



Information Technology Newsletter Switzerland

Federal Administrative Court's Decision Finds Individual Privacy Rights to Have Priority over Google's Interest in Making Profit

1 Introduction

On March 30, 2011, the Federal Administrative Court handed down its decision in the case brought by the Federal Data Protection and Information Commissioner ("FDPIC") against Google Inc. as well as Google Switzerland GmbH in connection with Google's Street View¹. The judgment is still subject to appeal.

The Court had to decide, whether it had jurisdiction over the Google Inc. and Google Switzerland GmbH and whether Google Inc. and Google Switzerland GmbH were in breach of Swiss Data Protection laws. Google was represented in the proceeding by Gregor Bühler and David Rosenthal of Homburger AG.

The case brought was preceded by an investigation of the FDPIC who found that the software used by Google to pixelate license plates and the faces on Street View was flawed and that Google proceeded with the recording of pictures in far more cities and streets than Google had announced.

On September 11, 2009 the FDPIC issued a recommendation to Google Inc. as well as Google Switzerland GmbH which they rejected in large parts. On November 11, 2009 the FDPIC filed an action against Google Inc. as well as Google Switzerland GmbH.

2 FDPIC's Application to the Court

The FDPIC applied in its submission to the Court for a restraining order which would have prohibited Google Inc. as well as Google Switzerland GmbH, pending

the proceeding, to upload pictures taken and to proceed with a further recording of pictures in Switzerland.

In substance the FDPIC requested in its claim filed with the Court that

1. Google Inc. as well as Google Switzerland GmbH publish only such pictures in Google's Street View where all of the license plates and faces are completely pixelated.

2. enhanced pixelation was to be used to secure the anonymity of persons in the neighborhood of sensitive institutions, such as shelters for women, retirement homes, prisons, schools, tutelage and welfare authorities, courts and hospitals;

3. Google Inc. as well as Google Switzerland GmbH assure that private areas such as gated areas and gardens etc not be recorded and be deleted to the extent already recorded;

4. Google Inc. as well as Google Switzerland GmbH assure the deletion of pictures from private streets to the extent there is no consent;

5. Google Inc. as well as Google Switzerland GmbH announce one week in advance in which cities and communities a recording of pictures will take place;

6. Google Inc. as well as Google Switzerland GmbH inform one week in advance which cities and communities are being uploaded.

By letter dated December 16, 2009 the FDPIC informed the Court that Google Inc. and Google Switzerland GmbH had agreed to comply with certain conditions in respect of the recording and data processing pending the proceeding. The FDPIC

¹ Decision of the Federal Administrative Court of March 30, 2011, A-7040/2009



considered the requirements of the temporary restraining order met and therefore requested that the motion for the temporary restraining order be written of.

3 Response Filed by Google

The following contains a short summary of the arguments raised by the defendants. Google Inc. and Google Switzerland GmbH based their defense on formal as well as substantive arguments.

In their response they filed a motion for dismissal of the complaint filed by the FDPIC for lack of jurisdiction and requested that the FDPIC's recommendation be quashed. Alternatively, in the case the Court should find jurisdiction over Google Switzerland GmbH, they asked the court to dismiss the action and quash the FDPIC's recommendation.

Google Inc. and Google Switzerland GmbH argued that Google Switzerland GmbH was not an addressee of the FDPIC's recommendation and was not participating in Google Street View, it merely made the vehicles, which are registered in its name, available for the recordings. The equipment and electronic systems belonged to Google Inc. who also entered into the agreements with the chauffeurs of the vehicles. The recordings were not processed in Switzerland but dispatched to Belgium directly by the chauffeurs. Hence no action would lie against Google Switzerland GmbH.

Google also contested the applicability of the Swiss Data Protection Act because the publication of the data allegedly takes place in the United States. And any alleged violation of the US - Swiss Safe Harbour Framework was to be determined under US law and fell under the exclusive jurisdiction of the US authorities.

In substance Google argued that the pictures of persons and license plates do not constitute personal data and that there was no systematic error since no large number of persons are concerned and that there is no danger that such number grows excessively.

Google further argued that the recording was warranted by prevailing private and public interests. A complete anonymization of the license plates and faces would be possible only with a substantial effort

such that the purpose of the data processing could no longer be achieved.

Irrespective of the data processing rules, the recording of pictures and its publication on Street View does not constitute a relevant infringement of personality rights since it does not reach the required level of intensity.

Moreover Google Inc. argued to have a financial interest in the recording and publication of the pictures and that there existed also a public interest in Street View. A potential violation of privacy rights was therefore protected by a prevailing private and public interest.

Google also contended that the prayer for relief filed by the FDPIC was not sufficiently clear.

4 Court's Reasoning

4.1 Prayer for relief sufficiently clear

The Court rejected Google's formal defense the prayer for relief was not sufficiently clear and found the relief requested by the FDPIC sufficiently clear to be incorporated into the operative part of a potential judgment in favor of the FDPIC and taking also into consideration that the relief sought could be clarified by the court in course of the proceeding.

4.2 Both Defendant's had a substantial involvement in the processing of the data

The Court found that both of the defendants had an involvement in the processing of the data and that Google Switzerland GmbH had a substantial involvement in the recording of the raw data which it enabled by making its vehicles available for the recording. Moreover, Google Switzerland GmbH was also in charge of handling requests of persons concerned for deletion. The court concluded that the prerequisite of data processing as determined in the Swiss Data Protection Act was fulfilled for both defendants.

4.3 Swiss Data Protection Act applicable

Google contested the applicability of the Swiss data protection act because the publication of the pictures takes place in the USA.



The court reasoned that the Swiss Data Protection Act ("DPA") as a matter of public law can apply to occurrences in Switzerland only. The DPA therefore applies to all processing of personal data on the Swiss territory. The processing of data includes also the transmission of data abroad as well as the collection of personal data in Switzerland from abroad.

The collection of the data occurs in Switzerland and therefore the DPA is applicable. The uploading of the pictures takes place in the USA, but are published worldwide. Hence the Court concluded that the FDPIC is competent in principle to investigate the matter.

The court then continued to analyze whether the DPA was applicable to the facts at hand. The DPA is in principle a public law act and in respect of the public law provisions, the principle of territoriality applies, but may also lead to civil law claims of the persons concerned and in which case the provisions of the Swiss Private International Law Act ("SPILA") must be consulted.

The court found that the relevant processing consisted in the recording of the pictures in Switzerland and that persons living in Switzerland will be primarily concerned in the case of a potential violation of their privacy rights.

The court reasoned that the appropriate provision of the SPILA in data protection matters was Art. 139 SPILA. According to Art. 139 para. 3 SPILA claims resulting from violation of privacy rights through data processing are to be decided by the law applicable in the case of the violation of personality rights by publishing media. Hence at the election of the individual concerned the law at the place of abode of the infringer, place of abode or registered domicile of the author, or place of the effects.

Undoubtedly a host of persons in Switzerland have filed a complaint with the FDPIC and requested the FDPIC to investigate the matter. These requests were sufficient for the court to find that the FDPIC was entitled to investigate the matter under the application of the DPA since such requests were sufficient evidence for the choice of Swiss law by the persons concerned. Consequently the Court found that the DPA was in fact applicable.

4.4 Data processed by Google is personal data under the DPA

Google argued that the data processed is not personal data, since the identification of the persons was not possible, due to the limited number of pixels, the camera perspective, the pixelation and the lack of indication as to the time the picture was recorded.

Personal data according to Art. 3 lit a DPA is all data which relates to an identified or identifiable person. The court reasoned that the pictures of persons, houses, gardens and vehicles constitute information in the sense of the law the placement of which in the internet can constitute such personal data.

The court also found the second criteria, the relation to persons - such as pictures from persons - fulfilled by its very nature.

The court continued to analyze the third criteria of identification or identifiability of persons. The Court found that the raw data which contained pictures of persons and license plates that were not pixelated constitute personal data. The court discarded the arguments raised by Google that only a small fraction of the persons (or license plates) remained identifiable. The exact number of flawed pixelation of faces and license plates which takes place on the raw data recorded was found to be irrelevant since the collection of the (unpixelated) raw data already constitutes a processing of data.

Hence the Court held the raw data of persons as well as of licenses plates, homes and gardens to be personal data. The court reasoned that Google process such data from all of Switzerland and therefore found a systematic error in the sense of Art. 29 para. 1 lit a DPA.

4.5 Processing of data by Google illegal

According to Art. 12 para 1 DPA, however processes personal data shall not violate the personality rights of the persons concerned. The court held that each person has a right to his or her own picture. In principle, no one may be depicted - without his or her approval.

As such, even the mere taking of a picture may constitute a violation of privacy right and the publication of an individualized picture without the consent of the person concerned always constitutes a



violation of personality rights. Further, pictures from private areas regularly constitute a violation of personality rights.

The court then proceeded to analyze whether the incidental taking of pictures of persons may be qualified as an accessory, which - according to some authors - does not violate the right to one's own picture. This can be for instance the case, where pictures are taken in public places.

The court also argued that the zoom function on Street View permitted an enlargement of the individuals, such that they no longer appear as a mere accessory. According to the court, in the case of accessory, a balancing of the various interests involved must take place.

4.6 No justification of Google

The court found Google to knowingly accept the violation of the personality rights of a large number of persons. The court found the interest of the public in Street View and Google's own financial interest as a profit oriented company not sufficient to outweigh the interest of the persons whose privacy rights are concerned. According to the court, a complete pixelation is not an undue burden on Google. Also, it argued, Google could make Street View available as a pay service.

Google further argued that the persons concerned had (tacitly) consented to the recording and processing of their pictures, because it had announced on its homepage, when the camera vehicles would be taking their tours.

The consent of a party to the processing of its own data regularly justifies the processing of such data. However, such consent requires that the persons concerned are informed at least in broad terms on the data and the purpose and extent of processing. An implied consent may only be assumed, where for instance based upon an agreement, the processing of personal data is necessary for the fulfillment of the contractual obligations. The Court found these requirements not to be met in the case at hand.

For lack of a prevailing private or public interest and the consent of the persons concerned, the Court found that the infringement of personality rights by Google could not be justified and upheld the action filed by the FDPIC, except for the relief sought by the FDPIC in respect of private streets.

Conclusion

The decision of the Court is a decision in the interest of the individuals and the protection of their privacy rights in a world, where data is collected for all imaginable and unimaginable purposes or seemingly for no purpose at all.

The Court opted for a rather extensive applicability for Swiss law and made it clear that without the consent of the parties concerned and without a prevailing private or public interest the collection and processing of personal data infringes Swiss law.

Enterprises must assure the proper information of the parties concerned, when collecting and processing data. An implied consent to the collecting and processing of data cannot be easily assumed. The mere interest of a party in maximizing its own profit is not a sufficient private – let alone public – interest which would outweigh the interest of the persons whose privacy rights have been violated.

This case has a broad impact, beyond Google. Today, pictures are stored, processed, copied and shared by search engines, social networks and individuals. The ubiquitous access to such information around the globe poses an ever increasing threat to one's privacy right. Apparently, the court found that the responsible handling of the flood of information should not be left in the hands of a profit oriented company alone.

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