GZ: DSB-D123.431/0003-DSB/2018 from September 16, 2020

[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 Sabine A***'s data protection complaint

(Appellant), represented by the Union of *** on September 3, 2018

against the ***club N*** (respondent party), represented by C*** & Partner

Rechtsanwälte GmbH, due to violation of the fundamental right to secrecy as follows:

- The complaint is upheld and it will

found that the

Respondent the complainant thereby

in the fundamental right

violated secrecy

by showing the union membership of the

Complainant in a letter dated July 27, 2018 to her employees,

their professional management, their clients and their relatives as well as the

mayor of N*** disclosed.

Legal bases: Article 5 paragraph 1 letter c, Article 6, Article 9, Article 51 paragraph 1, Article 57 paragraph 1 letter f and

Article 77 paragraph 1 of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter:

GDPR), OJ No. L 119 of 4.5.2016 p. 1; §§ 1 para. 1 and para. 2, 18 para. 1 and 24 para. 1

and Section 5 of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended.

A. Submissions of the parties and course of the proceedings

REASON

1. With the complaint initiating the procedure dated September 3, 2018, the

Complainant summed up before that she by the Respondent in her

right to secrecy,

in particular the protection of special categories

personal data, has been breached. The complainant indicated in

In this context, a violation pursuant to Art. 8 GDPR, improved its reference

however, in the course of the procedure on Art. 9 GDPR. In this regard, the complainant stated that

that she terminated her employment with the Respondent on August 31, 2018

have. On July 27, 2018, their chairman sent them a letter to everyone

Employees, the technical management of the *** association, the mayor and everyone

clients and their relatives, in which it was stated that the

complainant

their employment, represented by the union of the ***,

have resigned. Since union membership is a sensitive datum

act, which was unlawfully processed, will now determine the

Infringement sought by the data protection authority.

2. The Respondent then brought in its statement of October 2, 2018

summarized, that it is the union membership of the

complainant was not a secret, especially since the complainant

Among other things, I had photos taken next to ÖGB boss Werner D*** and myself

otherwise in her function as chairwoman of the works council with the backing of the trade union for

employed the workers and

in this context too

her

trade union membership publicly disseminated. A violation within the meaning of

Art. 9 (1) GDPR does not exist according to Art. 9 (2) e GDPR.

The Respondent also submitted that the letter dated July 27, 2018 contained a ****

published newspaper article preceded the "*** newspaper",

by the

Complainant, among other things, also critical of the Respondent

have expressed, which is why there is a need to notify the termination of the

employment relationship and representation by the union. accordingly

whether the procedure is also to avert an imminent evil (i.e. any

unjustified claims for damages)

within the meaning of Art. 9 Para. 2

lit. f GDPR

been justified.

3. The complainant replied in her opinion of 23 October 2018

summarized that union membership of the public by no means

had been known. Also, neither would a joint appearance with a

Union member, another association with the union such a one

imply belonging. It should also be noted that the complainant in

her role as a works council member much more to the requirement of cooperation with the

Unions according to § 36 Abs. 2 ArbVG.

B. Subject of Complaint

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

through this

in

their right to secrecy

hurt

in which

she the

Complainant’s trade union affiliation in a letter dated 27 July 2018

their employees, their specialist management, their clients and their relatives

and disclosed to the mayor of N***.

C. Findings of Facts

1. The complainant was employed by the respondent and has her

Employment terminated on August 31, 2018. She is a member of the Union of

***.

2. On July 27, 2018, the Respondent sent a letter to her employees, her

professional management, their clients and their relatives as well as the mayor

transmitted. In this letter, the groups of people mentioned were informed about the

Termination of employment and representation of the complainant

informed by the trade union of *** (formatting not reproduced 1:1):

[Editor's note: the graphic file (Respondent's letter dated 27.

July 2018) was removed because it cannot be displayed pseudonymised in the RIS.]

Evidence assessment: The findings made are based on the initiating proceedings

Complaint by the complainant dated September 3, 2018, including the attached letter

the respondent

dated July 27, 2018

as well as the opinion of

Respondent of October 2, 2018. The Respondent subsequently has

no longer denied that they sent the letter of July 27, 2018 to their

Employees, the technical management, the clients and their relatives as well as the

mayor submitted.

3. The complainant was during

their employment at the

Respondent worked as a works councillor, she was also a member of the board of directors

Professional representation of the social care professions ***. The latter was also discussed in an article by

"*** Newspaper" from **. July 2018, in which the respondent commented on the situation in

Social and care area critically expresses.

Evidence assessment: The findings made are based on the opinion of the

Respondent of October 2, 2018 together with the documents submitted therein (in particular

newspaper clippings).

D. In legal terms it follows that:

1. On the scope of protection of § 1 Para. 1 DSG

a) Basics

According to § 1 Para. 1 DSG, everyone has the right to confidentiality of the data concerning him

personal data, insofar as there is a legitimate interest in it. The existence

such an interest is excluded if data as a result of their general

availability or due to their lack of traceability to the person concerned

secrecy claim are not accessible.

b) On "generally available data"

According to the established Rsp of the data protection authority, the very general assumption of the

absence

an injury

confidentiality interests worthy of protection

for

legitimately published data not compliant with the provisions of the GDPR,

why the restriction for "generally available data" standardized in § 1 para. 1 DSG

has to remain unapplied (cf. the notification of January 15, 2019, GZ DSB-

D123.527/0004-DSB/2018 with regard to § 27 para. 1 ÄrzteG 1998 and the decision of

October 31, 2018, GZ DSB-D123.076/0003-DSB/2018 mwN and the notice of

April 23, 2019, GZ DSB-D123.626/0006-DSB/2018).

c) On the "traceability of the data"

further

relate

itself

the

representational

relevant

information

(Surname,

trade union membership) indisputably to the complainant.

d) intermediate result

The scope of protection of § 1 Para. 1 DSG is therefore open in principle.

2. Regarding the restrictions according to § 1 Para. 2 DSG

Restrictions on the right to secrecy are then in accordance with Section 1 (2) DSG

permissible if personal data is in the vital interest of the person concerned

be used, the data subject has given his consent, if a qualified

legal basis for use exists, or if use by

overriding legitimate interests of a third party is justified.

The GDPR and in particular the principles enshrined therein are to interpret the

Right to secrecy (cf. the decision of the DSB of October 31, 2018,

GZ DSB-D123.076/0003-DSB/2018).

The use of data in question is not in the vital interest of the

Complainant and a consent as well as a legal obligation is also

little before.

However, legitimate interests of a third party come into question.

3. Weighing of Interests

a) General

First

It should be noted that union membership is one of the “particularly

data worthy of protection" according to § 1 Para. 2 second sentence DSG counts (cf. Art. 9 Para. 1 DSGVO).

b) Re Article 9 (2) (e) GDPR

If the Respondent relies on Article 9(2)(e) GDPR in this context

is based, it should first be noted that the exceptional circumstances of Art. 9 Para. 2 DSGVO

are in principle to be interpreted narrowly and the facts of the "obvious own

Publication" within the meaning of lit. e leg. cit. an act of will of the person concerned

requires. In case of doubt, no own publication will be accepted, rather this must be done

be proven by the person responsible (Kastelitz/Hötzendorfer/Tschohl in Knyrim, DatKomm

Art 9 GDPR, margin nos. 41-42).

According to the data protection authority, such proof was not provided:

Neither the fact that the complainant publicly communicated with members of the

trade union photographed, nor her work as a works council member and that

coherent cooperation with the union, can as a separate act of will to

publication will be assessed.

Apart from that, it should also be pointed out that the group of addressees is extremely wide

addressed by the Respondent in its letter of July 27, 2018. It is of it

it can be assumed that this also includes people who are union members

the complainant was not "obviously known".

This means that the prohibition principle of Art. 9 Para. 1 GDPR does not apply

Basis of Art. 9 Para. 2 lit. e leg. cit. was repealed.

c) Re Article 9 (2) (f) GDPR

The Respondent considers the "assertion, exercise

or defense of legal claims or where the courts are acting in their

judicial activity” within the meaning of Article 9 (2) (f) GDPR.

In this regard, it should be noted that the concept of “legal entitlement” is fundamentally broad

is to be interpreted and this covers both judicial and extrajudicial claims. Decisive

is, however, that there is a legal conflict (cf. the judgment of the Supreme Court of July 24, 2019,

6 Ob 45/19i, referring to the ship in Ehmann/Selmayr, Art. 9 GDPR margin no. 48).

In the present case, the Respondent merely expressed fears that

claims for damages arise in the future, but there are no concrete legal claims

before and were also not claimed.

Furthermore, it should be pointed out that in this context it is probably also due to the

Requirement of notification of union membership would fail to

to be able to ward off or defend such legal claims:

In the opinion of the data protection authority, it is not clear why it is necessary for the defence

from

(unspecified) legal claims would be required which

information of

trade union membership of the complainant to a larger group of addressees

To make available.

Therefore, neither the existence of a legal claim nor the necessity can be affirmed

be, which is why a justification according to Art. 9 Para. 2 lit f GDPR is out of the question

comes.

Other legitimate interests are not apparent to the data protection authority.

4. Result

As a result, it can be stated that the principle of prohibition according to Art. 9 Para. 1 DSGVO for lack

Permission according to Art. 9 Para. 2 leg. cit. was not repealed and neither

entitled

Interests of the Respondent in the objectively relevant

data processing are available.

The disclosure of the complainant's trade union membership in the communication of the

Respondent of July 27, 2018 was therefore unlawful.

It was therefore to be decided accordingly.