

Litigation Chamber

Decision on the merits 03/2021 of 13 January 2021

File number: DOS-2020-00608

Subject: Sending by a school of a global e-mail in which all the recipients are

visible

The Litigation Chamber of the Data Protection Authority, made up of Mr Hielke

Hijmans, chairman, and Messrs. Christophe Boeraeve and Frank 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");

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

ACL;

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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made the following decision regarding:

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X, hereinafter "the plaintiff"□

Y, hereinafter "the defendant"□

1. Facts and procedure□

1. On January 30, 2020, the complainant filed a complaint with the Data Protection Authority□
against the defendant.□

2. The subject of the Complaint relates to the Respondent sending an e-mail containing a letter□
information, addressed to the parents of pupils of the whole school and in which all the□
email addresses are visible to all recipients of the email in question.□

3. On February 17, 2020, the complaint is declared admissible on the basis of Articles 58 and 60 of the LCA and□
the complaint is forwarded to the Litigation Chamber under Article 62, § 1 of the LCA.□

4. On April 3, 2020, 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.□

5. On April 3, 2020, 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□
under Article 99 of the LCA, deadlines for transmitting their conclusions. The deadline□
for receipt of the respondent's submissions in response was set for May 18, 2020, that for□
the complainant's submissions in reply as of June 8, 2020 and that for the submissions in reply□
of the defendant on June 29, 2020.□

6. On May 18, 2020, the Litigation Chamber receives the submissions in response from the□
defendant, in which he confirms that Y sent an e-mail on January 30, 2020 with the□
monthly information, this communication concerning the launch of the nursery section□
by the municipality as well as the fact that the school would be closed the following day. When sending the message,□
parents' addresses were mistakenly placed in the "Carbon Copy" (CC) field instead of□
be in the "Blind Carbon Copy" (BCC) field. The error was detected too late and an attempt□
to cancel the sending of the e-mail or to withdraw the e-mail failed. According to the defendant, the purpose was not□

no way to put all the addresses in CC.□

7. In addition, the Respondent attaches three documents containing instructions for sending□

e-mails to external persons, in which it is systematically indicated that the addresses□

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e-mail must be put in BCC during a mass sending of an e-mail. Also, the default□

to cancel sending an email, originally set to 5 seconds, would now be□

set to 30 seconds, so that in case of doubt, the sending of the e-mail can still be undone.□

8. Respondent also apologizes to Complainant for releasing his email address.□

9. On May 20, 2020, the Litigation Chamber received the plaintiff's submissions in reply in□

which he asserts that prior to the January 30, 2020 email that is the subject of the complaint, he had already□

received emails from the defendant on several occasions, in which he noted each time that the□

email addresses were visible to all recipients. Despite the efforts that the defendant□

would have deployed, the plaintiff attaches an e-mail, sent by the defendant on April 22, 2020, attesting□

that after January 30, 2020, all email addresses were still visible to all□

recipients.□

10. On May 22, 2020, the Litigation Chamber received the defendant's submissions in reply in□

which the latter indicates that he will take the necessary steps to ensure follow-up.□

2. Legal basis□

- Article 5.1.b) of the GDPR□

"Personal data are: [...] b) collected for specified purposes,□

explicit and legitimate, and not further processed in a manner inconsistent with□

these purposes; further processing for archival purposes in the public interest, for the purposes of□

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

pursuant to Article 89(1) as incompatible with the original purposes□

(limitation of purposes);□

- Article 6.1 GDPR□

Processing is only lawful if and insofar as at least one of the following conditions ☐

is fulfilled: ☐

[...] ☐

f) the processing is necessary for the purposes of the legitimate interests pursued by the data controller ☐

processing or by a third party, unless the interests or freedoms and rights ☐

fundamentals of the data subject which require protection of personal data ☐

personal, in particular when the person concerned is a child. ☐

[...] ☐

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- Article 6.4 GDPR ☐

"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 ☐

data have been collected and the purposes of the further processing envisaged; ☐

b) the context in which the personal data was collected, in particular ☐

with regard to the relationship between data subjects and the controller; ☐

c) the nature of the personal data, in particular if the processing relates to ☐

special categories of personal data, pursuant to Article 9, or if ☐

personal data relating to criminal convictions and offenses are ☐

processed, under Article 10; ☐

d) the possible consequences of the envisaged further processing for the persons ☐

concerned;□

(e) the existence of appropriate safeguards, which may include encryption or□
pseudonymization."□

- Article 24.1 and 2. of the GDPR□

"1. Taking into account the nature, scope, context and purposes of the processing as well as□
that risks, the degree of likelihood and severity of which vary, for the rights and freedoms of□
natural persons, the controller implements technical and□
organizational arrangements to ensure and be able to demonstrate that the□
processing is carried out in accordance with this Regulation. These measures are reviewed□
and updated if necessary.□

2. Where proportionate in relation to the processing activities, the measures referred to in□
paragraph 1 include the implementation of appropriate policies with regard to□
data protection by the controller."□

- Article 25.1 and 2. of the GDPR□

"1. Taking into account the state of knowledge, the costs of implementation and the nature,□
the scope, context and purposes of the processing as well as the risks, including the degree of□
probability and severity varies, that presents the treatment for the rights and freedoms of□
natural persons, the controller implements, both at the time of the□
determination of the means of processing only at the time of the processing itself, of the measures□

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appropriate technical and organizational arrangements, such as pseudonymization, which are□
intended to implement the principles relating to data protection, for example□
the minimization of data, in an effective way and to match the processing of the guarantees□
necessary to meet the requirements of this Regulation and to protect the rights of□
the person concerned.□

2. The controller implements the technical and organizational measures□

appropriate to ensure that, by default, only personal data that is
necessary with regard to each specific purpose of the processing are processed. This applies
the amount of personal data collected, the scope of their processing,
their shelf life and their accessibility. In particular, these measures ensure that,
by default, personal data is not made accessible to a number
of natural persons without the intervention of the natural person concerned

3. Motivation

11. The Respondent has the contact details of the parents of the students, including those of the Complainant, in order to
be able to communicate with them about important information in the context of the relationship
between the defendant and the parents of the students. The Litigation Chamber assumes that for
obtaining this data, there is a legal basis, as referred to in Article 6.1 of the GDPR, to
know the necessity of the performance of the contract between the plaintiff and the defendant (article 6.1.b).
Indeed, it does not seem in principle really possible for the pupils of a school to benefit from a
teaching without the school having the e-mail address of the parents (or one of them).
For this reason, consent as a legal basis, in accordance with the terms of the
articles 4, point 7) and 7 of the GDPR, is not an option for obtaining the data. The parents
children are not free to choose whether or not to transmit their contact details to
school.

12. The Litigation Chamber verifies to what extent the defendant can share these contact details
of the complainant with third parties, in this case the parents of other pupils.

13. In accordance with Article 5.1. b) GDPR, the processing of personal data for
purposes other than those for which the personal data was collected
initially can only be authorized if it is compatible with the purposes for which the
personal data was initially collected. Taking into account the criteria set out in
section 6.4. of the GDPR and recital 50 of the GDPR¹, it should be checked whether the processing

¹ Recital 50 of the GDPR: [...] In order to establish whether the purposes of further processing are compatible with those for which

the personal data was initially collected, the data controller, after having complied with all the requirements relating to the lawfulness of the initial processing, should take into account, inter alia: any link between these purposes

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later, in this case the distribution by e-mail of the contact details of the complainant to the parents of other students, is or is not compatible with the initial processing consisting of the collection of contact details of the complainant in the context of direct contact between the students' parents and the school.

The Litigation Chamber concludes that the complainant provided his contact details in the context of his relationship with the school (namely the defendant) and could in no way expect reasonably that the school shares this same data with third parties who certainly have a link own with the school, since they are parents of other pupils, but who are strangers to the relationship between the complainant and the school.

14. It follows that there is no question of compatible further processing, so that a basis separate legal entity is required for communication of the complainant's contact details to parents of other pupils can be qualified as lawful.

15. Processing of personal data, and therefore also further processing incompatible as in the present case, is in fact lawful only if there is a legal basis to that effect.

For incompatible further processing, reference should be made to Article 6.1. GDPR and

Recital 50 of the GDPR. Recital 50 of the GDPR² indicates that a separate legal basis

is required for the processing of personal data for other purposes which are not

not compatible with the purposes for which the personal data were

initially collected. These distinct legal bases which make it possible to consider a treatment

as being lawful, therefore including subsequent incompatible processing, are defined in Article

6.1. of the GDPR.

16. To this end, the Litigation Division examines to what extent the legal bases such as

defined in article 6.1. of the GDPR may be invoked by the defendant in order to legitimize the

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complainant.□

17. The Respondent does not itself cite any legal basis allowing it to proceed with the□

processing of data that is the subject of the complaint, namely the communication of the e-mail address□

of the complainant to the parents of other students. Moreover, the defendant expressly admits that this□

communication was a mistake and that the goal was in no way to put all the addresses□

the intended further processing; the context in which the personal data was collected, in particular the□

reasonable expectations of data subjects, based on their relationship with the controller, as to□

further use of such data; the nature of the personal data; consequences for people□

data subjects of the planned further processing; and the existence of appropriate safeguards both in the context of the initial pro

the planned further processing.□

2 Recital 50 of the GDPR: The processing of personal data for purposes other than those for which□

the personal data was initially collected should only be allowed if compatible with the purposes□

for which the personal data was originally collected. In this case, no separate legal basis□

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email in CC. The defendant therefore does not argue that the communication could take place and he does not□

nor does it attempt to justify it by invoking any legal basis.□

18. On the basis of the factual elements present in the file, the Litigation Chamber verifies ex officio□

whether a legal basis can possibly be invoked allowing the defendant to proceed to□

sending the e-mail containing the complainant's e-mail address in a way visible to all□

recipients. To this end, the Litigation Division examines whether the communication of the address□

complainant's e-mail may be based on any legitimate interest on the part of the defendant□

(article 6.1. f) of the GDPR).□

The other legal bases listed in article 6.1. under a), b), c), d) and e) of the GDPR□

not apply in this case.□

19. In accordance with Article 6.1.f) of the GDPR and the case law of the Court of Justice of the Union□

European Union (hereinafter "the Court"), three cumulative conditions must be met for a□

controller can validly invoke this basis of lawfulness, "namely,□

firstly, the pursuit of a legitimate interest by the controller or by the□

third parties to whom the data are communicated, secondly, the necessity of the processing of the personal data for the fulfillment of the legitimate interest pursued and, thirdly, the condition that the fundamental rights and freedoms of the person concerned by the protection of data do not prevail" (judgment "Rigas"3).

20. In other words, in order to be able to invoke the basis of lawfulness of "legitimate interest" in accordance with Article 6.1.f) of the GDPR, the controller must demonstrate that:

1)

the interests it pursues with the processing can be recognized as legitimate (the "test of purpose");

2)

the intended processing is necessary to achieve those interests (the "necessity test"); and

3)

the weighing of these interests against the interests, freedoms and fundamental rights of data subjects weighs in favor of the controller (the "weighting test").

21. With regard to the first condition (the so-called "finality test"), the Chamber

Litigation believes that the purpose of simultaneously contacting all the parents of the students

by means of the sending of a single e-mail must be considered as being carried out for a

legitimate interest. According to recital 47 of the GDPR, the interest that the defendant was pursuing

as controller can in itself be considered legitimate. The first one

condition set out in Article 6.1.f) of the GDPR is therefore fulfilled.

3 CJEU, 4 May 2017, C-13/16, Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA „Rīgas satiksme”, recital 28. See also CJEU, 11 December 2019, C-708/18, TK v/ Asociația de Proprietari bloc M5A-ScaraA, recital 40.

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22. In order to fulfill the second condition, it must be demonstrated that the processing is necessary for the achievement of the aims pursued. More specifically, this means asking whether the

same result cannot be achieved with other means, without data processing to

personal nature or without unnecessary substantial processing for the data subjects.

23. Based on the purpose, namely to reach the parents of pupils by a single and unique e-mail, the Chambre

Litigation notes that there is a simple technical means to contact the

recipients targeted by the e-mail in a single step, without the e-mail addresses of each one being

visible, i.e. sending in BCC instead of sending in CC. The second condition is therefore not

fulfilled due to the fact that the principle of data minimization (article 5.1.c) of the GDPR) has not been

respected.

24. In order to check whether the third condition of Article 6.1.f) of the GDPR - the so-called "test of

balancing" between the interests of the controller on the one hand and the freedoms and rights

fundamentals of the person concerned on the other hand - can be fulfilled, one must first take

account the reasonable expectations of the data subject, in accordance with recital 47 of the

GDPR. In particular, it must be assessed whether "the data subject can reasonably

expect, at the time and in the context of the collection of personal data, that

that they are processed for a given purpose"⁴.

25. This aspect is also underlined by the Court in its judgment "TK v. Asociația de Proprietari bloc

M5A-ScaraA" of December 11, 2019⁵, which states the following:

"Also relevant for the purposes of this balancing are the reasonable expectations of the

data subject that his or her personal data will not be processed when,

in the circumstances of the case, that person cannot reasonably expect a

further processing thereof.

26. Regarding this third condition, the Litigation Division can only note that the

complainant could at no time expect to share his email address with the parents

other students.

27. The Litigation Division considers that all of the elements presented demonstrate that the

defendant cannot rely on any legal basis attesting to the lawfulness of the processing

of data as implemented by it. Furthermore, the defendant does not contest the facts□

4 Recital 47 GDPR.□

5 CJEU, 11 December 2019, C-708/18, TK v Asociația de Proprietari block M5A-ScaraA, recital 58.□

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and declares itself that in the e-mail subject of the complaint, the e-mail address of the complainant□

had been placed in the "CC" field instead of the "BCC" field, although this had□

place unintentionally. He thus indicates that he has committed a violation of the processing of□

personal data of the complainant. The Litigation Chamber therefore decides that□

breach of Article 5.1.b) juncto Article 6.4. of the GDPR, and in Article 6.1.□

of the GDPR is proven.□

28. Although it appears from the exhibits submitted by the Respondent that general directives were□

written within the school, indicating that in global emails, recipients should□

be placed in BCC, the complainant demonstrates that these directives are not transposed into the□

convenient. Not only does the e-mail of January 30, 2020 which is the subject of the complaint, not respect□

this directive, but this rule is also not applied in the email of April 22, 2020, attached□

by the complainant in his reply submissions. The defendant does not deny it, but indicates□

only that the case will be followed. The Litigation Chamber decides that the violation of articles□

24.1. and 2, and section 25.1. and 2. of the GDPR is proven.□

29. The Litigation Chamber also considers that a school must be transparent about the way□

of which it processes the (contact) data of the parents and of which it draws up a policy for this purpose. The□

The Litigation Chamber therefore orders the defendant to develop such a policy, aimed at□

that communication with parents is done in accordance with article 24.1 and 2, and with□

section 25.1. and 2. GDPR.□

30. Given that this problem arises for all schools in Belgium, the Litigation Chamber□

regards this decision as an exhortation for schools to carefully use the□

parents' data and to develop a policy in this regard. An important element of this□

could be the further processing of data, for which (in cases where Article 6.1. f) of the GDPR cannot be applied) consent can be used as a legal basis. Through example, when this data is processed for communication between parents.

31. In this regard, it is important for schools to keep in mind the following general rule: if the consent has been given, further processing is only possible within the limits of this consent. Consent must indeed be granular⁶. If the parents give their consent for the use of contact details by the school in the context of communication with other parents, this same data cannot, for example, be passed on to third parties for direct marketing purposes (e.g. for textbooks). If the school wishes when

⁶ Recital 43 GDPR: [...] Consent is presumed not to have been freely given if a separate consent does not cannot be given to different personal data processing operations although it is appropriate in the case at hand, or if the performance of a contract, including the provision of a service, is subject to consent despite that it is not necessary for such execution.

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even transmit this data for direct marketing purposes, it must again request the parental consent. This method is also in line with the guidelines of the Committee European Data Protection Authority (EDPS) relating to consent⁷, which indicate in essence that prior to the collection of personal data, the person responsible for the processing must determine on which legal basis the processing is based and that it cannot invoke the legal basis of 'legitimate interest' where further processing does not correspond to the initial legal basis of 'consent' on the basis of which data was collected.

32. The Litigation Chamber considers that the penalties mentioned below are sufficient, given in particular the fact that the defendant himself admits that there was a mistake and that he is willing to avoid such facts in the future.

33. Given the importance of transparency regarding the decision-making process of the Chamber Litigation and in accordance with Article 100, § 1, 16° of the LCA, this decision is published

on the website of the Data Protection Authority by deleting the data□

identification of the parties, since these are neither necessary nor relevant in the context of□

publication of this decision.□

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https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf.□

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121. Article 6 establishes the conditions for lawful processing of personal data and describes six legal bases on which□

which a controller may rely on. The application of one of these six legal bases must be established before□

the processing activity and in connection with a specific purpose□

122. It is important to note that if a data controller chooses to rely on consent for a party□

treatment, they must be prepared to respect that choice and to discontinue treatment if an individual withdraws their consent.□

Indicate that the data will be processed on the basis of consent, while the processing is based on another basis□

legal, would be fundamentally unfair to the persons concerned.□

123. In other words, the controller cannot switch from consent to another legal basis. For example, he□

is not permitted to retrospectively use the legal basis of legitimate interests to justify processing where□

problems were encountered regarding the validity of the consent. As soon as the data controllers have
the obligation to communicate the legal basis on which they rely at the time of data collection, they must have
defined their legal basis prior to said collection.

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FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation:

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issue a reprimand to the defendant, pursuant to Article 100, § 1, 5° of the

ACL;

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pursuant to Article 100, § 1, 9° of the LCA, to order the defendant to bring it into compliance

processing with Article 24.1. and 2. of the GDPR and with article 25.1 and 2. of the GDPR. For this purpose,

the Litigation Division grants the defendant a period of three months and expects the defendant to

report to it by March 31, 2021 at the latest on the compliance of the

treatment with the aforementioned provisions.

Under article 108, § 1 of the LCA, this decision may be appealed within a period of

thirty days, from the notification, to the Court of Markets, with the Authority for the Protection of

given as defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber