GZ: DSB-D124.482/0005-DSB/2019 of September 4, 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 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 Maja A***'s data protection complaint

(complainant) of March 28, 2019 against Directory24 XX YY GmbH

(Respondent), represented by ***, lawyer ***, for violation in

Fundamental right to secrecy as follows:

- The complaint is upheld and it is established that the

Respondent gives the complainant the fundamental right to secrecy

violated by the Respondent's personal data

Complainant (the e-mail address: majaa***xxyy@mail***.com and the information

that the complainant is the author of a particular comment

to a specific company on the Respondent's platform).

disclosed a third person.

Legal basis: Sections 1 (1) and (2) and 24 (1) and (5) of the

Data Protection Act - DSG, Federal Law Gazette I No. 165/1999 as amended; §§ 16 and 18 paragraph 4 of the E-

Commerce Act - ECG, Federal Law Gazette I No. 152/2001 as amended; Art. 5 para. 1 and Art. 6 para. 1 of the

Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR), OJ No. L 119 of

May 4, 2016, p. 1.

REASON

A. Submissions of the parties and course of the proceedings

1. With the procedural submission dated March 28, 2019, the□

complainant a violation of the right to secrecy.□

In summary, the complainant had an anonymous assessment of a□

Company written on the Respondent's platform. A lady this□

I read the review and contacted the Respondent and wanted to know who□

wrote this review. Then this lady got the e-mail address of the□

Complainant (apparently meaning: from the Respondent) received. the□

The complainant subsequently received an e-mail to which she did not respond.□

As a result, this lady googled the complainant and she googled her employer□

contacted. According to the information provided by the Respondent, the data is that of the Complainant□

was sent due to a system error. Presumably the lady has the data of the□

Appellant received on March 18 or 19, 2019.□

2. With a statement dated April 23, 2019, the Respondent brought□

summarized, that the complainant uses the platform of the respondent□

have used therefore the respondent's personal data□

complainant and also the e-mail address "majaa***xxyy@mail***.com".□

The data protection authority is not competent because the respondent as□

evaluation platform is a medium within the meaning of § 9 DSG. The evaluation platform serves the□

Evaluation of companies and other organizations as well as the□

exchange of views between users. Also the passing on of the nickname and the□

Email address to a third party who also has an "opinion" about the□

companies rated by the complainant was covered by the media privilege;□

this made a discourse between these two people possible.□

In addition, there is an obligation to “name and address a user” within the meaning of Section 18□

Para. 4 ECG to third parties. For such inquiries from companies that□

are to be evaluated, an internal process has been defined. For such requests, go□

Respondent in such a way that the data of the evaluator is not passed on to the third party

would be disclosed, but the evaluator was contacted by the Respondent

and asked for his consent whether the data would be passed on to a third party

person will be approved. The "B***" program is used to process these inquiries.

In the specific case, it is correct that the rated company did not

Respondent approached, but a third person who had contact with

wanted to admit the complainant. This is because the third person similar

Gained experience with the rated company and familiarized yourself with the

Appellant wanted to "arrange". It was through the clerk to a

Confusion of the templates stored in the program "B***" and thus to one

Disclosure of the user name, a nickname and the e-mail address

"majaa***xxyy@mail***.com". For what reasons and by what means

third person in a row have researched on the Internet, evade the knowledge of the

Respondent.

The complainant probably has the e-mail address mentioned in directories or

other services or published on websites, so that any third person who reads these e-

Mail address researched on the Internet, also the professional contact details of the

Complainant could research and then learn her phone number. So be

the e-mail address, for example, in a publicly accessible document (available on the

Webpage of the University O***) to find. There is therefore no interest in secrecy

at the e-mail address that they themselves entered using their first and last name

Internet publish. In addition, the e-mail address in the context of e-mail

Transmissions (without encryption) can be seen and recorded by everyone. If the

Complainant create an email address that includes her first and last name,

the complainant behaved in a way that made her appear in the "public" herself.

By using an E*** LL.C. and the use of

and surname in the address let them know that they themselves are not

I have an interest in keeping first and last names secret.

In addition, although the Respondent erroneously passed on the data,

but the disclosure of the very limited data is due to the legitimate interest of

third person justified. The third person credibly explained in a similar way

to have been in the same situation as the complainant and have contacted her

want to discuss the situation. The Respondent did not expect that

that the third person did not just contact the complainant by e-mail,

but to a certain extent explore them and finally contacted them by phone.

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

investigation – summarized in its statement of June 9, 2019 that

Rating sites like those of the Respondent would have the purpose of anonymous

write, otherwise she could give her real name. The assertion that one

could not have guessed that the unknown person would find the complainant

do, be "naive". Your data would therefore be requested in order to subsequently

search. She didn't expect that her data would simply be released

would.

B. Subject of Complaint

Based on the submissions of the appellant, it follows that

The subject of the complaint is whether the respondent is the complainant

thereby violated the right to secrecy by the Respondent

personal data of the complainant (e-mail address

majaa***xxyy@mail***.com and the information that the complainant is

to the author of a specific comment about a specific company

the platform of the Respondent) has disclosed to a third person.

C. Findings of Facts

1. The Respondent is the operator of the platform https://www.****verzeichnis24.at/.

On this platform it is possible to search for companies for more information

to receive this (including contact information) and this using a

to evaluate pseudonyms (in the form of a five-star rating and in the form of a

comment).

Evidence assessment: The findings made are based on an ex officio

Research of the webpage https://www.****verzeichnis24.at/ (retrieved on September 3rd

2019).

2. On March 29, 2019, the complainant posted on the platform mentioned under the

Pseudonym "***" submitted a review of a company. Then the

Respondent as operator of the platform contacted by a third person who

with regard to the company rated by the complainant

wanted to exchange. As a result, the Respondent has the information

"majaa***xxyy@mail***.com" to this third person.

Evidence assessment: The findings made are based on the insofar

matching statements by the complainant of March 28, 2019 and the

Respondent of April 23, 2019.

D. In legal terms it follows that:

1. Competence of the data protection authority and "media privilege"

a) General

The national legislature restricts what is to be provided for under Article 85 (1) GDPR

"Media privilege" in § 9 para. 1 DSG, whereby the privilege only media companies or

Media services is accessible, provided personal data to journalistic

purposes by media owners, publishers and media staff or employees

of a media company or media service are processed (cf

Notification of the DSB of August 13, 2018, GZ DSB-D123.077/0003-DSB/2018).

To understand the importance of freedom of expression in a democratic□

To take account of terms such as journalism, which refer to this society□

be interpreted broadly (recital 153 last sentence GDPR).□

Processing of personal data for journalistic purposes is based on□

understanding of the ECJ if the processing has the sole purpose of□

To disseminate information, opinions or ideas to the public (cf. the judgment of□

ECJ of February 14, 2019, C-345/17, Buivids, para. 53 and the case cited there).□

At the same time, the ECJ states that it cannot be assumed that any□

information published on the Internet relating to personal data, at□

the term "journalistic activities" falls (cf. the judgment of the ECJ of February 14□

2019, loc.cit., para. 58).□

For the assumption of a journalistic purpose, it is therefore the case that not every type of□

Publication of exceptions or deviations from data protection regulations□

justified by the GDPR. Rather, publications must have a minimum level of journalistic□

have processing. Art. 85 GDPR is therefore not relevant when it comes to the□

publication of mere data collections or listings (e.g. address, telephone□

or business directories). The same applies to the publication of official notifications□

or the publication of other, unchanged from other sources□

documents.□

The hurdle of the minimum level of processing is of particular importance for online□

information offers. In its case law on rating portals, for example,□

German BGH (cf. the judgment of the German BGH of June 23, 2009, VI ZR 196/08).□

sufficient journalistic-editorial level, which is a data protection law□

could justify privileging, only then accepted “when the opinion-forming□

Effect for the general public formative part of the offer and not only□

is a decorative accessory" (cf. the judgment of the German Federal Court of Justice of June 23, 2009, VI ZR□

196/08). These requirements are convincing and must also apply under Art. 85 GDPR

(cf. Buchner/Tinnefeld in Kühling/Buchner [eds], General Data Protection Regulation [2017]

Art. 85, para. 24 f mwN).

b) In the matter

The processing that is the subject of the procedure is a disclosure of

personal data (e-mail address: "majaa***xxyy@mail***.com ") to a third party

Person. According to the Respondent, this disclosure was made for the purpose of “enabling a

Discourses” between the complainant and the third person on the platform

rated companies.

Even with a broad interpretation of the term "journalism".

however, no "processing for journalistic purposes" was recognized as the subject of the proceedings

be, since a minimum of journalistic processing in the sense of the above considerations

view of the data protection authority is not reached.

Viewed from another perspective, any disclosure of personal data,

those in connection with a mediation of contacts (however structured).

and the following contact for the purpose of "discourse", as "processing to

journalistic purposes" withdrawn from the scope of protection of the GDPR, although

Exceptions to the restrictions in the fundamental right to data protection

have to limit the established case law of the ECJ to what is absolutely necessary (cf. the

Judgment of the ECJ of February 14, 2019 a.a.O Rn 64 and the Rsp cited there).

The DSB does not ignore the fact that the ECJ, according to a well-established case law (cf. the judgment of

16 December 2008, C-73/07) assumes that journalistic activities are not merely

should be reserved for "classic media companies" and the Austrian

"Media privilege" according to § 9 paragraph 1 DSG, however, such a limitation of the privilege

certain professional groups. However, an interpretation of Section 9 Para. 1

DSG in the light of the relevant Rsp of the ECJ to no other result, because - how

set out above – a privilege due to the missing minimum

journalistic processing is not considered.

If the Respondent in this context refers to the decision of the DSB dated

August 13, 2018 loc.cit. and states that the DSB assumes that

User comments are accessible to the media privilege, it should be noted that it is in the

cited case about user comments of an online platform operated by a media company

Forums has acted and the storage of user comments pursued the purpose of a

to facilitate discussion in relation to a journalistic (online) article;

however, there is a different situation and a different processing purpose

before.

Since § 9 paragraph 1 DSG does not apply, the responsibility is the

given data protection authority.

2. For the possible exclusion of an interest worthy of protection

Complainant as a result of general availability of personal data

Data:

a) General

A secrecy claim is excluded according to § 1 Para. 1 DSG if data as a result

their general availability or because of their lack of traceability to the

Those affected are not accessible to a non-disclosure claim.

It must be taken into account that the very general assumption of the non-existence of a

Violation of confidentiality interests worthy of protection for permissibly published

Data is not compatible with the provisions of the GDPR (see already the decision of the

DSB of October 31, 2018, GZ: DSB-D123.076/0003-DSB/2018 mwN).

The principle of the primacy of Union law over Austrian law applies

law (priority of application). This is of particular importance where immediate

applicable Union law meets conflicting national law. the

Application priority means that in the event of a conflict, the rule of the (immediately
applicable) Union law, not that of Austrian law (cf.
VfSlg 15,448, 19,661 mwN; Mayer/Kucsko-Stadlmayer/Stöger, Federal Constitutional Law11
[2015] Margin no. 246/9).
This principle is to be observed automatically by all Austrian authorities, they have
therefore leave national law disapplied in such cases. To the rank of
Austrian law does not matter, Union law also applies to national law in the event of a conflict
Constitutional law (cf. VfSlg. 15.427; 17.347; Mayer/Kucsko-Stadlmayer/Stöger,
Federal Constitutional Law11 [2015] margin no. 246/9).
According to the case law of the ECJ on Directive 95/46/EC on a
Data processing of data only in media published material as such
included, this data processing falls within the scope of the Directive and is of
their material scope of protection is not excluded (cf. the judgment of the ECJ of
12 February 2007, C-73/07, Satakunnan Markkinapörssi and Satamedia paragraph 62; compare that
Supreme Court judgment of June 27, 2016, 6 Ob 48/16a). Also the scope of the
(directly applicable) GDPR does not recognize any exception in this regard
"Generally available data" (cf. Kriegner, comments on § 1 DSG after entry into force
of the General Data Protection Regulation [GDPR], wbl 2019, p. 81 ff).
Likewise, Art. 8 of the EU-GRC does not recognize a corresponding restriction of protection
personal data as a result of general availability.
The connection between the fundamental right to data protection according to § 1 DSG and the
GDPR is reflected on the one hand in the fact that those mentioned in § 1 Para. 3 Z 1 and Z 2 DSG
The rights of data subjects are now "embodied" in the GDPR and on the other hand that
Section 4 (1) DSG generally refers to the GDPR.
It follows from all of this that Section 1 (1) DSG in the light of the requirements of Union law
is to be interpreted restrictively, so that generally available data are not ipso facto dated

Scope of data protection regulations are excluded. Rather it is necessary

for the processing of this data as well, a corresponding justification within the meaning of § 1

Para. 2 or Art. 6 Para. 1 GDPR or Art. 9 Para. 2 GDPR).

b) In the matter

Against the background of these considerations, the statements of

Respondent that at the e-mail address that is the subject of the proceedings,

first and last name of the complainant, there is no interest in secrecy

is given, remain undecided.

For the sake of completeness, however, it should be mentioned that the fact that a person

occurs anywhere on the entire Internet with an email address (which is also the purpose of the

use of an e-mail address), or such an e-mail address is merely registered,

In the opinion of the DSB, this cannot result in the interest in secrecy

this e-mail address or first and last name (if this is part of the

address are used) can be ruled out at all:

It depends on whether the personal data is published lawfully

and whether this publication was only within a certain group (e.g

to a university, or to the email host service), or to

the Internet as such (e.g. on a public website operated by the data subject

accessible webpage; cf. Jahnel, Handbuch Datenschutzrecht [2010] Rz 2/1 with further references).

In this context, reference should also be made to Section 107 (2) TKG 2003, which without

Consent (and without an existing customer relationship) the sending of electronic

Post (i.e. mostly promotional offers) prohibited; from leg.cit. is therefore already dated

Basic assessment made by the legislature that e-mail addresses (and also the

dealing with them) are worth protecting.

Apart from that, it should be noted that in the present case not only the e-mail

The complainant's address to the third person, but also the information that it

contact the complainant (“Maja A***”, as can be seen from the e-mail address) about the

is the author of a specific comment on a specific company,

was disclosed; this information is clearly not to be considered "generally available".

qualify (cf. the decision of the DSB of April 12, 2019, DSB-D123.591/0003-

DSB/2019; accordingly, "text passages" made public on a website are one

Journalists linked to this overall and therefore considered personal data

to qualify; For a broad understanding of the term "personal data", see also this

Judgment of the ECJ of December 20, 2017, C-434/16, Nowak, 34 f).

3. Permissibility of Disclosure

a) General

According to Section 1 (2) DSG, restrictions on the right to secrecy are only permissible

if the use of personal data is in the vital interest of the

Affected or with his consent, in the case of overriding legitimate interests

another or in the presence of a qualified legal basis.

b) In the matter

In the present case, the disclosure that is the subject of the proceedings did not take place in the

vital interest of the complainant. Nor is there consent.

It is questionable whether a qualified legal basis (in the form of a legal

Obligation within the meaning of Art. 6 Para. 1 lit. c GDPR) for disclosure exists:

In this context, it should be noted that the Respondent, like herself

submits, as a hosting provider pursuant to Section 18 (4) ECG, the name and address of a

Users of their service, with whom they have agreements on the storage of information

has completed, has to transmit to third parties upon request, provided that this one

overriding legal interest in determining the identity of a user and

of a specific illegal situation and also make credible that the

Knowledge of this information is an essential prerequisite for legal prosecution

forms.

However, the above requirements are not met in the present case, since the

Respondent itself submits that the purpose of the publication was merely

to enable a "discourse" between the complainant and the third person

the Respondent expressly as an "exchange of views" about the on the platform

rated companies under the scope of application of the media privilege of Section 9 (1).

DSG subsumed.

Furthermore, the Respondent submits that the third person has an “interest in the

provided data”; such an “expression of interest” is expressly prohibited

However, the wording of Section 18 (4) ECG is not sufficient, rather the above must

obvious requirements for disclosure according to Section 18 (4) ECG (cf.

such as RIS-Justiz RS0129335, according to which it is necessary for the application of Section 18

Para. 4 ECG the hosting provider has to assess at least in the form of a rough examination,

whether a claim according to § 1330 ABGB cannot be completely ruled out).

A weighing of interests in the sense of "legitimate interests" according to § 1 Para. 2 DSG or Art. 6

Paragraph 1 lit. f GDPR is out of the question; if looked at differently, the determination would

of § 18 Para. 4 ECG and the requirements for disclosure provided therein

thereby undermined by a general balancing of interests without the provisions of § 18

Para. 4 ECG standardized requirements would be possible.

Apart from that, it is also not clear to what extent the legitimate interests of the third party

Person who wanted to "exchange" ("[...] because they had similar experiences with the

rated company"), compared to the legitimate interests of the

Complainant in maintaining her (depending on your point of view) anonymous or

Pseudonymity on the Internet, predominate:

Thus, it is inherent in rating platforms that people (like concretely the

complainant) can submit a certain evaluation anonymously or pseudonymously,

without having to fear social or economic disadvantages; the border

In turn, Section 18 (4) ECG applies, which makes it possible to object to unobjective assessments

to put up a fight.

Finally, it should be pointed out that the Respondent, according to its own statements,

has established a corresponding internal process to deal with such inquiries (from

third persons) a consent (and thus a different legal basis) before a

to obtain disclosure and that in the present case it was only due to an oversight

disclosure has come. In other words: The Respondent is evident

anyway aware that the prior request for consent is the more proportionate means

opposes disclosure based on legitimate interests.

As a result, the data at issue in the proceedings were disclosed

Appellant without permission and was therefore unlawful.

According to the verdict, it was therefore determined that the fundamental right to secrecy had been violated.