Berliner Beauftragte
für Datenschutz
und Informationsfreiheit

Berlin DPA: 521.10949 / 632.201
French DPA: 18022379
A56ID 60758
CR 63286

Final Decision

Berlin, 7 June 2021

[redacted]

For your information:
[redacted]

Reprimand
Complainant: Mr [redacted]
Your letters of 30 April 2019 and 27 November 2020

Dear Sir or Madam,

The Berlin Commissioner for Data Protection and Freedom of Information (Berlin DPA) hereby issues a reprimand to your company for a violation of the General Data Protection Regulation (GDPR).

Reasoning

The decision is based on the following considerations:

I.
The Berlin DPA has established the following facts:

In a message dated 29 April 2018, the complainant requested [redacted] to erase his personal data and to close his customer account. The erasure was confirmed to the complainant by [redacted] in an email dated 30 April 2018. In his complaint of 8 November 2018, the complainant submitted that a few months after the erasure had been confirmed to him, he had received an email from [redacted] informing him that the email address of his customer account had been changed. The complainant then confronted [redacted] by e-mail with the fact that his customer account should have been erased long ago. The customer account was finally erased by [redacted] on 26 March 2019.

Berlin Commissioner for Data Protection and Freedom of Information

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be Berlin

In the statement of 30 April 2019, you informed us that the non-erasure could possibly be related to the reorganisation of internal processes with regard to the applicability of the GDPR. The erasure of the customer account on 26 March 2019 had been carried out due to a query with the customer service department by the legal department in an entirely hasty manner and without consultation by the customer service department. However, the fact that the account was not initially deleted could possibly be due to the fact that there were obstacles. However, it is no longer possible to clarify the facts of the case because the customer account has been erased. [redacted] is of the opinion that the facts of the case should be assessed solely according to the old legal situation.

In the statement of 27 November 2020, you described the procedure in the event of a deletion request. Before erasure, it is always checked whether there are obstacles such as open orders or open invoice amounts. If this is not the case, the customer account is first deactivated and then erased. Otherwise, the customer would be informed about the existence of the specific reason for obstruction. Furthermore, you pointed out that the display of the data in Annexes 3 and 4 (Annex 3: [redacted]_hacking and Annex 4: [redacted]_question) differed from the display of the data in Annexes 1 and 2 (Annex 1: [redacted]_contact and Annex 2: [redacted]_answer), so that, depending on how the data was read (DD/MM/YY or MM/DD/YY), it was also possible that the e-mail address in the customer account had been changed before the request for deletion. In this respect, a manipulation by the complainant could not be ruled out. Before the erasure, a check by the customer service had shown that there were no indications of fraudulent activities.

II.
Legally, we assess the facts as follows. Your company has committed a violation of the General Data Protection Regulation.

1. Violation of Article 17(1)(a) and (b) GDPR.

The failure to erase the complainant's customer account constitutes a violation of Article 17(1)(a) and (b) in conjunction with Article 6(1), Article 5(1) GDPR.

The GDPR applies in the present case, as the failure to erase or, in a similar way, the continued storage of the complainant's data is data processing which, although it started before the GDPR applied, was still ongoing on 25 May 2018 and beyond. The complainant's request for erasure was made on 29 April 2018 and thus before the GDPR applied. However, it is undisputed that the complainant's request was not complied with until 26 March 2019, i.e. after the deadline. The supervisory complaint was lodged on 8 November 2018 and thus also after the effective date.

With the applicability of the General Data Protection Regulation, the national law of the Member States ceased to apply. Pursuant to Article 99(2) GDPR, the General Data Protection Regulation has been directly applicable since 25 May 2018 (effective date). Data processing that started before 25 May 2018 and continued beyond 25 May 2018 must comply with the requirements of the General Data Protection Regulation as of the effective date (cf. recital 171 pp. 2; Taeger/Gabel/Golland, GDPR, 3rd ed. 2019, Article 99 marginal no. 5; cf. also FG Saarland, decision of 03.04.2019, Ref: 2

K 1002/16 = DStRE 2019, 1226, marginal no. 10). The lawfulness of data processing as of 25 May 2018 must therefore be assessed in accordance with the GDPR, even if it began before the effective date.

Pursuant to Article 17(1) GDPR, if one of the listed grounds applies, the data subject has the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay. If one of the grounds pursuant to Article 17(1) GDPR applies, the controller is also obliged to erase the data immediately, irrespective of the data subject's request. Erasure is immediate if it takes place without undue delay.

Article 17(1)(a) to (c) GDPR concern cases in which initially lawful data processing has become unlawful (BeckOK/Worms, Datenschutzrecht, 34th ed., Article 17 GDPR, para. 24). In the present case, it is assumed that the data processing based on the customer relationship was initially lawful within the meaning of Article 6(1) and Article 5(1) GDPR.

However, with the declaration of the request for erasure on 29 April 2018, the purpose of processing ceased to exist (Article 17(1)(a) GDPR). Accordingly, a reason for erasure exists if the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed. If a customer relationship is terminated, the data processing is usually no longer necessary (cf. Paal/Pauly/Paal, GDPR, 3rd ed. 2021, Article 17 marginal no. 23). By requesting the closure of the customer account, the complainant initiated the end of the customer relationship, so continued storage of the data was no longer necessary within the meaning of Article 6(1)(b) GDPR.

Insofar as the processing was based on consent, the reason for deletion pursuant to Article 17(1) (b) GDPR also exists. Accordingly, the personal data must be deleted if the data subject withdraws consent and there is no other legal basis for the processing. The request for erasure implicitly includes the withdrawal of consent within the meaning of Article 7(3) sentence 1 GDPR (Sydow/Peuker, GDPR, 2nd ed. 2018, Article 17 marginal no. 20). The erasure request continues to apply from the day of the declaration until the day of fulfilment of the claim, so that regardless of the old legal situation, you were in any case obliged to erase without delay from the effective date of 25 May 2018 in accordance with Article 17(1)(b) GDPR. In view of the change in the legal situation, the complainant did not have to reissue his request for deletion, as the legal basis Article 6(1)(a) GDPR had ceased to exist. Notwithstanding the fact that Article 17(1) GDPR does not require a request anyway, as there is an obligation to delete regardless of the request, such a requirement would disadvantage the data subject if the request for deletion was - as in this case - unjustifiably not complied with. This would contradict the protective purpose of the data subject's rights.

In any case, the retention of the complainant's data in the period between 25 May 2018 and 26 March 2019 (date of erasure) is also not permissible in any other way pursuant to Article 6(1) GDPR.

As explained, Article 6(1)(a) GDPR cannot be considered as a legal basis, as the consent was in any case withdrawn in an implied manner by the request for erasure.

Furthermore, the retention of the personal data cannot be based on Article 6(1)(f) GDPR, as there was no overriding legitimate interest in not erasing

the data. The interests can be of a legal, economic or non-material nature (BeckOK Daten-schutzR/Albers/Veit GDPR, 34th ed., Article 12 para. 18). The controller bears the burden of proof for the existence of the conditions for data processing and thus for the existence of legitimate interests (cf. also Gola/Schulz, GDPR, 2nd ed. 2018, Article 6 marginal no. 7). [redacted] has not demonstrated legitimate interests in the form of the existence of obstacles. The mere possibility that grounds for obstruction might have existed does not constitute proof.

Furthermore, there are no actual indications for the existence of grounds for obstruction, e.g. in the form of outstanding invoices, which would have to be taken into account in the context of Article 6(1)(b) GDPR anyway. This view is supported by the fact that the hasty erasure on 26 March 2019 would probably not have taken place if reasons for the failure to erase the data at that time had been apparent to the customer service when re-examining the process. Rather, the hasty catching up of the erasure suggests that the customer service recognised its own omission in this respect and attempted to rectify it. Furthermore, [redacted] states in its submission of 27 November 2020 that, as a matter of principle, a review of the grounds for obstruction takes place as a standard procedure prior to every erasure. Why such a check should not have taken place in this case, of all cases, is not explained. The confirmation of erasure sent to the complainant on 30 April 2018 is rather an indication that the conditions for erasure already existed at that time.

Finally, you cannot successfully invoke one of the exceptions under Article 17(3) GDPR. In this respect, only Article 17(3)(e) GDPR applies. There were no indications that you or the complainant would need the data for the assertion, exercise or defence of legal claims at the time of the request for deletion. The facts of the case could no longer be determined in detail because the erasure was carried out too quickly. Insofar as you have put forward the existence of obstacles as a possible reason for non-erasure, the mere theoretical possibility is not sufficient to fulfil the exceptional circumstances. As already explained, there are no factual indications for the existence of obstacles.

2. Violation of Article 6(1) GDPR.

The continued storage of the complainant's personal data also constitutes a violation of Article 6 (1) GDPR. The permissibility of data processing follows the principle of prohibition with an exception. Accordingly, any data processing must satisfy both the principles set out in Article 5 GDPR and at least one of the legal grounds set out in Article 6(1)(a) to (f) GDPR. The continued storage of the complainant's personal data constitutes processing relevant under data protection law. A legal basis for the continued storage of the data after the request for erasure has been made is not apparent, as none of the conditions mentioned in Article 6(1)(a) to (f) GDPR apply.

You have the burden of proof for the existence of a permissible condition (Article 6(1), Article 5(1)(a) and (2) GDPR). You have not met this burden of proof, and according to the above explanations, there is no indication that a permissive circumstance existed.

As already explained, the complainant has in any case impliedly revoked any consent within the meaning of Article 6(1)(a) and Article 7(3) GDPR by

declaring his request for erasure, so that the continued storage of the complainant's personal data cannot be based on Article 6(1)(a) GDPR. Article 6(1)(b) GDPR is not a legal basis, as the complainant has terminated the customer relationship with [redacted] and further storage of his personal data was therefore no longer necessary. The continued storage cannot be based on Article 6(1)(f) GDPR either, as [redacted] has not proven the existence of legitimate interests in any case. Moreover, there is no necessity for the continued storage, so that Article 6(1)(c) to (e) GDPR cannot be considered as a legal basis either.

With regard to the e-mail stating that the e-mail address of the customer account had been changed, the facts of the case could not be clearly established.

III.
As a result, we decided not to take any further supervisory measures due to the violation, but to leave it at a reprimand.

The reprimand is based on Article 58(2)(b) GDPR.

Taking into account the specific circumstances of the established facts, we consider a reprimand to be appropriate after completing our investigation. We have again identified a violation on your part, which, however, was based in the past and should no longer occur as a result of the processes that have been changed in the meantime. You have comprehensively changed your processes and corrected the error immediately after it was identified.

In the certain expectation that you will comply with the data protection regulations in the future, we consider the matter closed.

Kind regards,

The Berlin DPA