

GZ: 2020-0.103.803 from February 25, 2020 (case number: DSB-D122.871)□

[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□

Data Protection Authority decides on Iris A\*\*\*\*'s privacy complaint□

(Appellant) of March 6, 2018 against the Federal Ministry for□

National defence/counter-intelligence agency (respondent party) because of 1) violation of the right to□

confidentiality and 2) violation of the right to information as follows:□

- The appeal is dismissed.□

Legal basis: Section 1 of the Data Protection Act 2000 (DSG 2000), Federal Law Gazette I□

No. 165/1999 as amended to Federal Law Gazette I No. 132/2015; §§ 24 para. 5, §§ 36 ff and 69 para. 4 des□

Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended from Federal Law Gazette I No. 120/2017; §§ 22 e□

of the Military Authorization Act (MBG), Federal Law Gazette I No. 86/2000 as amended, §§ 1 ff of the regulation of□

Federal Minister of Defense on the declaration of reliability, Federal Law Gazette II□

No. 195/2001 as amended.□

REASON□

A. Submissions of the parties and course of the proceedings□

1. With submission dated March 6, 2018, amended with letter dated March 14, 2018,□

the complainant alleged a violation of the right to secrecy□

summarized by the fact that her brother, Eugen A\*\*\*, as part of an "extended□

Reliability check" the home address of the complainant dem□

Respondent had to announce. The complainant was about it□

only coincidentally on February 28, 2018 by phone through her brother and not from

"Federal Army" has been informed. The applicant's brother had

forced and therefore not voluntarily passed on their data, otherwise he

desired item, resulting in significant loss of income and

lead to career cuts.

2. With a statement dated April 5, 2018, the Respondent brought

summarized before that military departments with tasks of

intelligence services would be entrusted with matters of the military

National defense would be entitled to a reliability check according to § 23 MBG

to be carried out, in particular for persons who have access to legal military assets

should have or should have obtained one. According to § 24 MBG a related

Reliability check only on the basis of a declaration of reliability from the person concerned

with regard to his previous life and his current living conditions as well as with

obtain its approval. By decree of the Federal Minister for

National defense about the declaration of reliability are more detailed provisions u.a.

been made via the extended declaration of reliability, which also includes information on

residency of certain family members. See the explanations for the MBG

in addition, that the constitutional fundamental rights to data protection, as well as

respect for private and family life, but with regard to

national defense would not apply in certain matters.

3. The complainant submitted to the Respondent's comments in the granted

Party does not comment.

4. By letter dated July 17, 2019, the Data Protection Authority requested the

Respondent for additional comments.

5. With a supplementary statement of September 6, 2019, the

Respondent summarized that the purpose of the background check

according to §§ 23 and 24 MBG lies in a risk prognosis about the to be checked□

create person. As part of the examination of the proportionality of the intervention,□

each individual case, a weighing of interests with regard to the severity of a possible□

encroachment on fundamental rights. The desired success must be in a reasonable□

Proportionate to the damage or threats caused by the use of power□

expected to cause. In addition, here is the creation of a reliable□

Risk prognosis for one person required, so that subsequently none□

legal military interests would be endangered. Success is therefore in the state of protection□

of legal military interests and the preventive averting of attacks□

military legal interests. Since the information obtained also according to the□

legal requirements would be kept, a misuse and thus a□

Endangering the person concerned can be ruled out. In representational□

Matter lies neither a violation of the right to secrecy nor a□

Violation of the obligation to provide information in accordance with the provisions of the DSG.□

The application is therefore made to dismiss the complainant's complaint.□

6. The Appellant submitted to the Respondent's supplementary statement□

made no statement in the issued party hearing.□

7. By letter dated October 25, 2019, the data protection authority for the□

November 14, 2019 an inspection of the premises of the Defense Office. the□

Inspection was conducted on November 14, 2019.□

6. The complainant admitted to the - in the context of the hearing of the parties - submitted□

Summary note about the inspection from no opinion.□

B. Subject of Complaint□

The subject of the complaint is the question of whether the respondent through the processing□

personal data of the complainant in the context of□

Reliability check of the complainant's brother on their rights□

breached confidentiality and information.□

### C. Findings of Facts□

The data protection authority first puts the above under A. on file□

Documented facts based their decision, being in relation to the□

Assurance statement it is established that the complainant's brother□

(Eugen A\*\*\*) has filled out and submitted such a form.□

Evidence assessment: The findings result from the matching□

Submissions of the parties to the proceedings in their letters to the data protection authority.□

Mr. A\*\*\* has the reliability test on the occasion of the justification of a□

applied for the employment relationship itself, the application was processed by the S 2 service of the responsible□

Military commands (here military command \*\*\* - MilKdo \*) received.□

The reliability check was carried out on the basis of the□

standardized questionnaire ("Extended declaration of reliability according to § 1 Para. 1 Z 2□

Declaration of Reliability, Federal Law Gazette II No. 195/2001"). A sample form□

is in the act.□

Subsequently, the application filled out by Mr. A\*\*\* was sent by MilKdo \* together with□

physically combined with the applications of other people into a "collective file" and□

this collection file then also physically to the counterintelligence office for further examination□

submitted.□

Merely a completion letter from the MilKdo \*, in which reference is made to the submission of the□

Collection file is referred to, including the follow-up sheet, were sent to the Counterintelligence Office□

communicated (electronically) for information. Eugen A\*\*\*'s name does not appear on the□

first page of this settlement, but only on the following sheet. A search in□

electronic file management system of the counterintelligence office with the search parameters□

"Eugen A\*\*\*\*" is negative. Only as part of a so-called "full-text search".□

the data "Eugen A\*\*\*\*" the completion letter of the MilKdo \*, and thus the□

Business number, are assigned.□

On the basis of the MilKdo \* settlement letter, including the reference number, it is possible to□

physical application of Eugen A\*\*\* can be found in the physical filing cabinet (here:□

file box with the number Z\*\*\*\*\*-2018).□

There are several verified applications in the file box, the application of Eugen is A\*\*\*□

not separately marked in the overall collection and can therefore only be seen after viewing all□

applications are withdrawn.□

In "Supplement 2 to the extended declaration of reliability" by Eugen A\*\*\* appears - next to□

other entries – following handwritten entry (formatting not as in□

Original, handwritten entries in italics):□

“Relationship to this person: brother/sister□

Surname: A\*\*\*□

First name: Iris□

previous names: -□

Place and country of birth: \*/Austria□

Date of birth: \*.\*\*.1974□

Citizenship(s): Austria□

Profession: \*employee□

Place of residence: \*\*\*\* Vienna, \*\*gasse \*\*/“□

The complainant's data were obtained from the respondent as part of the□

Reliability check of the Eugen A\*\*\*not processed electronically.□

The electronic data processing of the complainant's data in□

The file management system of the Counterintelligence Office relates exclusively to the□

present complaints procedure.□

Evidence Assessment: This follows from the one conducted on November 14, 2019□

Inspection, during which the data protection authority made sure that the data□

of the complainant solely in connection with the present□

Complaints procedures are processed electronically. This was done by querying the□

electronic file management system of the countermeasures office. the□

The data protection authority was also able to determine that the data of the complainant□

in connection with the reliability test of Eugen A\*\*\* only analogously in the application□

des Eugen A\*\*\* appear and this application only in the manner described above□

can be excavated.□

D. In legal terms it follows that:□

D.1 Legal situation:□

D.1.1. Violation of § 1 Para. 1 DSG 2000:□

This part of the complaint is subject to procedural law according to the new legal situation (DSG idF□

BGBI. I No. 24/2018) according to § 24 Para. 5 DSG. Material law is the□

However, after the - before February 28, 2018 (time of the alleged□

violation of the right to secrecy) - applicable provisions of the DSG (2000)□

as amended by Federal Law Gazette I No. 83/2013.□

An encroachment on the fundamental right to data protection is not of a specific form□

dependent. According to the case law of the Administrative Court on § 1 Para. 1 DSG□

2000 grants these provisions a comprehensive claim to secrecy□

personal data, regardless of the technical-organisational□

conditions of their processing. The Constitutional Court also has in its cognition□

VfSlg. 19.937/2014 pronounced that the right to secrecy according to § 1□

Para. 1 DSG 2000 does not refer to data processed by automated means or manually□

data is restricted (cf. the knowledge [editor's note: des□

Administrative Court] of February 28, 2018, Ra 2015/04/0087).□

The scope of § 1 DSG 2000 is thus opened up in any case.□

There is no violation of the fundamental right to secrecy according to Section 1 (1) DSG 2000□

before, if the data processing is based on the consent of the person concerned, in their

vital interest or to protect overriding legitimate interests

others, and in the case of interventions by a state authority only on the basis of one

qualified legal basis (§ 1 Abs. 2 DSG 2000).

Since the intervention of a state authority - the respondent -

is to be attributed, it must be checked whether the intervention was carried out by a qualified statutory

basis is covered.

Sections 23 and 24 MBG read in extracts:

reliability check

§ 23. (1) Military departments with tasks of intelligence

Defense are entrusted, may in matters of military national defense

Carry out a reliability check. A reliability check is the clarification of the

Reliability of a person based on data that provides information about whether

There are indications that this person poses a threat to the military

security runs out.

(2) [...]

(3) A reliability check may be carried out with regard to persons who

1. Have or should have access to legal military interests in accordance with Section 1 (7) no. 3

or

2. being in the vicinity of people or things, their protection and

Security is required as part of the military security service.

(4) [...].

Carrying out the reliability test

§ 24. (1) A reliability check is only required in the cases of § 23 Para. 3 Z 1

Reason for a declaration of the person concerned regarding his past life and his

current living conditions (declaration of reliability) and with his consent

to perform. The Federal Minister of Defense has issued an ordinance with more details□

to issue provisions on the declaration of assurance.□

(2) In the reliability check, those data are to be included that are associated with tasks□

military agencies entrusted with counterintelligence.□

In addition, by way of a request for information according to § 21 or § 22 para. 2□

be determined□

1. in the case of § 23 Para. 3 Z 1 to check the correctness and completeness of the□

information required by the auditee and□

2. in the case of § 23 para. 3 no. 2, the data without which the execution of the□

reliability test would not be possible.□

When including data in a reliability check, the□

Maintaining proportionality between the interests of private and family life□

of the person concerned and the overriding public interest.□

(3) In the case of a reliability check according to § 23 Para. 3 Z 1□

limit investigations to the verification of the declaration of assurance.□

If the results of such investigations contradict the declaration of reliability,□

give the person concerned the opportunity to comment.□

Section 3 of the Ordinance on the Declaration of Reliability reads in part:□

§ 3. (1) The reliability check is based on an extended□

Assurance Statement□

to be carried out if the person concerned has access to military areas or army property□

or military secrets, the impairment of which□

represents a significant disadvantage for military security.□

(2) Within the framework of the extended declaration of reliability, in addition to the□

subject areas□

according to § 2 para. 2, only information on the following subject areas is required:□



[...]

3. Name, place and date of birth, citizenship, occupation and residence of

a) children, siblings, former spouses or life partners and

b) other closely related or closely related by marriage or better known

Persons,

each with relevance to military security,

[...].

As noted, the applicant's brother gave an extended

declaration of reliability. As stated, this was checked by the Defense Office.

As far as the complainant is concerned, the data established above

processed.

In total, therefore, the data processing that is the subject of the proceedings takes place

Appellant coverage in the cited provisions, which is why a violation in

There is no right to secrecy.

D.1.2. Breach of information obligations:

This part of the complaint is procedurally based on the new legal situation (DSG, Federal Law Gazette I

No. 165/1999 as amended by Federal Law Gazette I No. 24/2018) in accordance with Section 24 (5) DSG. temporal

does the alleged infringement continue, since the respondent is also in the current

Proceedings before the data protection authority until its conclusion

information obligations have not been complied with.

The data processing that is the subject of the procedure falls under Chapter 3 of the DSG,

because they are used by a competent authority (cf. § 36 Para. 2 Z 7 lit. a DSG) for purposes

military self-protection (cf. § 36 Para. 1 DSG in conjunction with § 2 Para. 1 Z 2 MBG)

took place.

The competence of the data protection authority is based on § 31 paragraph 1 DSG and was

moreover not in doubt.

§ 43 DSG obliges the person responsible for certain

provide information on the processors of their data.

Chapter 3 of the DSG implements Directive (EU) 2016/680. This policy applies

in accordance with Article 2 Paragraph 2 for fully or partially automated processing

personal data and non-automated processing

personal data stored or stored in a file system

should be.

The §§ 36 ff DSG are therefore in the light of this factual scope

interpret.

As noted, the complainant's data were collected as part of the

Her brother's reliability check not processed automatically. So it's for

the application of §§ 36 ff DSG requires that the non-automated processing

takes place in such a way that the data processed in this way is stored in a file system or

are to be saved.

According to § 36 para. 2 Z 6 DSG "file system" means any structured collection

personal data that are accessible according to certain criteria

of whether this collection is centralized, decentralized or by functional or

geographic points of view.

According to the case law of the ECJ on the comparable definition under the Directive

95/46/EG there is always a file if a structured collection

personal data is given, which makes it easy to find a person

guaranteed (see the judgment of July 10, 2018, C-25/17 margin number 52 ff).

Applied to the present case, this means the following:

In order to retrieve the complainant's data, it is first necessary to

know that she is Eugen A\*\*\*'s sister and that he is an extended one

submitted a declaration of reliability.

Since the search for the declaration of reliability of the reference person - Eugen □

A\*\*\* - as noted, causes considerable effort and the data of □

Complainant only in "Supplement 2 to the extended declaration of reliability" □

appear and this supplementary sheet must be specifically sought out in the overall bundle, □

cannot be assumed that their easy retrieval □

data is possible. □

The complainant's data are therefore not processed in a file system □

why the §§ 36 ff DSG, and thus also the obligation to inform the □

affected person according to § 43 DSG, do not apply. □

D.1.3. summary □

In summary, therefore, the alleged infringement does not exist. □

It was therefore to be decided accordingly. □