

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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The scope of the right to access under the fundamental right of data protection

Austrian Constitutional Court
Judgement of October 2nd, 2007 (B 227/05)

The Circumstances of the Case

Subject of the appeal to the Constitutional Court under Article 144 of the Austrian Constitution was a decision of the Austrian Data Protection Authority (DPA) who had rejected the appellant's complaint under section 31 paragraph 1 of the Austrian Data Protection Act (DSG 2000). The appellant had claimed at the DPA her right to access personal data against a direct marketing company (DMC). This enterprise had issued a CD including personal related marketing information (e.g. address, family status, income, size of household, special interests) for sale to other enterprises for business purposes. Following an application for access to the DMC the appellant had gained access to her personal data stored on the CD but had not received information on the concrete recipients of the CD. She therefore deemed the information incomplete in this point.

The DPA had rejected the appeal referring in particular to section 14 paragraph 3 of the DSG 2000 which it interpreted as stipulating a logging obligation only for such transmissions that are not registered in the data processing register. In the present case the DMC had notified to the register that the direct marketing data would be transmitted to "customers who were in contractual relations" with the DMC. The DPA therefore had not found a logging obligation concerning specific customers and, consequently, no right to access such concrete information on recipients. Additionally the DPA had pointed out that an information containing the individual names of customers interfered with the data protection rights of DMC and its clients. According to the DPA, the access to information on individual recipients was not necessary for the person whose data are stored on the CD, in order to assert its legal rights. The DPA had deemed it sufficient that the data subject could prevent further processing² by simply notifying the DMC, which then becomes effective also for all CD customers³⁴.

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- 1 Special thanks to *Angelika Hable* who spent a lot of precious time on proof-reading the article and suggesting a large number of important linguistic modifications.
 - 2 Under section 151 paragraph 8 of the Austrian Trade and Industry Act there is a special right to deletion for direct marketing data.
 - 3 Compulsively the data on the CD had to be updated regularly; not performing the update made it inoperable.

Relevant Austrian Law

Section 1 paragraph 3 number 1 DSG 2000 – provision in constitutional rank:

Everybody shall have, insofar as personal data concerning him are destined for automated processing or manual processing, i.e. in filing systems without automated processing, as provided for by law, the right to obtain information as to who processes what data concerning him, where the data originated, for which purpose they are used, as well as to whom the data are transmitted.

Sections 14 and 26 DSG 2000:

Data Security Measures

Sect. 14 (1) Measures to ensure data security shall be taken by all organisational units of a controller or processor that use data. Depending on the kind of data used as well as the extent and purpose of the use and considering the state of technical possibilities and economic justifiability it shall be ensured that the data are protected against accidental or intentional destruction or loss, that they are properly used and are not accessible to unauthorised persons.

(2) In particular, the following measures are to be taken insofar as this is necessary with regard to the last sentence of para. 1:

...

7. Logs shall be kept in order that the processing steps that were actually performed, in particular modifications, consultations and transmissions [Übermittlungen], can be traced to the extent necessary with regard to their permissibility,

...

(3) Unregistered transmissions from data applications subject to an obligation to grant information pursuant to sect. 26 shall be logged in such a manner that the right to access can be granted to the subject pursuant to sect. 26. Transmissions provided for in the standard ordinance (sect. 17 para. 2 lit. 6) and the model ordinance (sect. 19 para. 2) do not require logging.

...

Right to access

Sect. 26 (1) The controller shall provide the data subject with information about the data being processed and relating to him, if the data subject so requests in writing and proves his identity in an appropriate manner. Subject to the agreement of the controller, the request for information can be made orally. The information shall contain the processed data, the available information about their origin, the recipients or categories of recipients of transmissions, the purpose of the use of data as well as its legal basis in an intelligible form. Upon request of the data subject, the names and addresses of processors shall be disclosed in case they are charged with processing data relating to him. With the

4 To read comparable circumstances in detail see e.g. case K121.902/0017-DSK/2004 on www.ris.bka.gv.at/ris/dsk; the original DPA decision is no longer published after it was annulled.

consent of the data subject, the information may be provided orally alongside with the possibility to inspect and make duplicates or photocopies instead of being provided in writing.

(2) The information shall not be given insofar as this is essential for the protection of the data subject for special reasons or insofar as overriding legitimate interests pursued by the controller or by a third party, especially overriding public interests, are an obstacle to furnishing the information. ...

Section 27 paragraph 8 DSG 2000:

...
 (8) If data that were rectified or erased in terms of para. 1 were transmitted before having been rectified or erased, the controller shall inform the recipient of the data by appropriate means, insofar as this does not constitute an unreasonable effort, in particular with regard to a legitimate interest in the information, and that the recipient can still be determined.

Art 7 paragraph 1 Austrian Constitution:

All nationals are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. ...

The Court's assessment

The Court had no doubts about the constitutionality of sec. 14 para. 3 or sec. 26 par. 1 DSG 2000. Regarding the former provision he found that the legislator had already implemented part of the balancing required by sec. 14 para. 1 nr. 7 and para. 2; however, para. 3 didn't rule on the scope of the logging requirement for *registered* transmission, which therefore had to be determined in individual cases.

In the opinion of the Court, the notion "available information" in sec. 26 para. 1 DSG 2000 showed that, in principle, information must be given even if logging is not required under sec. 14.

The rules on the right to access in sec. 26 corresponded with those on logging in sec. 14. As according to sec. 14, information on specific recipients was not necessarily available in each case, the legislator had accommodated this situation also with regard to the right to information on transmissions. It was therefore possible in certain cases to provide an applicant only with the information on categories of recipients.

This was also in line with the constitutional provision in sec. 1 para. 3 nr. 1 DSG 2000, which the Court read as not requiring information on individual recipients in each case. Since also Directive 95/46/EC provided the opportunity to give information only on categories of recipients it seemed evident to the Court that the DSG 2000 legislator (including the legislator of the constitutional provision in sec. 1) regarded this opportunity as covered by sec. 1 para. 3 nr. 1 DSG 2000. Also provisions in the Data Protection Act of 1978 preceding the DSG 2000 had contained similar regulations on logging. The Court considered sec. 26 para. 1 also as inoffensive as regards Article 18 of the Constitution

(which states the necessity of adequate determination of legal provisions). The decision concerning the question whether information on concrete recipients or only categories must be given, could be found by balancing the mutual interests in individual cases.

To that extent, the Court was thus of the opinion that the DPA had not misjudged the law. Nevertheless, in the view of the Court, the decision of the DPA had infringed the appellant's right to equal treatment before the law. Such an infringement could in particular result from a qualified, repetitive misjudgment of the law⁵, which the Court perceived in the DPA's interpretation of sec. 14 para. 3 DSG 2000. From that provision, the DPA seemed to have drawn the conclusion that registered transmissions didn't have to be logged and no access had to be given to personal data, even if it were available at the DMC. The Court, by contrast, was of the opinion that the applicant had to be provided with all available information.

Also the DPA's opinion that the access to information on individual recipients was not necessary for the appellant to assert her legal rights was qualified as a misjudgement by the Court: On the one hand the appellant had no subjective right that the DMC *de facto* exercised and enforced its option to prohibit the further processing of the appellant's data. On the other hand the prohibition of the further use was not the only purpose of the right to access. In fact this right should secure the data subject's knowledge of where data are held. According to the Court, this information would also serve other purposes than just preventing a further processing of data.

The Court therefore stated that the DPA's reasoning was missing an objective appraisal, of whether the concrete data protection interests of the DMC and its customers indeed overbalanced the appellant's interests thus justifying a refusal to access specified information. A mere abstract statement that information interfered with the data protection rights of the data controller and data recipients was considered insufficient.

The DPA's decision was annulled.

Commentary

The Court's assessment is comprehensible as regards the only cursory reasoning in the DPA's decision⁶. From the factual statements given in the decision, it cannot even be verified if information on individual recipients was actually available at the DMC. It is furthermore true that a coherent interpretation of sec. 14 para. 1 to 3 and sec. 26 para. 1 does not support a right to refuse access if data is effectively available. In that case, a refusal to access information can only be justified by duly weighing the different interests in accordance sec. 26 para. 2.

However, I would challenge the Court's assessment to the extent that it ignored another pertinent provision in that context. Sec. 27 para. 8 DSG 2000

5 This prevailing case law gives the Court the opportunity also to take up infringements upon non constitutional individual rights.

6 In recital 3 it was mentioned that the DPA's decision is no longer published. Therefore comments are based on the cited comparable decision.

obliges the data controller to inform a recipient, if data that it had received were subsequently rectified or erased. This provision is a component of the right to erasure regulated in sec. 27 DSG 2000. Contrary to what the Court provides, in my view, the appellant has a subjective right that the DMC informs the recipients of the prohibition to further process personal data. The DMC has also followed that obligation by erasing personal data, where applicants had prohibited the use of their data in the course of the regular and compulsive updates (see fn. 2). In this legal context, the question arises if the balancing of interests pursuant to sec. 26 para. 2. would not lead to the result that the data protection rights of the DMC and its clients generally overbalance the legal interests of the data subject. As a further consequence, the data subject would thus be forced to point out specific interests (other than merely prohibiting the use of its data which the Court recognized without further clarification), which would oblige the data controller to notify individual recipients.

Finally it must be pointed out that, in "ordinary" cases, also the DPA requests information on individual recipients, when it is available. Only if the interests of data subjects are typically reduced by a special legal situation it deems categories as sufficient⁷. In the present case, such an exceptional situation arose from the data subjects' special rights against direct marketing companies under sec. 151 of the Trade and Industry Act (establishing an unconditional right to erasure in para. 8⁸ and the so called Robinson List in para. 9) in connection with sec. 27 para. 8 DSG 2000. Unfortunately the Constitutional Court did not pay attention to this special constellation. The DPA, in turn, must be blamed for not having made its reasoning clear enough in the decision and for having focused on sec. 14 para. 3 DSG 2000 which is *de facto* not the appropriate provision in the present circumstances.

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7 See e.g. decision K120.981/0002-DSK/2005 from 15 February 2005, affirmed by the Administrative Court in judgement 2005/06/0111 from 19 December 2006

8 See recital 1