



24 June 2021

Record no. 4182/146/2019

Decision of the Data Protection Ombudsman

Matter Right of access to data

Complainant [REDACTED]

Data controller [REDACTED]

On 4 March 2019, the complainant has instituted a matter with the Danish Supervisory Authority (Datatilsynet) concerning a data subject's right of access to data. The complainant has stated that he has requested access to his data from the controller. The data controller has confirmed the receipt of the complainant's request on the same day, 12th November 2018. Later, on 12th December 2018, the data controller has communicated that they will provide the requested data within the 60 days referred to in Article 12, Paragraph 3 of the General Data Protection Regulation. This never happened. The Danish Supervisory Authority has contacted the controller at a later time, and the controller has informed the Danish supervisory authority on 27th March 2019 of its intent to provide the complainant with the requested data. In a telephone conversation on 20th May 2019, the complainant has, however, informed the Danish Supervisory Authority that he has not received the data in question.

The Danish Supervisory Authority has completed a preliminary assessment of the matter, investigating, inter alia, its cross-border nature. With regard to this, the controller has pointed out that the headquarters of the company, [REDACTED], are located in France. However, according to the preliminary assessment, these French headquarters do not make decisions on processing personal data that is the subject matter of this complaint, nor do they have the competence to implement these decisions. Instead, the decisions are made and implemented by [REDACTED], a company operating in Finland, Sweden, Norway, and Denmark and in Estonia, Latvia and Lithuania, with headquarters in Finland. The preliminary statement submitted to the Danish Supervisory Authority furthermore indicates that personal data is processed in all of the aforementioned locations. The decisions concerning personal data processing which are the subject matter of the complaint are made and implemented in Finland, which means that the Finnish Supervisory Authority (The Office of the Data Protection Ombudsman) has been determined to be the competent lead supervisory authority in the matter.

Information provided by the controller

The Office of the Data Protection Ombudsman has requested that the controller provide more information on the matter. The controller has submitted a statement on 12th May 2020.

The statement provided confirms that the complainant has requested access to his information on 12th November 2018. The statement furthermore indicates that the controller has determined detailed procedures for ensuring that such requests by data subjects will be identified and processed in an appropriate manner, and on submitting the



requested information to the data subject within the set deadline. The controller has furthermore stated that its failure to submit the data to the complainant has not been intentional.

The submitted statement also explains that the requested information has been collected and processed for the purpose of being sent to the complainant. Regarding this, the controller has notified that they have divided the material into written documents and telephone call recordings. The controller has also stated that it has not submitted the telephone call recordings, because the third party on the telephone calls was recognizable. The controller has, however, stated that in the future, recordings will be made available to the data subjects in the future for listening.

With regard to the written materials, the controller has stated that they were not submitted to the complainant due to a human error. The controller has made it known that they will find out the reasons behind this error. Due to the Covid-19 pandemic, several employees of the controller were temporarily laid off at the time of the investigation, which has complicated the process. The controller has also stated that they have updated their procedures and guidelines regarding the use of right of access. The controller has stated that they are confident that they can minimize the occurrence of similar human errors in the future and that all requested information will be provided in due time.

Additional information provided by the controller

The Office of the Data Protection Ombudsman has requested that the controller provide additional information on the matter. The controller has submitted an additional statement on 20th August 2020.

The controller has stated that they have subsequently delivered the complainant the data he had requested, excluding the telephone call recordings. The complainant was not offered the telephone call recordings because the controller has wanted to ensure that there will be no violation of the rights and data protection of a third party that appears on the recordings and can be recognized. The controller has stated that they have taken measures to comply with the contents of the decision of the Deputy Data Protection Ombudsman, no. 3021/452/2017. The controller has suggested that in the future, it will be possible to produce transcripts of the recorded telephone calls to make the third party unrecognizable, and to submit these transcripts to the data subject requesting access to their data. For clarity's sake, the controller has noted that it is not in possession of telephone recordings concerning the complainant. The telephone recordings are deleted from the controller's systems six months after the telephone call.

The complainant's response

The complainant has submitted a response on 14th October 2020.

The complainant has confirmed that the controller has submitted him the data in question. The controller has also reserved the complainant an opportunity to visit their office to listen to the recordings of telephone conversations which were, at the time, in the possession of the controller.

The complainant is not satisfied with the controller's course of action. The complainant has mentioned that the procrastination by the controller has caused him to suffer losses



of right. The complainant had numerous problems with the vehicle he had purchased. The complainant claims that due to the procrastination of the controller, he has been forced to ultimately sell his vehicle. According to the complainant, he has lost approximately DKK 75,000 (≈ EUR 10,000, estimate by the complainant). The complainant has not been able to keep a vehicle that has to be repaired constantly. Due to the complainant being refused access to data, he has not been able to bring the matter to be assessed by a competent authority. The controller has refused to compensate the costs accrued to the complainant. The complainant does not think it is right or fair that he has had to wait for his data for over 18 months.

Applicable legislation

The General Data Protection Regulation of the European Parliament and of the Council ((EU) 2016/679, the GDPR) has been applied as of 25 May 2018. As a regulation, the GDPR is directly applicable in Member States. The GDPR is supplemented by the Finnish Data Protection Act (no. 1050/2018) that has been in force since 1 January 2019. The Data Protection Act repealed the Personal Data Act (523/1999).

Evaluation of cross-border factors

The General Data Protection Regulation separately sets forth provisions on cross-border processing of matters, as laid down in Article 4, Paragraph 23 of the GDPR. These matters must be processed by a competent supervisory manner in the manner laid down in Article 56, Chapter VII.

The controller's preliminary statement points out that the headquarters of the company [REDACTED] are in France. However, according to the preliminary assessment, these headquarters in France do not make decisions on processing personal data to which this complaint focuses, nor do they have the competence to implement these decisions. Instead, the decisions are made and implemented by [REDACTED], a company operating in Finland, Sweden, Norway, Denmark and Estonia, Latvia and Lithuania. The headquarters of this company are located in Finland. The preliminary statement submitted to the Danish Supervisory Authority furthermore indicates that personal data is processed in all of the aforementioned locations. Due to these factors, the Data Protection Ombudsman finds that, by virtue of Article 56 of the General Data Protection Regulation, the Data Protection Ombudsman is the competent lead supervisory authority in this case.

Judicial question

As stated above, the Data Protection Ombudsman shall review and decide on the case based on the General Data Protection Regulation (EU) 2016/679, and the Data Protection Act (1050/2018).

In the case of the complainant, it must be assessed if the controller has taken the measures required for the complainant to exercise their right of access to data in accordance with Article 12(1 and 3), and Article 15(3) of the General Data Protection Regulation. The Data Protection Ombudsman will additionally assess if it should apply the corrective powers bestowed on to it under Article 58(2) of the GDPR.

Decision of the Data Protection Ombudsman



The controller has not taken the measures for the complainant to exercise their right of access to data as laid down in Article 12(3) of the GDPR.

The controller has not provided the complainant with the telephone call recordings in accordance with Article 12(1) and Article 15(3) of the GDPR.

The Data Protection Ombudsman issues a reprimand to the controller by virtue of Article 58(2b) of the GDPR. The controller has not provided the complainant with access to data referred to Article 15 of the GDPR without undue delay or the deadline laid down in Article 12(3) of the GDPR. Regarding the telephone calls, the controller has not taken the measures for the complainant to exercise their right of access to data as laid down in Article 15 of the GDPR.

The Data Protection Ombudsman shall issue a reprimand to the controller in accordance with Article 58(2d) of the GDPR, ordering the controller to change their processing procedures so that the data subjects will be able to exercise their right of access to data in accordance with Article 12(1 and 3), and Article 15(3) of the General Data Protection Regulation.

Grounds

Article 15(1) of the GDPR sets forth that the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the information referred to in the sub-paragraphs of Article 15(1). Similarly, in accordance with Article 15(3) of the GDPR, the controller shall provide a copy of the personal data undergoing processing.

By virtue of Article 12(3) of the GDPR, the controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay.

According to Article 12(1) of the GDPR, the controller shall take appropriate measures to provide any information relating to processing to the data subject referred to under Article 15 in a concise, transparent, intelligible and easily accessible form, using clear and plain language. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means. In accordance with Article 12(2) of the GDPR, the controller shall facilitate the exercise of data subject rights under Articles 15 to 22.

Article 15(4) of the GDPR sets forth that the right to obtain a copy shall not adversely affect the rights and freedoms of others, and according to Paragraph 63 of the Recitals of the GDPR, these include trade secrets or intellectual property and in particular the copyright protecting the software, and based on this, it is as such possible to refuse to provide the data referred to in Article 15(1). According to Article 15(4) of the GDPR, it is possible in some cases to refuse to submit a copy of the data referred to in Article 15(1). However, the contents of the aforementioned provision do not constitute an



acceptable reason for refusing the data subject to exercise their right of access to all information.

The present case

The complainant has confirmed that the controller has submitted him the data in question, exclusive of the telephone call recordings. The data was not, however, provided without an undue delay nor was it submitted within the deadline laid down in Article 12(3) of the GDPR.

The complainant has requested access to his data initially on 12th November 2018, and on 12th December 2018, the data controller has informed the complainant that the requested data will be provided within the 60-day period referred to in Article 12(3) of the General Data Protection Regulation. This has, however, not happened, due to which the complainant has contacted the Danish Supervisory Authority that has later contacted the controller. The controller has informed the Danish Supervisory Authority on 27th March 2019 of its intent to provide the complainant with the requested data. In a telephone conversation on 20 May 2019, the complainant has, however, informed the Danish Supervisory Authority of not receiving the data in question.

The Office of the Data Protection Ombudsman has sent the controller a request for information on 16th May 2020. The controller has submitted a statement on 12th May 2020. The statement indicates that the information was not submitted to the complainant due to a human error. The Data Protection Ombudsman wants to point out that the controller has not, at this point, committed to rectifying the situation. The controller has not promised to take the measures required to ensure that the complainant could exercise his right of access. An additional request for information has been presented to the controller on 7th August 2020, and the controller has submitted an additional statement on 21st August 2020. The additional statement provided indicates that the information has been delivered to the complainant with the exception of the telephone call recordings. It must be noted here that the complainant has requested for his data initially in November 2018, and it was finally delivered to him in August 2020. Thus, it has taken one year and nine months for his right to be realized. It can be stated that, despite the requests of the complainant and the contacts taken by the data supervisory authority, the controller has not taken the measures to ensure that the complainant can exercise his right appropriately. The controller's acts have violated the provisions of Article 12(3) of the GDPR.

Telephone call recordings

The controller did not provide the complainant with the telephone call recordings due to the controller's need to avoid the violation of the rights and data protection of the third person on the recordings, who is recognizable on the tapes.

It must be noted for clarity's sake that the recording includes personal data referred to under Article 4(1) of the GDPR. In its decision no. 2094/1/09, granted on 30 July 2010, the Supreme Administrative Court of Finland has determined that a voice captured on a tape is a piece of personal data, and thus the right of access laid down in Section 26 of the Finnish Personal Data Act (523/1999, repealed on 01/01/2019) applies to it. Similarly, a Court of First Instance of the European Communities has on 11 March 2009 interpreted in the case T-166/05 that a person can be identified by their voice (Section



39). Thus, a person's voice must be deemed an item of personal data. The GDPR has not amended the definition of personal data as laid down in the Personal Data Act.

The GDPR's entry into force and its application have not changed the definition of personal data in such a manner that the interpretation of a voice captured on tape as personal data would need to be re-evaluated. Thus, the data subject will continue to have a right of access to personal data also with regard to the telephone call recordings. It must be stated that the Deputy Data Protection Ombudsman's decision, no. 3021/452/2017 (issued 20/02/2020) also follows the aforementioned legal practice and conforms to the interpretation.

Let it also be noted that Article 15(4) of the GDPR sets forth that the controller can refuse to submit a copy of the data if the exercise of this right could adversely affect the rights and freedoms of others. To be able to restrict the rights of data subjects based on the aforementioned provision the controller must, however, be able to indicate that exercising the right of the data subject will adversely affect the rights and freedoms of others as referred to under Section 15(3) of the GDPR. It must be stated that recording the voice of a person who is doing their job cannot be considered to constitute such a reason.

It must additionally be stated the Data Protection Ombudsman has interpreted, in their decision no. 2240/523/2013 issued on 12/09/2013 under the repealed Personal Data Act, that telephone call recordings contain in practically all cases personal data of another person, and this cannot be deemed a reason to refuse the right of access. According to this decision, personal data of the controller's representative could have been submitted to a data subject who is exercising their right of access without constituting a breach of the Personal Data Act.

The controller did not provide the complainant with the telephone call recordings, but they did reserve the complainant the right to listen to the recordings at the controller's office.

The Data Protection Ombudsman has furthermore made the interpretation in its decisions under the repealed Personal Data Act (issued on 10/05/2011, record no. 2680/41/2010 and issued on 12/09/2013, record no. 2240/523/2013) that a data subject is entitled to the customer call recordings by virtue of Section 28 of the Personal Data Act. The Data Protection Ombudsman has viewed that the measures taken to exercise the right referred to under Section 26 of the Personal Data Act can include reserving the data subject an opportunity of listening to the telephone call recording (2680/41/2010) or by providing a written copy of the recording to the data subject as per their request, for example as a print-out of a transcribed document (2240/523/2013). However the data must be submitted in written form as per the request of the data subject (12/09/2013, record no. 2240/523/2013). It must be stated that the Deputy Data Protection Ombudsman's decision, no. 3021/452/2017 (issued 20/2/2020) also follows the aforementioned legal practice and conforms to the interpretation.

The GDPR also includes provisions on the form of the data provided. According to Article 12(1) of the GDPR, the information that applies to Article 15 shall be provided in writing, or by other means, including, where appropriate, by electronic means. Furthermore, regarding the right of access to data, Article 15(3) of the GDPR sets forth that the controller shall provide a copy of the personal data undergoing processing.



The Data Protection Ombudsman finds that with regard to the telephone call recordings, offering the opportunity to listen to the recordings does not comply with the provisions of Article 12(1) and Article 15(3) of the GDPR. According to Article 12(1) of the GDPR, *the information shall be provided in writing, or by other means, including, where appropriate, by electronic means*. Similarly, in accordance with Article 15(3) of the GDPR, *the controller shall provide a copy of the personal data undergoing processing*. In this respect, the Data Protection Ombudsman wants to draw attention particularly to the fact that any restrictions to the right of access to data that is laid down in Article 8(2) of the Charter of Fundamental Rights of the European Union (2012/C 326/02) must be narrowly interpreted.

The Data Protection Ombudsman finds that the controller is entitled to offer the data subject the opportunity to listen to the telephone call recordings in the controller's office, if they so wish, but this cannot be the only measure taken to ensure that the data subject can exercise their right of access.

The repealed Personal Data Act would have placed the obligation to the controller to submit the data requested by the data subject in a written form, for example in a transcribed file. The GDPR allows the data to be submitted in electronic form, which means that the controller could, at their discretion, to submit a copy of the data in some other form, for example as a recording.

The additional information provided indicates that the controller is no longer in the possession of the telephone call recordings that concern the complainant. The additional information provided furthermore indicates that telephone recordings are deleted from the controller's systems six months after the telephone call. In this context, it must be stated that the Data Protection Ombudsman cannot issue an order for the data subject to have a right of access to data that is not in the controller's possession (cf., inter alia Decision by Helsinki Administrative Court 19/0154/5, issued on 07/03/2019).

Based on the aforementioned, the Data Protection Ombudsman concludes that the controller has not taken the required measures for the complainant to exercise their right of access to data as laid down under Article 15 of the GDPR, and the controller's course of action with regard to ensuring the data subject's right of access to the telephone call recordings, does not comply with the provisions of Article 12(1) and Article 15(3) of the GDPR in general.

Applicable legal provisions

As referred to under Grounds.

Appeal

According to Section 25 of the Data Protection Act (1050/2018), this decision may be appealed in the Administrative Court by lodging an appeal in accordance with the provisions of the Administrative Judicial Procedure Act (808/2019). Appeals shall be lodged in the Helsinki Administrative Court.

The appeal instructions are enclosed.

Service of notice



The service of notice of the decision shall be effected by post against a certificate of service in accordance with section 60 of the Administrative Procedure Act (434/2003).

Further information on this decision is provided by the referendary

Senior Officer's name and telephone number

The Data Protection Ombudsman



Senior Officer



The document was signed electronically. The authenticity of the signature can be verified with the registry of the Office of the Data Protection Ombudsman.

Appendices

Appeal instructions

Distribution

Complainant

Controller

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