

GZ: [REDACTED]
[REDACTED]

Sachbearbeiterin: [REDACTED]

«Anrede»
«Titel»«Vorname» «Nachname» «Nachgestellter_Titel»
«Name»
«ZH»

«Straße» «ON»
«Postleitzahl» «Ort»
«Land»

Datenschutzbeschwerde

[REDACTED] (A56ID 147669, 61 VMN 542925.1)

per RSb/Brief/E-Mail «emailadresse»

F I N A L - D E C I S I O N

The Data Protection Authority decides on the data protection complaint of [REDACTED] (complainant) of September 2020 against [REDACTED] (respondent) for unlawful processing as follows:

– The appeal is upheld and it is found that the respondent has infringed the principle of transparency under Article 5(1)(a) GDPR in the processing of the complainant's personal data.

Legal bases: Articles 4(1), 5, 6, 13, 51(1), 57(1)(f), 58(2) and 77(1) of Regulation (EU) 2016/679 (General Data Protection Regulation; 'the General Data Protection Regulation'): GDPR), OJ L 119, 4.5.2016, p. 1; Sections 18(1) and 24(1) and (5) of the Data Protection Act (DSG), BGBl. I No 165/1999 as amended.

R E A S O N I N G

A. Claims of the parties and course of proceedings

1. In his complaint of September 2020, initially filed with the Hessen Commissioner for Data Protection and Freedom of Information, the complainant claimed to have been infringed in Articles 5 and 6 of the GDPR by the respondent unlawfully disclosing personal data of the complainant to third parties (company [REDACTED]). Specifically, the complainant complained that the respondent had disclosed to third parties that the complainant had made a private request to the respondent for a cruise.

2. By letter of 16 September 2021, the respondent essentially stated that it cooperated in its activities with several agencies in connection with the placement of training tournaments. One of these agencies is the company [REDACTED]. A trip was advertised jointly via [REDACTED] and also via the Respondent's homepage and the Respondent was the operating charter company and [REDACTED] was the agency, maritime school and the instructor.

The complainant booked the above-mentioned cruise with [REDACTED] and then cancelled it again.

The complainant also obtained an offer from the respondent for the same cruise with the same type of vessel.

When the Respondent received the cancellation made by the complainant from the [REDACTED] Agency, the fact of an additional offer was noticed. Since both companies acted together as providers and trainers, it is essential that customer data, which are relevant to bookings, must also be processed together.

3. By resolution of 14 June 2023, the DPA requested the respondent to submit additional observations.

4. By letter of 4 July 2023, the respondent submitted, in summary, that, in 2018, it had placed a respective PDF on both homepages together with [REDACTED]. Furthermore, by letter of 8 May 2018, [REDACTED] asked the respondent to include this sailing trip in its advertising accordingly. The complainant had information that the respondent and [REDACTED] were cooperating and coordinating. It was clear to customers that the respondent and [REDACTED] would act together as providers and trainers.

5. The complainant was granted the right to be heard by the parties. The complainant did not submit any further observations.

B. Subject-matter of appeal

On the basis of the submissions, the subject matter of the complaint is whether the respondent has processed personal data of the complainant contrary to Articles 5 and 6 GDPR and thereby infringed the complainant's rights by forwarding to [REDACTED] the information that the complainant has made a request for a trip to the respondent.

C. Factual findings

1. The complainant booked a sailing trip with [REDACTED] [REDACTED] cooperates with the respondent on the sailing trip. The company logos of both companies were visible on the PDF mailing, which advertised the sailing trip.

Evidence assessment: This finding follows from the respondent's comments of 16 September 2021 and 4 July 2023, as well as from the initialling of the appellant.

2. The complainant has made a new request to the respondent for a sailing trip equivalent to that of [REDACTED].

Evidence assessment: This finding follows from the initial filing of the appellant and was not disputed by the respondent.

3. The complainant has also obtained and received from the respondent an offer for the same sailing trip with the same type of vessel.
4. The respondent has informed [REDACTED] that the complainant has made a private request to it via a sailing trip.

Evidence assessment: This finding follows from the initial entry of the complainant and from the respondent's statement of 16 September 2021.

D. From a legal point of view, it follows:

D.1. General

Pursuant to Article 77(1) of the GDPR, every data subject has the right to lodge a complaint with a supervisory authority, without prejudice to any other administrative or judicial remedy, where the data subject considers that the processing of personal data concerning him or her infringes this Regulation.

The processing of personal data must not only be based on one of the grounds set out in Article 6 of the GDPR, but must also comply with all the principles set out in Article 5 of the GDPR (see the judgment

of the European Court of Justice of 11 December 2011). 31 December 2019, C-708/18, paragraph 36 and the judgment of 4 May 2023, C-60/22, paragraphs 53 and 54).

D.2. In the matter

The complainant alleges a breach of the GDPR, as the respondent disclosed to [REDACTED] the information that the complainant had sent them a request for a sailing trip, which he also requested from [REDACTED].

As a preliminary point, it should be noted that the term 'personal data' according to Article 4(1) of the GDPR must be interpreted broadly and, ultimately, includes all information 'about' the data subject in question (see the judgment of the European Court of Justice of 20 June 2006). 31 December 2017, C-434/16, para. 34).

The information that the complainant has made a request regarding a sailing trip to the respondent is therefore his personal data, as they allow conclusions to be drawn about his behaviour in particular. The material scope of the GDPR is therefore open.

Under the GDPR, the processing of personal data is lawful only if at least one of the conditions set out in Article 6(1)(a) to (f) of the GDPR is met. In addition, according to the case-law of the CJEU cited above, any processing of personal data must comply with all the principles enshrined in Article 5(1) of the GDPR.

The DPA does not overlook the respondent's argument that it promotes and offers the sailing trips it carries out together with [REDACTED] and that, to a certain extent, it is inevitable that customer inquiries and the personal data contained therein will be processed jointly.

Under Article 5(1)(a) of the GDPR, personal data must be processed lawfully, in good faith and in a manner that is comprehensible to the data subject ('lawfulness, processing in good faith, transparency').

Where, as in the present case, personal data are collected directly from the data subject, the data subject must be provided with the information referred to in Article 13(1) and (2) of the GDPR, including, in particular, the purposes for which the personal data are to be processed and the legal basis for the processing (lit. c leg. cit.) and, where applicable, the recipients to whom the personal data are disclosed (lit. e leg. cit.).

According to the highest court case law, this information must be actively provided to the data subject at the latest at the time of collection of his or her personal data, whereby a failure to provide information cannot subsequently be cured (cf. VwGH 06.03.2024, Ro 2021/04/0030 on Article 14 GDPR, whereby there are no grounds for not applying the statements made therein also to Article 13 GDPR).

Failure to provide the data subject with the information provided for in the GDPR (in due time) constitutes, among other things, a violation of the principle of transparency pursuant to Article 5(1)(a) of the GDPR.

In this context, it should be noted that the wording of the right to lodge a complaint under Article 77(1) of the GDPR does not specifically refer to an infringement of rights, but rather to an infringement of the GDPR by data processing. From the point of view of EU law, it is therefore permissible to base a data protection complaint under Article 77 GDPR (alone) on Article 5 GDPR (see, for example, CJEU, 22 June 2023, C-579/21; CJEU 16 July 2020, C-311/18; and CJEU 6 October 2015, C-362/14).

In the present case, the complainant was informed before or when booking the sailing trip that the respondent was cooperating with [REDACTED]. However, it is not apparent from the information provided to the complainant that the other information provided for in Article 13 GDPR was communicated to him.

Against this background, the complaint proved to be well founded and therefore had to be upheld.

The DPA does not overlook the fact that, in principle, it is obliged to take appropriate remedial measures in the event of established infringements in order to bring situations in which GDPR is infringed back into line with EU law (see CJEU, 14 March 2024, C-46/23, paragraph 40).

However, by way of exception and taking into account the specific circumstances of the specific case, a supervisory authority may refrain from taking a remedial action even though a personal data breach has been established (see CJEU, 26 September 2024, C-768/21, paragraph 43).

In the view of the Data Protection Authority, this is the case in the present case, since – as already explained above – a service contract pursuant to Article 58(2)(d) GDPR within the meaning of a subsequent provision of information to the complainant is not possible, which means that a warning under Article 58(2)(b) GDPR is the only remedy.

However, since, in the opinion of the DPA, the infringement found is so small – in particular, there is no evidence that the complainant belongs to a category of persons particularly worthy of protection or that categories of data particularly worthy of protection have been processed – and there are furthermore no indications that the complainant has suffered disproportionate material or intangible disadvantages as a result of the infringement found, a (additional) warning by the respondent had to be refrained from.

In conclusion, it was therefore appropriate to decide in accordance with the ruling.

- This decision may be appealed in writing to the Federal Administrative Court within four weeks of service. The complaint must be submitted to the Data Protection Authority and must:
- the name of the contested decision (CJ, subject)
- the name of the respondent authority;
- the grounds on which the allegation of illegality is based;
- Desire and
- the information necessary to assess whether the complaint has been lodged in a timely manner;

included.

The data protection authority may, within two months, either amend its decision by **means of a preliminary decision on the complaint or submit the complaint with the files of the proceedings to the Federal Administrative Court.**

The complaint against this decision is **subject to a fee**. The fixed fee for such an entry, including supplements, shall be **EUR 50**. The fee must be paid to the account of the Austrian Tax Office, stating the intended purpose.

In principle, the fee must be paid electronically using the 'Finance Office payment' function. The recipient must be the Austrian Tax Office - Service for Special Responsibilities (IBAN: AT83 0100 0000 0550 4109, BIC: BUNDATWW). In addition, the tax number/tax account number 10 999/9102, the tax type 'EEA-complaint fee', the date of the decision must be indicated as the period and the amount.

If the e-banking system of your credit institution does not have the function 'Finance Office payment', the eps procedure can be used in FinanzOnline. An electronic transfer can only be excluded if no e-banking system has been used so far (even if the taxpayer has an internet connection). Then the payment must be made by means of a payment order, paying attention to the correct allocation. Further information can be obtained from the tax office and from the manual 'Electronic payment and notification of payment of self-assessment levies'.

The payment **of the fee** must be proved when the complaint is lodged **with the data protection authority** by means of a proof of payment to be attached to the submission or a print-out of the payment order issued. If the fee is not paid or not paid in full, **a report shall be sent to the competent tax office.**

A timely and admissible appeal to the Federal Administrative Court shall have **suspensive effect**. The suspensive effect may have been excluded in the ruling of the decision or may be excluded by a separate decision.

****Genehmigungsdatum****

Für den Leiter der Datenschutzbehörde:

****Genehmiger(in)****

Unofficial Translation