

Litigation Chamber

Decision on the merits 138/2021 of 8 December 2021

File number: DOS-2020-04026

Subject: Complaint for unlawful processing of personal data and failure to react  
on request for erasure

The Litigation Chamber of the Data Protection Authority, made up of Mr. Hielke Hijmans,  
chairman, and Messrs. Dirk Van Der Kelen and Frank De Smet, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 relating to the protection  
of natural persons with regard to the processing of personal data and to the free movement  
of this data, and repealing Directive 95/46/EC (General Data Protection Regulation),  
hereinafter “GDPR”;

Having regard to the law of 3 December 2017 establishing the Data Protection Authority, hereinafter "LCA”;

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;  
made the following decision regarding:

the complainant :

Mr. X, represented by Mr. A. Coolsaet, hereinafter “the plaintiff”;

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the defendants:

Y1 and Y2 together, represented by Me Jonas de Wit and Me Wouter Rubens, below  
the "first defendant" and Z1 and Z2, represented by Me Ine Smisdom and Me Ilka Buys,  
hereinafter the "second defendant".

## I. Facts and procedure

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1. On September 17, 2020, the complainant filed a complaint with the Data Protection Authority  
against the defendants.

2.

This is a complaint by Mr. X (former secretary of Y1) against Y1 as well as against Y2 and Z1.

The personal data of the complainant are mentioned in an audit report entitled

Organisatiestudie WZC [...] which was written on behalf of Y1. According to the complainant, counsel  
municipal authority of Y2 used the content of the audit report when appointing a new director

general. The complainant previously wanted to exercise his right to erasure with the first

and second defendants through his attorney. The defendants did not access his

request. Furthermore, the complainant claims that there is no valid legal basis for the processing  
of his personal data in the organizational study (audit).

3. On October 27, 2020, the complaint was declared admissible by the Front Line Service on the basis  
of Articles 58 and 60 of the LCA and the complaint is transmitted to the Litigation Chamber pursuant to  
Article 62, § 1 of the LCA.

4. For a good understanding of the facts and of this decision, the Litigation Chamber

will first provide some general information and try to give a description of the

position and function of the complainant within Y1. It appears from the conclusions and exhibits

that the complainant had held the position of secretary of Y1 since 1 April 1993.

This function was initially based on a statutory designation. On December 22, 2017, the

Decree on local administration entered into force. Under this decree, a single director

general would now lead the two local administrations (Y1 and Y2) rather than the two

secretaries who filled the function until then.□

5. In his capacity as secretary of Y1, the complainant was ultimately responsible for the general management of□  
the organization of Y1, including the Woonzorgcentrum (residential care center) '[...]', which is a□  
establishment of Y1. After endlessly recurring alleged warnings about worries at□  
within the Woonzorgcentrum, it was decided, after deliberation by the Permanent Bureau, to□  
conduct an organizational study to analyze the organizational structure and management□  
of the WZC. The contract to carry out this study was awarded to the second respondent on□  
November 7, 2019.□

6. On January 6, 2020, the President and members of the Permanent Bureau of Y1 received an email from□  
data protection officer of the second defendant regarding the launch and□  
the execution of the organizational study. It can be read in the e-mail that when carrying out□  
study, privacy will be respected at all times. The email draws attention to the principles of□  
processing of data which will be respected. It is also underlined that the planned investigation□  
will be anonymous and no personal data will be processed. The delegate to the□  
data protection therefore requests that it be sent the questionnaires on which□  
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contains no identifiable data such as IP addresses. Neither the questions asked nor the answers□  
provided cannot lead to the identification of the person. The report of this study□  
organizational structure was finalized on February 20, 2020.□

7. Referring to Article 583, § 1 of the Decree on local administration, the municipal council decided□  
at the meeting of July 19, 2018 to offer the position of Chief Executive Officer as a priority to incumbents□  
in place and not to declare it vacant externally. Since the municipal council has indicated□  
at that time not having sufficiently reliable data to definitively close this□  
appointment procedure, there had not yet been a concrete call from the incumbents,□  
to the reasoned comparison of titles and merits, nor to the final designation.□

8.□

It appears from the documents produced that by decision of the college of mayors and aldermen, the file relating to the selection and appointment of the Chief Executive Officer was finally submitted to the Board communal meeting of May 28, 2020, meeting on the agenda of which the taking of the oath (of a general manager) was also listed. On the same day, a definitive managing director was appointed for Y1 and Y2 which combined the function of municipal secretary and secretary of Y1. Between the two candidates, of which the complainant was one, the other candidate was chosen.

9. The plaintiff's lawyer states in particular in her conclusions: "That there were rumors tenacious claims that the organizational study was only a pretext to be able to spread - in a falsely objectified way - unfounded criticism, in particular that it would serve as a alleged ammunition for later comparison of titles and merits between Madame Z and my client with a view to appointing the managing director. This has also been fully corroborated and emerges from multiple elements."

carried out by the translation service of the General Secretariat of the Data Protection Authority data, in the absence of an official translation]. In addition, further to the foregoing, it has been pointed out several times that the other candidate had been, so to speak, favored by an image biased to his advantage.

10. On January 4, 2021, 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.

11. On January 4, 2021, 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 submissions in response from the defendants was fixed at February 15, 2021, that for the plaintiff's reply submissions on March 8, 2021 and that for the submissions in reply of the defendants on March 29, 2021.

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12. On January 14, 2021, the second respondent agrees to receive all communications relating to

to the case by electronic means and requests a copy of the file (art. 95, § 2, 3° of the LCA), which  
was transmitted on January 18, 2021.

13. On March 8, 2021, the Complainant agrees to receive all communications relating to the matter by  
electronically and expresses its intention to make use of the possibility of being heard if the  
defendants use this possibility, this in accordance with Article 98 of the LCA.

14. On February 13, 2021, the First Respondent agrees to receive all communications relating to  
to the case electronically and expresses its intention to make use of the possibility of being heard,  
this in accordance with Article 98 of the LCA.

Submissions in reply of the first defendant

15. On February 15, 2021, the Litigation Chamber receives the submissions in response from the first  
respondent. It is explained there that there would be permanent worrying signs concerning the  
management and operation of the Woonzorgcentrum. Especially during the last  
period during which the complainant performed the function of secretary from Y1 to Y2. The nurse in  
head of the Woonzorgcentrum at the time was allegedly the spouse of the plaintiff and there was talk  
of a breakup. After the revelation of these signs, the Permanent Bureau of Y1 deliberated on several  
occasions on the functioning of the Woonzorgcentrum. During a third deliberation on this subject,  
it would have been decided to submit the Woonzorgcentrum to an audit with the help of a professional  
external.

16. According to the first respondent - contrary to the plaintiff's allegations - during the execution of  
organizational study, there was no question of collecting "ammunition" to be able to  
subsequently compare the qualifications and merits of the complainant and the other candidate in the context of the  
final appointment of a managing director for Y1 and Y2. Furthermore, given the chronological order in  
which everything happened, there can be no question of carrying out a study in order to use it later  
to the detriment of the plaintiff. The Permanent Bureau had already named Z1, the second defendant, the  
November 7, 2019 to carry out an organizational study concerning the Woonzorgcentrum '[...]'.  
The municipal council of Y2 decided, several months later, on February 20, 2020, to provide for the

position of Chief Executive Officer via an internal call, in accordance with Article 583, § 1 of the Decree on local administration. The complainant, as secretary of Y1, as well as Mrs Z, who was municipal secretary, were given priority when applying. Therefore, - unlike the complainant's allegations - it could not be established as of November 7, 2019 that a comparison of the titles and merits would be made between the plaintiff and Mrs Z.

17. According to the first defendant, it is only later that a detailed comparison of titles and merits of Mrs Z on the one hand and of the complainant on the other hand has been carried out.  
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18. The organizational study consisted in part of an anonymous survey of staff at the means of questionnaires. The other part of the study consisted of workshops with employees and interviews with managers and final managers. This made it possible to Write the final report of the study.

19. According to the First Respondent, the Complainant was informed from the outset that interviews and workshops would also take place during the execution of the study. This was indeed also in second defendant's offer and information letter.

20. On February 21, 2020, the report of the organizational study was provided by the second defendant to the first defendant. The discussion of this report was placed on the agenda of the Bureau Permanent from March 13, 2020 but was postponed to May 19, 2020. According to the first defendant, it was therefore impossible for the complainant to become aware of this document only in June 2020. As as secretary of Y1, the complainant was indeed responsible for the Permanent Bureau and attended the meeting, sent the agenda and forwarded the minutes. Therefore, it is highly unlikely that the Complainant did not see the exhibits or only did so on June 22, 2020.

On March 16, 2020, the complainant himself sent the agenda to the members of the Permanent Bureau with in point 2 "discussion of the organizational study of the WZC [...]".

21. The First Respondent asserts that, as has always been indicated, the written investigation within the

staff was organized and conducted anonymously. Therefore, according to the first defendant, the plaintiff cannot assert that it was a question of data processing at personal character through anonymous questionnaires. The plaintiff's argument that relies entirely on this anonymous written staff survey does not hold water according to the first defendant.

22. The first respondent acknowledges that this is a processing of personal data of the complainant via the workshops/surveys without having obtained the consent of the persons concerned within the meaning of Article 6 of the GDPR. It was also impossible within the framework of a processing of personal data which has, as in this case, been collected from an indirect way. However, the fact that there was no question of consent does not mean in no way that the processing is unlawful.

23. There are legal tasks which must be performed by the first respondent under the Decree on local administration, with regard to the own internal control of which the service public and a good internal operating structure and organization. The law organic X also confers on the first defendant several objectives of public service and of interest general. It is for these reasons that it is necessary to be able to have a good vision of organization and internal functioning that could be established by means of the study organization of the Woonzorgcentrum '[...]'.

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24. The processing of personal data is legitimized, according to the first defendant, by the legitimate and weighted interest in the optimization of the organization and the (public) service. This service is indeed financed by public means. Therefore, the interest of the first defendant prevails, in his view, over the private interest of the plaintiff. In addition, only professional data from the complainant were processed within the framework of the organizational study of the Woonzorgcentrum '[...]'. He ... not it was not a processing of sensitive data and/or data relating to his private life.

25. Furthermore, the first defendant was bound by a material duty of care as well as a legal duty

of investigation to confront all the relevant factors and all the circumstances between them within the framework of the comparison of the titles and merits of the persons who have candidates for the position of general manager. A high-quality investigation was therefore required, especially because it was a job in the public interest. According to the first defendant, the treatment was proportional. Added to this is the fact that all staff members of the defendants are bound by professional secrecy. The decision to appoint the Chief Executive Officer was taken behind closed doors, which largely limited its free dissemination/communication. Considering of the foregoing, the processing of personal data referred to can be considered as necessary for the performance of legal tasks in the public interest, within the meaning of Article 6, paragraph 1, point e) of the GDPR.

26. The first respondent rejected the complainant's request to have his personal data personal data are erased, introduced in accordance with Article 17 of the GDPR, given that it was not one of the cases listed in Article 17(1) of the GDPR<sup>1</sup>. Now it's about of the exception as defined in Article 17(3)(b) GDPR<sup>2</sup>, given that the first defendant processes the data for the performance of legal tasks entrusted to it entrusted and which must be respected in the public interest.

<sup>1</sup> Article 17, paragraph 1 of the GDPR: "The data subject has the right to obtain from the controller the erasure, as soon as possible, of personal data concerning him and the data controller has the obligation to erase this personal data as soon as possible. deadlines, when one of the following reasons applies:

a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed way;

b) the data subject withdraws the consent on which the processing is based in accordance with point (a) of Article 6(1) or Article paragraph 2(a) and there is no other legal basis for the processing;

c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing; the data subject objects to the processing pursuant to Article 21(2);

the personal data has been unlawfully processed;



d)□

e) the personal data must be erased to comply with a legal obligation which is provided for by Union law or by the right of□  
the Member State to which the controller is subject;□

(f) the personal data was collected in the context of the offer of information society services referred to in Article 8(1)."

2Article 17, paragraph 3 of the GDPR: "Paragraphs 1 and 2 do not apply insofar as this processing is necessary:□

b) to comply with a legal obligation which requires the processing provided for by Union law or by the law of the Member State to which the controller is subject, or to carry out a task in the public interest or in the exercise of official authority vested in the person responsible for the processing;□  
treatment;□

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Submissions in reply of the second defendant□

27. The second defendant indicates that at the request of the first defendant, he issued an offer on□

October 15, 2019 in order to carry out an organizational study on the Woonzorgcentrum '...' which□

is operated by Y1, whose main goal was "to ensure the maximum continuity and quality of the□

service in the WZC" and he believes that an "organizational study can provide the guidelines and□  
necessary lighting".□

In addition, it is requested to clearly take into account the following:□

-□

"Y1 is looking for a high-performing, forward-looking organization with leadership□

sustainable, in particular leadership that is based on direction and support based on□

several principles: active leadership, encouragement, flexibility, an approach□

ethics, the search for solutions, innovation and collaboration.□

- A clear plan of structural approach, focused on the future."□

28. On November 7, 2019, the Permanent Bureau of Y1 instructed the second respondent to carry out a□

organizational study, in accordance with the offer of October 15, 2019.□

29. On January 6, 2020, following the information letter, the data protection officer of Y1□

(as noted above) emailed the Steering Group and the second defendant□

concerning the application of the GDPR in the context of the execution of the organizational study.□

The second defendant indicates that he therefore obtained the opinion of his adviser on GDPR.□

Then, he collaborated within the framework of his mission as a subcontractor.□

30. The second defendant then provided a questionnaire to the first defendant who was the donor□

of order, questionnaire which could be completed via a specific link. The questionnaire had□

in particular for purpose the structure and culture of the organization, the leadership within□

the organization. Possible responses were general statements such as 'not at all□

agree', 'tend to disagree', 'tend to agree', 'not applicable' and 'don't know'.□

31. The first defendant then put the link on which the questionnaire could be completed as well□

that□

the paper version of the questionnaire available to all□

the employees of□

Woonzorgcentrum and support services. The second defendant specifies that in order to hold□

account of Y1's data protection officer email account, he explicitly added the mention□

following in the questionnaire: "the answers are treated completely anonymously.□

The complete data is reported as a group, so that one cannot□

never find out who gave which answer".□

32. A detailed analysis of the documents was carried out by the second defendant, in particular□

organization chart, organizational structure and job descriptions. Workshops have□

also been organized with employees. According to the second defendant, this took place on the□

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based on several assertions. In its conclusions, the workshop method is described as□

follows:□

"As part of the workshop, the functioning and structure of the organization were assessed□

interactive way by the employees themselves. Several assertions were made□

in each session. The participants were asked, by affirmation, to indicate via post-its of□

color, to what extent the statement applied in the organization. After each round, the opinions of the participants were thorough. The leaders did not participate in the workshops in order to explicitly allow employees to give organization.” their vision of the functioning of

33. Finally, the interviews of the leaders and final managers were organized. Interviews with direct managers focused on the actual execution of tasks. The second defendant emphasizes that in the context of workshops and interviews, the protection of employees participants took center stage. It was not noted which collaborator, manager or final manager had given what advice. If within the framework of the workshops and interviews, a employee, manager or final manager had an opinion about certain people, it was noted.

34. On May 28, 2020, the second defendant received a letter from the plaintiff's lawyer asking him to withdraw the organizational study before the start of the municipal council meeting on the same day. The second defendant was unable to comply with this request since, as a subcontractor, he was in no position to do so. On July 10, 2020, the second defendant received a letter from the complainant who believed that the processing of personal data concerning him constituted a violation of the GDPR. He requested the erasure of this data. The second defendant again clarified that he could not respond to the complainant's letter given that he was only a subcontractor.

35. According to the second Respondent, the Complainant's claims are unfounded because of his status as subcontracting. It was the first defendant who determined the purpose and means of the study. The processor is the one who processes personal data on behalf of and according to the instructions from the controller. Therefore, it is the first defendant who determined the essential elements of treatment. According to the second defendant, it is indisputable that the second defendant did not participate in determining the purposes of the processing and in no way

used the data for their own purposes.□

36. Moreover, according to the second defendant, the plaintiff is misled regarding the identity of the first□

appointed. In his submissions in reply, the complainant drew attention to the exhibits relating to□

Z1, referring to a validity period and assessments. Z1 is however a separate entity□

within Z2 and cannot be confused with Z2. Z1 targets the recruitment and selection for□

public institutions while Z2 carries out organizational studies. Then the plaintiff□

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confuses several elements of organizational study. The questionnaire is indeed anonymous.□

It is therefore impossible to find out who answered what when completing the questionnaires.□

In addition, there is the outcome of workshops and interviews. In this context, employees and□

leaders were questioned about the functioning of the organization by means of statements□

general. They had the opportunity to give their opinion on the operation, the leaders, etc.□

In this context, the complainant was not the only one to be mentioned, the head nurse, the head nurse□

acting as well as the director have also been. Viewpoints were noted and□

mentioned in the final report without indicating where they came from. According to the second defendant and□

contrary to the assertions of the complainant, the methodology of the organizational study is indeed□

and well professional and based on industry standards.□

37. On September 14, 2021,□

the parties are□

informed of the fact that□

the hearing will have□

venue□

the□

November 23, 2021.□

38. On November 23, 2021, the parties are heard by the Litigation Chamber.□

39. On November 26, 2021, the minutes of the hearing are submitted to the parties.□

40. On December 1, 2021, the Litigation Chamber received a few remarks from the complainant on the minutes.

## II. Motivation

### II.1 Scope of the dispute

41. The Litigation Division notes that this case is part of a larger dispute between the Complainant and principally the First Respondent regarding the subject appointment of the first appointed as secretary of Y1. It goes without saying that the Litigation Chamber is limited to questions relating to data protection and the processing of personal data of the plaintiff included in the organizational study of the second defendant.

### II.2 Identification of the data controller (article 4.7) of the GDPR)

42. In accordance with Article 4.7) of the GDPR, the data controller is: "the natural person or legal entity, public authority, service or other body which, alone or jointly with others, determines the purposes and means of the processing".

43. The Court of Justice of the European Union has interpreted the concept of "controller" of broadly in its case law in order to ensure effective and comprehensive protection of

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persons concerned<sup>3</sup>. According to the EDPB Guidelines 07/2020, this is a quality functional which must be assessed on the basis of the factual situation per concrete case.

44. In the present case, the Litigation Division first notes that the first defendant carried out processing of personal data within the meaning of Article 4(2) of the GDPR, namely "any operation or set of operations whether or not carried out using automated processes and applied to personal data or sets of personal data, such as the collection, the recording, organization, structuring, storage, adaptation, or modification, the extraction, consultation, use, communication by transmission, dissemination or any other form of provision, reconciliation or interconnection, limitation, erasure or destruction".

45. The aforementioned guidelines provide: "In practice, if a controller engages a processor to carry out the processing on its behalf, it often means that the processor shall be able to make certain decisions of its own on how to carry out the processing. The EDPB recognizes that some margin of maneuver may exist for the processor also to be able to make some decisions in relation to the processing. In this perspective, there is a need to provide guidance about which level of influence on the "why" and the "how" should entail the qualification of an entity as a controller and to what extent a processor may make decisions of its own."<sup>4</sup>

processing engages a processor to carry out the processing on its behalf, this often means in practice that the subcontractor may take certain decisions himself on the way which it performs the processing. The EDPB acknowledges that there may be some leeway so that the processor can also make certain decisions related to the processing. In this perspective, it is necessary to provide guidelines on the question of whether what degree of influence on the "why" and "how" must lead to the qualification of an entity as controller and to what extent a processor can take decisions himself."

46. Using the documents provided, the Litigation Division finds that it is the first defendant who has determined the purposes and means of the processing of personal data in question. The first defendant, as contracting authority, had in fact awarded the second defendant the public contract for the execution of the organizational study relating to the 'WZC [...]'. It appears from the documents submitted in the pleadings that the first defendant determined the purposes and means for carrying out the organizational study, both when requesting the offer only during the subsequent execution of the organizational study. The objective of the study was to effect of analyzing the structure of the organization in order to obtain clarity on the signs of concern among the collaborators concerning the management of the Woonzorgcentrum.

3 See in particular CJEU, 5 June 2018, C-210/16 - Wirtschaftsakademie Schleswig-Holstein, ECLI:EU:C:2018:388, recitals 27-28.

4 EDPB Guidelines 07/2020 on the concepts of controller and processor.

07/eppb\_guidelines\_202007\_controllerprocessor\_final\_en.pdf, point 37.□

in the GDPR, <https://edpb.europa.eu/system/files/2021->□

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47. The request of the first respondent to the second respondent was as follows: "The Permanent Bureau□ believes that the only way to obtain clarity on this subject is a rapid and independent audit of□ organization of the Woonzorgcentrum."5 Carrying out the aforementioned study required the collection of□ personal data. The fact that the second defendant made proposals during□ performance of the contract and used certain methods to carry out the study does not mean□ by no means that the second defendant should also be considered responsible for the□ treatment.□

48. The first respondent also acknowledges itself as being the controller. Bedroom□ Contentious, however, notes that no subcontract has been produced by the□ defendants6.□

49. Based on the foregoing, the Litigation Division finds that the first defendant must□ be considered as the sole data controller within the meaning of Article 4.7) of the GDPR for the□ processing of personal data that is the subject of the analysis. The second defendant□ must be considered as a subcontractor within the meaning of Article 4.8) of the GDPR which processes data to□ personal nature for the benefit of the controller.□

50. Both the first defendant, as controller, and the second defendant, as□ as a subcontractor, are therefore required, by virtue of this quality, to ensure compliance with the□ principles of the GDPR, in accordance with the responsibility set out in articles 5.2 and 24 of the GDPR.□

### II.3 Lawfulness of personal data processing□

51. Processing of personal data must be based on one of the legal bases of□

Article 6.1 of the GDPR, worded as follows:□

"Article 6 Lawfulness of processing□

1. Processing is only lawful if and insofar as at least one of the following conditions is□

filled: ☐

a) the data subject has consented to the processing of his or her personal data for one or ☐  
several specific purposes; ☐

b) the processing is necessary for the performance of a contract to which the data subject is a party or to ☐  
the execution of pre-contractual measures taken at the latter's request; ☐

5 Offer with description of the claims of the first defendant of October 2019. ☐

6 See points 69-70 of this decision. ☐

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c) processing is necessary for compliance with a legal obligation to which the controller ☐  
is submitted; ☐

d) processing is necessary to protect the vital interests of the data subject or of a ☐  
other natural person; ☐

e) the processing is necessary for the performance of a task carried out in the public interest or relating to the exercise of ☐  
the public authority vested in the controller; ☐

f) processing is necessary for the purposes of the legitimate interests pursued by the controller ☐  
or by a third party, unless the interests or the fundamental rights and freedoms of the person prevail ☐  
concerned which require the protection of personal data, in particular when the person ☐  
concerned is a child. ☐

Point (f) of the first paragraph does not apply to processing carried out by public authorities in ☐  
the execution of their missions. ☐

2. Member States may maintain or introduce more specific provisions to adapt ☐  
the application of the rules of this Regulation with regard to processing for the purpose of complying with the ☐  
paragraph 1, points (c) and (e), determining more precisely the specific requirements applicable to the ☐  
processing as well as other measures to ensure lawful and fair processing, including in other ☐  
special processing situations as provided for in Chapter IX. ☐

3. The basis for the processing referred to in paragraph 1, points c) and e), is defined by: ☐



a) Union law; Where

(b) the law of the Member State to which the controller is subject.

The purposes of the processing are defined in this legal basis or, with regard to the processing referred to

in point (e) of paragraph 1 are necessary for the performance of a task carried out in the public interest or

the exercise of official authority vested in the controller. This legal basis can

contain specific provisions to adapt the application of the rules of this Regulation, between

other: the general conditions governing the lawfulness of the processing by the controller; them

types of data that are subject to processing; the people concerned ; the entities to which the

personal data may be communicated and the purposes for which they may

being ; purpose limitation; retention periods; and processing operations and procedures,

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including measures to ensure lawful and fair processing, such as those provided for in other

special processing situations as provided for in Chapter IX. Union law or the law of

Member States meets an objective of public interest and is proportionate to the legitimate objective pursued."

52. In its previous decisions, the Litigation Division has pointed out that before processing, the

controller had to designate a basis of lawfulness on the basis of which he wishes

process personal data. The requirement of a lawful basis is a

the three main principles – along with those of fairness and transparency – of data protection,

in accordance with Article 5(1)(a) GDPR.

53. The different bases of lawfulness entail several consequences, in particular with regard to

concerns the rights of data subjects. For the above reason, it is not allowed

that the data controller invokes one or the other legal basis, depending on the

circumstances<sup>7</sup>. Indeed, the choice of a legal basis involves consequences, in particular in terms of

with regard to the rights of data subjects.

54. The first defendant invokes Article 6, paragraph 1, e) of the GDPR and claims in this context "to have

several (legal) obligations under the Local Government Decree with regard to the

internal control (i.e. the public service it must provide. This indeed requires good

internal operational structure and good internal organization). In addition, Organic Law X

also confers on the defendants several public service/general interest objectives

(particularly in terms of social assistance and services). In order to achieve these legal purposes,

it is necessary that the defendants can have a good organization

(organizational structure and culture) and good internal functioning; project within the framework

which is part of the organizational study on the Woonzorgcentrum '[...]' referred to."<sup>8</sup>

55. In its submissions, the First Respondent refers more specifically to Article 583 of the Decree on

local administration<sup>9</sup>. According to him, as a public authority, he is bound by an obligation

<sup>7</sup> Decision on the merits 55/2021 of April 22, 2021 of the Litigation Chamber.

<sup>8</sup> First Respondent's Response, p. 19.

<sup>9</sup> Article 583 of the Decree on local administration "§ 1. If the holder of the function of municipal secretary and that of the function

public of social action which serves the municipality are different people, or if one of the two functions is occupied, the municipal

call on the incumbents or, as the case may be, the incumbent, to submit his candidacy for the post of Chief Executive Officer with

the college of mayors and aldermen determines which persons have submitted an admissible application in due time. If only one

persons referred to in the first paragraph has applied in time, the person in question will be automatically appointed director general

at the end of the application deadline, keeping his contract. If two of the persons referred to in the first paragraph apply in time, the

municipal council will appoint general manager, no later than August 1, 2018, one of the two people in question, who will keep his

a systematic comparison of titles and merits. If none of the persons referred to in the first paragraph apply in time or if the board

has not made use of the possibility referred to in the first paragraph, the municipal council will fill the position by recruitment or promotion

municipal determines the conditions of the office of director general and determines the selection procedure for this purpose. The

according to the job description with job profile and skill requirements as well as according to the assessment against the

terms.

§ 2. If the holder of the function of financial manager of the municipality and that of the function of financial manager of the public

who serves the municipality are different people, or if one of the two functions is occupied, the municipal council can call the holder

where applicable, the incumbent, to apply, within thirty days, for the position of Chief Financial Officer. At the end of the period, the

and aldermen determines which persons have applied in a timely manner. If only one of the persons referred to in the first paragraph has applied in time, the person in question will be appointed as of right the financial director of the municipality. If two of the persons referred to in the first paragraph apply in time, the municipal council, no later than August 1, 2018, will appoint one of the two persons in question as Chief Financial Officer, who will keep his contract until the end of the application deadline, keeping his contract. If two of the persons referred to in the first paragraph apply in time, the municipal council, no later than August 1, 2018, will appoint one of the two persons in question as Chief Financial Officer, who will keep his contract until the end of the application deadline, keeping his contract. If none of the persons referred to in the first paragraph apply in time or if the board does not make a systematic comparison of titles and merits. If none of the persons referred to in the first paragraph apply in time or if the board does not make a systematic comparison of titles and merits.

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decree to carry out a systematic comparison of the qualifications and merits of the candidates for the position of general manager of Y1 and Y2.

56. The complainant rejects the use of Article 6, paragraph 1, e) of the GDPR and asserts that "The obligation to carry out a self-assessment and a quality survey - also applicable for most of the organizations - in no way unconditionally justifies the manner in which the WZC attempts to fulfill its obligation ; the 'public interest' and the 'decretal obligation to compare qualifications and merits' require precisely a relevant motivation".

57. The Litigation Chamber emphasizes that recourse to the grounds of lawfulness set out in Article 6.1.e) of the GDPR implies that the data controller must be able to demonstrate that: a) the latter is invested in a task carried out in the public interest or in the exercise of official authority and b) the processing in question is necessary for the execution of the aforementioned mission.

58. Recital 45 of the GDPR specifies the following concerning the processing of personal data by personnel on the basis of Article 6.1.e):

"When the processing is carried out in accordance with a legal obligation to which the controller is subject or when it is necessary for the performance of a task in the public interest or in the exercise of official authority, the processing should have a basis in law of the Union or in the law of a Member State. (...) It should also be part of Union law or the right of a Member State to determine the purpose of the processing. Furthermore, this right could specify the general conditions of this Regulation governing the lawfulness of the processing of personal data, establish the specifications aimed at determining the person responsible for the

processing, the type of personal data being processed, the persons  
concerned, the entities to which the personal data may be communicated,  
purpose limitations, retention periods and other measures to ensure  
lawful and fair processing. It should also be part of Union law or the law of a State  
member to determine whether the controller performing a task in the public interest or  
subject to the exercise of official authority should be a public authority or another  
natural or legal person governed by public law or, when the public interest so requires, including  
health purposes, such as public health, social welfare and the management of health services  
health care, under private law, such as a professional association."

59. Recital 45 of the GDPR also explains that for the processing of personal data  
personal on the basis of Article 6, paragraph 1, e) of the GDPR, a specific legal provision is not  
not required for each individual treatment. A legal provision may suffice to establish  
several processing operations based on Article 6(1)(c) and (e) GDPR.

has not made use of the possibility referred to in the first paragraph, the municipal council will fill the position by recruitment or p  
municipal determines the conditions of the position of financial director and determines the selection procedure for this purpose.  
chosen according to the job description with job profile and skill requirements as well as according to the evaluation against  
to the terms."

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This reading also corresponds to the position of the ECHR with regard to the limitation of rights  
fundamental principles, the limitation of privacy pursuant to Article 8, second paragraph, must be  
foreseeable under the law. The notion of "foreseeable by law" is understood here in its meaning  
material, which is not limited to laws in the formal sense. Essentially, this means that it must be  
manifest, for the individual, that his personal data are processed for a mission  
specific public or to fulfill a legal obligation. It can also result from a set of  
legal rules<sup>10</sup>.

60. Furthermore, according to Article 6.3 of the GDPR, the legal basis may also "contain

specific provisions to adapt the application of the rules of this regulation, among others:□  
the general conditions governing the lawfulness of the processing by the controller; them□  
types of data that are subject to processing; the people concerned ; the entities to which□  
the personal data may be communicated and the purposes for which they□  
can be; purpose limitation; retention periods; and operations and□  
processing procedures (...)".□

61. The Litigation Chamber underlines in this regard that in accordance with Article 6.3 of the aforementioned GDPR,□  
read in conjunction with Section 22 of the Constitution, and in light of Sections 7 and 8 of the Charter□  
fundamental rights of□  
the European Union, a standard□  
legislative must define□  
them□

essential characteristics of data processing, necessary for the performance of a mission□  
in the public interest or falling within the exercise of official authority vested in the person responsible for the□  
treatment<sup>11</sup>. The Litigation Chamber stresses that the processing in question must be supervised□  
by a sufficiently clear and precise standard whose application is foreseeable for the persons□  
concerned. In accordance with Article 6.3 of the GDPR, the specific purpose(s) of the processing□  
must be included in the legal standard itself. In addition, the following items should□  
be predictable: the identity of the controller(s), the categories of data□  
processed, it being understood that these must comply with Article 5.1 of the GDPR ("adequate,□  
relevant and limited to what is necessary in relation to the purposes for which they are□  
processed"), the categories of data subjects whose data will be processed, the duration of□  
retention of data, the recipients or categories of recipients to whom their data□  
are communicated, the circumstances in which and the reasons for which they will be□  
communicated as well as the possible limitation of the obligations and/or rights referred to in□  
articles 5, 12 to 22 inclusive and 34 of the GDPR.□

10 Kluwer Navigator, Me Dr A.H. Pool, Arbeidsovereenkomst, art. 6 AVG, before. 5.3.□

11 See also Opinions of the Knowledge Center of the Data Protection Authority n° 36/2020, 42/2020, 44/2020, 46/2020, 52/2020  
64/2020□

([https://www.autoriteprotectiondonnees.be/citoyen/chercher?q=&search\\_category%5B%5D=taxonomy%3Apublications&searchice&s=recent&l=25](https://www.autoriteprotectiondonnees.be/citoyen/chercher?q=&search_category%5B%5D=taxonomy%3Apublications&searchice&s=recent&l=25)).□

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62. In this regard, the Litigation Chamber nevertheless emphasizes that the missions of public interest or□

in the exercise of official authority vested in controllers□

are often not based on precisely circumscribed legislative obligations or standards□

meeting the requirements mentioned in point 61, more specifically□

the definition of□

essential characteristics of data processing. Treatments instead take place on the basis□

a more general authorization to act, such as is necessary for the accomplishment of the□

assignment. As a result, in practice, the legal basis in question often contains no□

provision specifically describing the necessary data processing. Those responsible for□

processing who wish to invoke Article 6.1.e) of the GDPR on the basis of such a legal basis must□

then carry out a weighting themselves between the necessity of the processing for the mission□

public interest and the interests of data subjects<sup>12</sup>.□

63. It can be assumed that one of the public interest tasks of local administrations consists of□

a good administration which attaches great importance to a good structure and a good□

organizational culture and good internal functioning. The purpose of processing□

therefore consisted in obtaining a clear vision of the organization in order to then rectify the□

failings and to be able to lead better. The complainant's data was processed within the framework□

of the organizational study for this purpose. The processing must also, by its nature, be related to the exercise□

of the public mission. The notion of "public mission" must be read in the broad sense, also in the light□

of recital 45 of the GDPR, but the public mission must nevertheless be sufficiently apparent□

clearly from national law, which is the case here. Under the Administration Decree

local, the defending parties have various (legal) obligations, with regard to the control

internal structure, including a good internal organizational structure. Organic Law X also contains

public service and general interest objectives which must be respected by the defendants<sup>13</sup>.

64. The controller must also demonstrate that the processing of personal data

personnel was necessary and that it does not involve a disproportionate violation of the right to

data protection of data subjects. Treatment is necessary if the requirements

of proportionality and subsidiarity are fulfilled. The necessity test and the test of

proportionality are extremely important, especially if the controller bases the

processing in question on Article 6.1.e) of the GDPR, as is the case here.

65. Consequently, the controller must balance the need to process the data

personal data and the interest of the persons concerned. The necessary character and

<sup>12</sup> See also decision on the merits 124/2021 of 10 November 2021 of the Litigation Chamber.

<sup>13</sup> See for example article 57, § 1 of organic law X which provides the following: "§ 1 Without prejudice to the provisions of article 57 of the Constitution, the National Council of Social Assistance has the role of ensuring to the people and the families the assistance due by the community. It provides not only curative aid but still preventive aid. It encourages the social participation of users. This help can be material, social, medical, medico-social or psychological."

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proportionateness of the measure must therefore be more precisely demonstrated with regard to

the absence of less intrusive means for the rights and freedoms of data subjects via

which the intended purposes could also be achieved.

66. The Court of Justice of the European Union provided (in particular) in its judgment *Huber* clarifications

on the question of how the concept of necessity should be interpreted within the meaning of

Article 6.1.e) of the GDPR<sup>14</sup>.

67. In this case, the Litigation Chamber considers that the organizational study and the report which

provide a description of the organizational structure and in particular of the leaders of the WZC

could not have taken place without naming the various leaders, including the complainant, by their titles.□

The Litigation Chamber considers that in order to obtain a clear vision of the organization and□

roles of the various leaders within the WZC, it was extremely important to give a□

description as clear and complete as possible of the manner of directing the various leaders.□

According to the Litigation Chamber, the processing of workers' responses and the description of the□

results in the report (quoting the function of the complainant) were therefore necessary in order to□

compose as complete a picture as possible of the situation within the WZC, including the roles□

leaders. The Litigation Chamber therefore finds that the principle of proportionality has been□

complied with and that the legal basis of Article 6.1.e) of the GDPR could be invoked. Bedroom□

Contentitieuise therefore finds no violation of Article 6.1 of the GDPR.□

68. The Litigation Chamber does not consider itself competent and sees no reason to rule□

on the assertions of the plaintiff concerning the alleged intentions of the defendants to use□

the organizational study in order to discredit the complainant and not to have to designate him as□

as general manager. Insofar as the Litigation Chamber can establish it on the basis of the□

exhibits, the plaintiff also brought various proceedings before the Council of State.□

Regarding the subcontract□

69. Article 28, paragraph 3 of the GDPR<sup>15</sup> determines that processing by a processor must be governed□

in a processor agreement between the controller and the processor.□

<sup>14</sup> CJEU, Huber, C-524/06, ECLI:EU:C:2008:72.□

<sup>15</sup> Article 28, paragraph 3 of the GDPR: "Processing by a processor is governed by a contract or other legal act under Union law□

the law of a Member State, which is binding on the processor vis-à-vis the controller, defines the subject and duration of the pro□

cessing, the type of personal data and the categories of data subjects, and the obligations and rights of the person responsib□

le for the treatment. This contract or other legal act provides, in particular, that the subcontractor:□

a) only processes personal data on documented instructions from the controller, including in relation to transfers□

of personal data to a third country or to an international organisation, unless he is required to do so under the law of□

the Union or the law of the Member State to which the processor is subject; in this case, the processor informs the data control□



legal obligation prior to processing, unless the relevant law prohibits such information for important reasons of public interest;□

(b) ensure that persons authorized to process personal data undertake to respect confidentiality or are subject to a□  
appropriate legal duty of confidentiality;□

c) take all measures required under Article 32;□

d) complies with the conditions referred to in paragraphs 2 and 4 to recruit another processor;□

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The defendants did not produce any subcontract. During the hearing, the second□

defendant indicated that no subcontract had been drawn up for the execution of the□

market. The general coordinator of the second defendant clarifies this aspect by stating that a□

merger took place in 2017-2018. It was only later that a company was appointed to support the□

GDPR implementation. In the meantime, however, the second defendant submits for each□

contracted a subcontract as a subcontractor. When awarding the contract for□

organizational study, the second defendant was in fact still at an initial stage (little□

after the entry into force of the GDPR) and assumed that the contracting party's market□

was enough.□

70. The second respondent also indicates that sub-contracts are now well established.□

and well concluded during the award of a contract or equivalent.□

71. Respondents can, however, be expected to scrupulously carry out the provisions of the□

GDPR, especially since the controller is a public authority with a function□

example and that the main activity of the subcontractor consists in processing personal data□

relatively large scale staff.□

72. In view of the foregoing, the Litigation Division therefore finds a violation of□

Article 28(3) GDPR.□

73. In view of all the circumstances of this concrete case, the Litigation Chamber considers that the□

reprimand (i.e. call to order, as a corrective measure referred to in Article 58.2.b) of the GDPR)□

is, in the present case, the most effective, proportionate and dissuasive sanction which is necessary with regard to the□

defendants. During this judgment, the Litigation Division also took into account a

put forward attenuating circumstance, namely the fact that at the time of the award of the contract, the GDPR

had barely entered into force and the defendants were still busy organizing in this regard.

The second defendant stated that now a subcontract has indeed been concluded.

More generally, the Litigation Chamber emphasizes that when using service providers

of external services - in both the public and private sectors - attention

is devoted to the drafting of a subcontract.

e) takes into account the nature of the processing, assists the controller, through appropriate technical and organizational measures

as far as possible, to fulfill its obligation to follow up on requests made to it by data subjects with a view to exercising their

rights provided for in Chapter III;

(f) assist the controller in ensuring compliance with the obligations provided for in Articles 32 to 36, taking into account the nature

information available to the subcontractor;

g) at the choice of the data controller, delete all personal data or return them to the data controller at the end of

the provision of services relating to the processing, and destroys the existing copies, unless Union law or the law of the Member

retention of personal data; and

h) make available to the data controller all the information necessary to provide proof of compliance with its obligations and to

allow audits to be carried out, including inspections, by the controller or another auditor appointed by it, and contribute to these

audits.

With regard to point h) of the first paragraph, the processor shall immediately inform the controller if, in its opinion, an instruction

constitutes a breach of this Regulation or of other provisions of Union law or the law of the Member States relating to the protection

data."

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III. Publication of the decision

74. Seen

the importance of

transparency regarding

the decision-making process of

bedroom

Litigation, this decision is published on the website of the Authority for the protection of

data. However, it is not necessary for this purpose that the identification data of the parties

are communicated directly.

FOR THESE REASONS,

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

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pursuant to Article 100, § 1, 5° of the LCA to issue a reprimand to the first and second

defendants for violation of Article 28, paragraph 3 of the GDPR.

Under article 108, § 1 of the LCA, this decision may be appealed to the Court

contracts within thirty days of its notification, with the Protection Authority

data as a defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber