



noyb - European Center for Digital Rights
Goldschlag Street 172/4/3/2
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AUSTRIA

COMPLAINT UNDER ARTICLES 77(1), 80(1) DSGVO

noyb case no: C039

brought in by

■■■■■, born on ■■■■■, residing at ■■■■■ (hereinafter referred to as the "Complainant")

represented by

noyb - European Center for Digital Rights, a non-profit organization with its registered office at Goldschlagstraße 172/4/2, 1140 Vienna, ZVR: 1354838270 (hereinafter "*noyb*")

against

KSV 1870 Information GmbH, Wagenseilgasse 7, 1120 Vienna, a credit reference agency within the meaning of Section 152 of the Trade Regulation Act 1994 (GewO) (hereinafter "KSV").

1. REPRESENTATION

1. *noyb* is a non-profit organization active in the field of data protection (Articles of Association, **Enclosure 1**). The Complainant has mandated *noyb* to represent him pursuant to Article 80(1) of the GDPR (**Annex 2**).
2. **Communication between *noyb* and the Data Protection Authority in the context of this procedure may be made by e-mail ■■■■■ referring to the case number mentioned in the title of this complaint.**

2. CONTENT

3. By e-mail dated 22 December 2020 (**Annex 3**), the complainant submitted a request for information pursuant to Article 15 of the GDPR to KSV and other credit reporting agencies operating in Austria. In this request for information, to which he also attached a copy of his identity card (**Annex 4**), the complainant asked various questions about data processing by KSV. In addition, the complainant noted the following at the end of his letter:

"My information collected in response to this request for information may not be used for any purpose other than responding."

4. KSV replied to the request for information by e-mail dated 21.01.2021 (**Enclosure 5**). The actual answer was found in a PDF attached to the e-mail (**Enclosure 6**). In it, KSV states that it does not process any personal data relating to the complainant (**negative information**).
5. Next, however, the following sentence is found in Exhibit 6:

"Upon receipt of your request, the master data disclosed by you will now be processed in the business database regarding your person within the scope of the exercise of the trade pursuant to § 152 GewO."

No further explanations were provided regarding this further processing (as defined in Article 13(3) of the GDPR).

6. Obviously, the KSV has entered the data disclosed exclusively for the purpose of responding to the complainant's request for information into its "business database" and is now processing them for a completely different purpose than responding to the request for information, namely the "exercise of the trade pursuant to § 152 GewO".

3. REASONS FOR COMPLAINT

3.1. Violated rights

7. Without prejudice to the right of the Complainant to make further submissions on additional grounds of complaint, subject to the authority of the Data Protection Authority to investigate beyond the specific grounds set out herein, and in accordance with Section 24(2) DPA, the Complainant alleges the following violations of law:
 - **Purpose limitation principle** pursuant to Article 5(1)(b) of the GDPR in conjunction with Article 6(4) of the GDPR: The complainant provided his personal data solely in order to exercise his right of access. KSV collected this data for this purpose, but subsequently processed it for an incompatible purpose.
 - **Lawfulness of the data processing** pursuant to Article 6(1) DSGVO: There is no legal basis for the data processing; in particular, KSV cannot rely on Article 6(1)(f) DSGVO, as the confidentiality interests of the complainant blatantly prevail.

3.2. Violation of the purpose limitation principle

8. The complainant provided the data solely in order to exercise his right under Article 15 GDPR; consequently, KSV also collected the complainant's personal data solely in order to verify and respond to the complainant's request for information.
9. It is not possible that the KSV has already collected this data for the purpose of "exercising the trade according to § 152 GewO". At the time of receipt of the request for information (Annex 3) on 22.12.2020, the KSV could not yet know whether (i) it already had the data disclosed by the complainant, or (ii) whether these data were of no interest to it (e.g. if the complainant did not reside in Austria). Therefore, in order to determine whether the complainant's data is of interest to KSV's "business database", it first had to examine the complainant's request for information and process the data for that purpose. The processing for the purpose of "exercising the trade pursuant to Section 152 of the Trade Regulation Act" is thus further processing within the meaning of Articles 5(1)(b) and 6(4) of the GDPR.
10. A purpose compatibility check pursuant to Article 6(4) GDPR clearly concludes that the purpose of this further processing is not compatible with the original processing purpose:
 - 10.1. There is no close connection between the purposes (Article 6(4)(a) GDPR), quite the contrary: an information seeker will regularly use his or her right under Article 15 GDPR to subsequently make requests under Articles 16, 17, 18 or 21 GDPR, i.e. to control or stop data processing by a controller, not to initiate it.
 - 10.2. The context of the collection (Article 6(4)(b) GDPR) also speaks against compatibility: The data collection was carried out on the occasion of a request for information to the KSV, with which the complainant has no contractual or other relationship.
 - 10.3. The possible consequences of further processing (Article 6(4)(d) DSGVO) are hardly assessable for the complainant and may well be negative: An incorrect or inexplicably poor credit score issued by KSV can lead to a serious disadvantage for the complainant in business transactions.
11. As a result, further processing for the purpose of "exercising the trade pursuant to Section 152 of the German Trade Regulation Act" is not compatible with the original processing purpose of "responding to the request for information".

3.3. Data processing is unlawful

12. The legal basis for data processing in connection with responding to a request for information under Article 15 GDPR is found in Article 6(1)(c) GDPR. The provisions of Chapter III of the GDPR impose a legal obligation on a controller to handle data protection requests from data subjects. After the request for information has been dealt with, according to Article 6(1)(f) of the GDPR, data may be stored for a limited period of time for the purpose of preserving evidence. Further processing is usually excluded.
13. The further processing for the new purpose of "exercising the trade pursuant to Section 152 of the Trade Regulation Act" cannot be based on any legal basis within the meaning of Article 6(1) of the GDPR: Article 6(1)(d) and (e) DSGVO are obviously not relevant. Nor is there a legal obligation to process data pursuant to Article 6(1)(c) of the GDPR. Nor is there a contractual relationship within the meaning of Article 6(1)(b) or consent within the meaning of Article 6(1)(a) of the GDPR. On the contrary, the complainant has even clearly indicated that he does not want any processing beyond the response to his request for information (see RN 3).
14. Thus, only Article 6(1)(f) of the GDPR comes into question as a legal basis. Here, however, the balance of interests is clearly in favor of the confidentiality interests of the complainant:
 - 14.1. The processing purpose "exercise of the trade pursuant to § 152 GewO" is very intrusive, can lead to the transmission of creditworthiness scores from KSV to its customers and, in the case of incorrect or inexplicably poor creditworthiness scores, also to a serious disadvantage for the complainant in business transactions (see already RN 10.3.).
 - 14.2. According to recital 47 of the GDPR, the reasonable expectations of a data subject must also be included in the balance of interests. The fact that a controller processes data from a request for information for other purposes without being asked is completely surprising. As mentioned in RN 3, the complainant also sent requests for information to other credit reporting agencies in Austria. Like KSV, none of these companies had stored personal data of the complainant. Unlike KSV, however, these companies did not take the request for information as an opportunity to include the complainant's data in their databases (evidence can be provided if required). It can therefore by no means be spoken of a "common business practice". KSV is alone in Austria with this illegal practice.
 - 14.3. As mentioned above, the complainant has indicated that he does not wish any processing beyond the response to his request for information (see RN 3). The fact that his data is nevertheless processed for a theoretically unlimited period of time is highly dishonest and contrary to good faith as defined in Article 5(1)(a) of the GDPR.
 - 14.4. No information was provided on the occasion of the change of purpose pursuant to Article 13(3) of the GDPR. KSV only noted the following regarding the inclusion in its "business database" in Annex 6: *"If you have any further questions, please do not hesitate to contact us."* The information obligations in Articles 13 and 14 of the GDPR must be proactively fulfilled by the controller and are not the data subject's "duty to fetch" information. The absence of this information even precludes lawfulness on the basis of legitimate interests according to the highest court rulings (OGH 15.12.2005, 6 Ob 275/05t; 17.12.2009, 6 Ob 247/08d).

15. As a result, the processing of personal data of the complainant in the "business database" of the KSV for the purpose of "exercising the trade pursuant to Section 152 of the Trade Regulation Act" cannot be justified under Article 6(1) of the GDPR.

3.4. Data protection breach by KSV is systematic

16. The inclusion of the complainant's data on the occasion of his request for information is not an isolated case. *noyb* is aware of several similar cases (see **enclosures 7, to 9**). The KSV systematically uses requests for information from affected persons to expand its "business database".

17. Specifically, KSV proceeds in two ways here:

- If a person requesting information is previously unknown to the KSV, he or she will be newly entered into the KSV's "business database" on the basis of the data contained in the request for information or the enclosed identity document. This is what happened in the present case and in the case shown in Annex 8.
- If a person requesting information was previously known to the KSV, but at an outdated address, the database is updated on the basis of the data contained in the request for information or the enclosed identity document. As a source, the KSV states - deliberately misleadingly - "KSV1870" (i.e. absurdly itself). This is what happened in the cases shown in Annexes 8 and 9, each on page 10. The date of the last revision indicated there corresponds in both cases to the date of the answer to the request for information of the information applicant there (see enclosures 8 and 9, page 1 in each case).

18. Both forms of this database enrichment systematically violate Articles 5(1)(b), 6(4) and 6(1) of the GDPR and require an immediate general ban on processing pursuant to Article 58(2)(f) of the GDPR - regardless of whether the complainant should be exempted from complaints or not.

4. APPLICATIONS AND REQUESTS

1) Request comprehensive investigation

The complainant requests the DPO to fully investigate this complaint in accordance with the powers conferred on the DPO under Article 58(1) of the GDPR, in particular to clarify the following factual elements:

- (i) Did KSV actually transfer personal data provided to it by the complainant exclusively on the occasion of a request for information pursuant to Article 15 GDPR to its "business database" in order to process them for the purpose of "exercising the trade pursuant to Section 152 GewO"?
- (ii) Does the KSV generally transfer personal data provided to it by data subjects exclusively on the occasion of an application under Chapter III of the GDPR to its "business database" in order to process them for the purpose of "exercising the trade pursuant to Section 152 of the Trade Regulation Act"?

2) Application, for a declaration of infringement

The DPO may

- after the identification of the data processing operations that have actually taken place,
- regardless of whether or not KSV should have subsequently remedied the violations of Article 5(1)(b), Article 6(4) of the GDPR and Article 6(1) of the GDPR in accordance with Section 24(6) of the GDPR in the proceedings before the DPA,

decide by notice as follows:

- (i) KSV has violated the principle of purpose limitation pursuant to Article 5(1)(b) in conjunction with Article 6(4) of the GDPR by transferring personal data provided to it by the complainant exclusively on the occasion of a request for information pursuant to Article 15 of the GDPR to its "business database" in order to process them for the purpose of "exercising the trade pursuant to Section 152 of the Trade Regulation Act".
- (ii) KSV has violated Article 6(1) of the GDPR by transferring personal data provided to it by the complainant exclusively on the occasion of a request for information pursuant to Article 15 of the GDPR to its "business database" without a corresponding legal basis pursuant to Article 6(1) of the GDPR in order to process them for the purpose of "exercising the trade pursuant to Section 152 of the Trade Regulation Act".

3) Request to impose a processing ban

The complainant requests the DPA to prohibit by decision, pursuant to Article 58(2)(f) of the GDPR, KSV's practice of transferring personal data provided to it solely on the occasion of a request under Chapter III of the GDPR to its "business database" in order to process them for the purpose of "exercising the trade pursuant to Section 152 of the Trade Regulation Act".

4) Requesting the imposition of effective, proportionate and dissuasive financial penalties

Finally, the complainant suggests, pursuant to Article 58(2)(i) in conjunction with Article 83(5)(b) GDPR, to impose an effective, proportionate and dissuasive fine on KSV, taking into account - depending on the outcome of the investigation procedure before the DPA - that

- (i) the complainant is in all likelihood only one of possibly hundreds of thousands of data subjects whose data are processed by KSV in its "economic database" in breach of Articles 5(1)(b), 6(1) and 6(4) of the GDPR as a result of a request under Chapter III of the GDPR (Article 83(2)(a) of the GDPR).
- (ii) the breach was manifestly systematic and intentional (Article 83(2)(b) GDPR).

5. OTHER

We are always happy to assist with any queries of a factual or legal nature that you should require in order to process this complaint. Please contact us at [REDACTED]

[REDACTED]