

Written Observations of the Republic of Austria

Case C-434/16 *

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To the President and Members of the Court of Justice

WRITTEN OBSERVATIONS OF THE REPUBLIC OF AUSTRIA

pursuant to Article 23 of the Protocol on the Statute

of the Court of Justice of the European Union

in

CASE C-434/16

The Republic of Austria submits the following observations in regard to the request for a preliminary ruling made by the Supreme Court (Ireland) on 29 July 2016:

I. Questions referred:

- (1) The referring court referred to the Court of Justice the following questions on the interpretation of EU law by means of a preliminary ruling:
 1. *Is information recorded in/as answers given by a candidate during a professional examination capable of being personal data within the meaning of Directive 95/46/EC?*
 2. *If the answer to Question 1 is that all or some of such information may be personal data within the meaning of the Directive, what factors are relevant in determining whether in any given case such script is personal data, and what weight should be given to such factors?*

II. Legal Analysis

Questions 1 and 2:

- (2) Article 2(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data defines ‘personal data’ as ‘any information relating to an identified or identifiable natural person (“data subject”)’. According to that provision, an identifiable person is ‘one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity’.

(3) The so-called Article 29 Data Protection Working Party, composed of representatives of independent supervisory authorities, within the meaning of Article 28 of Directive 95/46/EC, has stated on this basis that ‘data relates to an individual if it refers to the identity, characteristics or behaviour of an individual or if such information is used to determine or influence the way in which that person is treated or evaluated’ (Opinion 4/2007 = WP 136, p. 10).

(4) In general, the Article 29 Data Protection Working Party distinguishes between a ‘content’ element, a ‘purpose’ element or a ‘result’ element, [one of] which should be present in order to make it possible to take the view that the data ‘relate’ to an individual (ibid.)

(5) As an example of a content element, the Data Protection Working Party cites the results of a medical analysis, which clearly relate to a specific patient, regardless of the purpose of the analysis (ibid.). Furthermore, in the present context, it appears interesting to note that the Article 29 Data Protection Working Party has concluded that so-called biometric data, which also includes handwriting, in general, ‘can always be considered as “information relating to a natural person” as it concerns data, which provides, by its very nature, information about a given person’ (working document on biometrics = WP 80, p. 5). The position would be different only if biometric data, for instance only in the form of a so-called ‘template’ (digital sample), were to be processed in such a way as to make it impossible for the controller or third parties, using reasonable means, to identify the data subject (ibid., p. 5, footnote 11).

(6) As an example of a result element, the Article 29 Data Protection Working Party used the fact, stated in the minutes of a meeting, that a named specific person participated in that meeting. This view has also been confirmed by the case-law of the Court of Justice. In its judgment delivered on 30 May 2013 in Case C-342/12, *Worten*, the Court of Justice ruled that Article 2(a) of Directive 95/46/EC must be interpreted as meaning that a record of working time containing an indication, in relation to each worker, of the times when working hours begin and end, as well as the corresponding breaks and intervals, constitutes ‘personal data’, within the meaning of that provision.

(7) Applied to the case here under consideration, it can be held that written answers to examination questions and written preparatory drafts on the basis of a complex examination topic are typically designed to determine with certainty the intellectual skill of a particular person and his knowledge in a specialised area. In any event, up to the point of assessment/correction of the relevant draft or answers including the determination of a given mark, or of an examination result, it is therefore essential to manage those drafts or answers in a way which enables them to be attributed to a specific examination candidate. It is irrelevant whether the examiner or corrector

learns the candidate's name or can make a direct identification. It is only at the level at which an appropriately positive or negative result is issued, or some other form of certification of the examination result valid vis-à-vis third parties, that a direct person-related connection can generally be made.

(8) Furthermore, as a rule, it is necessary to store examination scripts in a person-related form also beyond the date of certification of the examination results for the purposes of preserving evidence and of reproducing certificates which may have been lost or making duplicates. Any available possibility of lodging complaints, which allow the accuracy of the assessment of the examination work to be called into question, also makes it necessary that personal data should be stored.

(9) It may therefore be concluded from the foregoing that information in the form of answers to examination questions which are recorded on a data medium, and which originate from the candidate himself, may give expression to aspects of his identity and may therefore be classified as personal data. This applies, in the case of handwritten examination answers, not only in relation to the content of answers, but also, possibly, in relation to the candidate's handwriting.

(10) The further question arises as to whether corrective remarks made by an examiner, which are entered directly on the candidate's answers or drafts, are also personal information relating to the candidate and classifiable, as such, as 'personal data', which might subsequently be subject to a right of access on the part of the candidate. It must be noted in this regard that it depends in particular on whether or not evaluations arise from such corrective remarks which relate directly to the person of the examination candidate. If appropriate, such data are also assessed as 'personal data', which make reference equally to the candidate or the examiner. Incidentally, this evaluation does not conflict with the judgment of the Court of Justice of 17 July 2014 in Joined Cases C-141/12 and C-372/12, Y.S. and Others. The comments in question in that case related to a purely internally prepared (legal) analysis, which, carried out under certain circumstances and for internal use alone, that is to say, regardless of a given reference to persons, may have evidential value. By contrast, in the present case, the corrective remarks, that is without the candidate's answers or drafts, would by themselves be unable to achieve any meaningful evidential value.

III. Proposed answer to the questions referred

(11) The Republic of Austria accordingly proposes that the questions referred by the national court for a preliminary ruling be answered in the following terms:

Information recorded in/as answers given by a candidate during a professional examination constitutes personal data within the meaning of Directive 95/46/EC in so far as and for as long as it can be attributed to a specific examination candidate by the person responsible or by third parties, possibly only in combination with other information accessible to those persons.

Vienna, 2 November 2016

For the Republic of Austria:

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