□

with the data subject (Article 13.1.b) and Article 13.2.b) of the GDPR)□

The Inspection Service finds that the defendant's privacy statement does not mention□

the contact details of the data protection officer.□

The defendant responds to this that the obligation to appoint a data protection officer does not□

does not apply to him. Only one person responsible for privacy issues has been□

appointed. According to the defendant, the mention of the coordinates of this person in charge in the declaration of□

confidentiality would therefore not be necessary. The defendant, however, arranged for when□

even include the contact details of the person in question in their privacy statement.□

Since it does not appear from the inspection report that the defendant has the obligation to appoint a delegate□

to data protection, the Litigation Chamber therefore considers that there is no breach of□

Article 13.1.b) GDPR. Although Recommendation No. 04/2017 of 24 May 2017¹ and the Guidelines□

Guidelines for Data Protection Officers 2 indicate that even for data protection□

organizations that are not subject to the obligation to appoint a data protection officer,□

appointing such a delegate despite everything is a good practice, it is not an obligation□

legal.□

Regarding the finding of the Inspection Service that the defendant does not mention the□

right to the limitation of data processing, the defendant points out that the necessary has in the meantime□

been made to include this right in its privacy statement as well. The defendant□

thus acknowledges that the privacy statement was deficient on this point, which compels the□

Litigation Chamber to find the existence of a violation of Article 13.1.b) of the GDPR.□

3. With regard to the responsibility of the controller, the relationship with the processor□

(articles 24.1. and 28.1. of the GDPR)□

The Inspection Service finds that when asked for information on guarantees□

between him and X, the defendant confines himself to referring to contract X without giving any justification.□

The defendant therefore does not demonstrate that the processing complies with the GDPR, nor that the processor□

offers sufficient safeguards and that the protection of the data subject's rights is guaranteed.□

It follows from the contract between the defendant and X that upon receipt of personal data□

following an application for a job offer published by X at the request of the defendant, X intervenes□

as a sub-contractor for the defendant. Section 1.2. Additional Terms for□

advertisements contains a description of the service by X, where it appears that X states that the data is□

1 Recommendation on the appointment of a data protection officer in accordance with the General Regulation on□

data protection (GDPR), in particular the admissibility of combining this function with other functions, including that of□

security advisor.□

2 Article 29 Working Group Guidelines, adopted 13 December 2016 and last revised 5 April 2017.□

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immediately sent to the employer and fall under the employer's privacy policy,□

in this case the defendant.□

The fact is further that the Terms and Conditions of X have a separate heading "Terms□

additional data processing by X" specifically guaranteeing that the processing by X□

is carried out in accordance with the obligations of the GDPR, in particular Article 28 of the GDPR. It emerges from□

article 1.5 of the "Additional conditions data processing by X" that this section is□

applicable to the contract between the defendant and X. It is stipulated therein, among other things, that X takes all□

organizational and technical measures to protect the personal data of□

data subjects (article 3.3 of the Additional Terms data processing by X) and that□

X guarantees the protection of the rights of data subjects (article 3.7 of the Additional Conditions□

data processing by X).□

In addition, all this is described in the privacy statement of X which is brought to the attention□

of the data subject if the data subject registers with X.□

On the basis of the documents submitted by the defendant, the Litigation Chamber decides that it is□

sufficiently demonstrated that there is no violation of Articles 24.1. and 28.1. of the GDPR.□

Regarding the record of processing activities (Article 30.1.d) and g) of the GDPR)□

The Inspection Service finds that in the "GDPR-register" file as attached by the defendant, the□

categories of recipients to whom the personal data are or will be provided are lacking,□

as well as a general description of the technical and organizational security measures within the meaning of□

section 32.1. of the GDPR.□

With regard to the record of processing activities, the respondent points out that a description□

general technical and organizational measures within the meaning of Article 32(1) GDPR□

is only optional (article 30.1.g) of the GDPR).□

As regards the categories of recipients, the Respondent acknowledges that indeed they have not□

been listed, but specifies that this is now the case (article 30.1.d) of the GDPR).□

The Litigation Chamber finds that the defendant certainly took the necessary steps to put the register□

processing activities in order but that previously, this register did not meet all the□

requirements, so that it is therefore a question of a violation of Article 30.1.d) of the GDPR and of□

section 30.1. g) GDPR. With regard to technical and organizational measures, these□

these were admittedly mentioned in general terms in the adapted version of the register of activities□

treatment, and could be further specified.□

4. With regard to the appointment of the data protection officer (articles 37.5. and 37.7. of the□

GDPR)□

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The Inspection Service finds that the defendant has not complied with the obligations imposed by the□

sections 37.5. and 37.7. of the GDPR. The Litigation Chamber repeats (see above points B.2., p. 7 and□

8) that since it does not appear from any document in the file that the defendant has the obligation to designate a data protection officer and therefore has no indication that the defendant would fall within the scope of Article 37.1 b) or c) of the GDPR, it considers that there is no violation of Sections 37.5. and 37.7. of the GDPR.

All of the measures taken by the defendant to respond to the findings made by the Inspection Service that went beyond the subject of the complaint led the Litigation Chamber to consider that the Respondent has taken appropriate action on each of these findings in order to remedy the problems identified, with the effect that on these particular points, the defendant has put the processing of data for which he is the data controller in accordance with the GDPR requirements. The fact remains that before the adaptations, the violation of Articles 13.2.b), 30.1.d) and 30.1.g) of the GDPR is proven and that the sanctions set out below must be considered as appropriate.

To determine the nature of the sanctions to be imposed following the violations established in this decision, the Litigation Chamber nevertheless takes into account the fact that the defendant is a company whose activity should be considered rather modest. In addition, the Litigation Chamber attaches importance very particular to the spirit of collaboration which the defendant demonstrated in order to adapt on the points perfectible, in order to comply more transparently on these points and to act in accordance with GDPR requirements. In this respect, the Litigation Chamber also observes that even before the proceedings initiated as part of the complaint, the defendant had clearly made efforts to deal with personal data in accordance with the GDPR.

The decision will be published, after anonymization.

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FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation, to impose sanctions regarding the violation of Articles 12.3., 12.4., 13.2.b), 30.1.d) and 30.1.g) of the GDPR:

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pursuant to Article 100, § 1, 5° of the LCA, formulate a reprimand following the violation □

Articles 12.3., 12.4., 13.2.b), 30.1.d) and 30.1.g) of the GDPR; □

- publish this decision on the website of the Data Protection Authority, □

under article 100, § 1, 16° of the LCA, admittedly after anonymisation. □

Pursuant to article 108, § 1 of the law of December 3, 2017, this decision may be the subject of a □

recourse within thirty days, as of the notification, to the Court of Markets, with □

the Data Protection Authority as defendant. □

(Sr.) Hielke Hijmans □

President of the Litigation Chamber □