

## CAN DATA PROTECTION LAWS PREVENT THE SURVEILLANCE OF CRITICAL VOICES IN GERMANY?

European courts and national data protection authorities dealt with the so-called “journalistic exemption” rule when the Data Protection Directive, preceding the General Data Protection Regulation (‘GDPR’), came into force. The aim of this legal exemption is to relieve journalistic, academic, and artistic expressions from certain obligations under Data Protection Law. It also aims to reconcile the right to the protection of personal data with the right to freedom of expression and information.

The subject of this article is a case where the journalistic exemption is employed by a civil society organisation to legitimise surveillance. The organisation concerned invoked the exemption to avoid complying with its GDPR obligations, undermining the implementation of digital rights. The outcome of this case, which will be decided by the Berlin Data Protection Authority (‘DPA’), will set an important precedent for the protection of individuals’ data rights against a distorted use of the “journalistic exemption” rule for surveillance practices.

### I. THE CASE: DR. ANNA-ESTHER YOUNES V. RIAS/VDK

In November 2019, [Dr. Anna-Esther Younes](#), a scholar of critical race theory, was disinvited from a panel discussion on racism and white supremacist/right-wing extremist networks. Weeks later, she discovered that the [Berlin Department for Research and Information on Antisemitism/VDK](#) (‘RIAS’), an [organisation that “reports and monitors antisemitic incidents in Berlin”](#), along with [Mobile Counseling against Right-wing Extremism in Berlin](#) (‘MBR’), an organisation [“identifying and dealing with extreme right-wing, right-wing populism, racist and anti-Semitic behavior”](#), had prepared a dossier about her.<sup>1</sup> The document patches together distorted selections of her writings and personal information, including but not limited to several posts she shared on social media, an excerpt from an academic article she published, and some academic petitions and calls she signed and shared. The document unfoundedly paints a picture of her as an anti-Jewish racist and as a supporter of terrorism and sexism. The dossier was sent to the organiser of the event, which led to her exclusion from the event hours after the dossier was received.

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<sup>1</sup> RIAS and MBR are two [projects of the umbrella organisation VDK e.V.](#) (Society for a Democratic Culture in Berlin) and are funded by German public bodies. VDK e.V. is the legal entity representing RIAS and MBR.

In March 2020, Dr. Younes' legal team from the [European Legal Support Center](#) ('ELSC') and her lawyer submitted a request to RIAS to access and obtain her personal data under Article 15 (1) of the [General Data Protection Regulation 2016/679](#) ('GDPR').

RIAS claimed that its activities fall within the scope of the journalistic exemption under Article 85 GDPR and the scientific research exemption under Article 89 GDPR, which will be briefly referred to in the following section. On this basis, it refused to provide Dr. Younes access to her processed data. In June 2020, Dr. Younes lodged a complaint before the Berlin Data Protection Authority ('DPA') against RIAS and MBR. The complaint entails a request to the DPA to represent her interests as a citizen and to ask RIAS and MBR to provide her with a copy of her personal data. It also requested that MBR and RIAS stop processing and permanently delete her data. Around two years later, the DPA's decision is still pending. To date, it is still not clear if or when the DPA will make a decision.

## II. ARGUMENTS OF THE PARTIES

Dr. Younes' legal team argued that:

- (1) **the data processing carried out by RIAS,<sup>2</sup> which resembles surveillance practices, is unlawful**, because it violates several data processing principles laid down in Article 5 GDPR: principles of accuracy, purpose limitation, and transparency;
- (2) RIAS misrepresented Dr. Younes' views and opinions, without taking the necessary steps to ensure the accuracy of her personal data;
- (3) the initial research purpose invoked for collecting the data and producing the document is not compatible with the transfer of the report to third parties; and
- (4) RIAS' refusal to provide the data access is not legally justifiable. Its assertions that it would be impossible and/or disproportionate to provide Dr. Younes' data were unfounded.

Conversely, according to RIAS:

- (1) the data collection about Dr. Younes and the subsequent transmission of her data falls under the journalism exemption, as enshrined in Article 85 GDPR and in § 19 [Berlin Data Protection Law](#); and
- (2) the data processing was carried out in the context of scientific and academic research. In that regard, RIAS invoked Article 89 GDPR and § 27 of the [German Federal Data Protection Act](#) implementing GDPR, which provide derogations from the obligation to

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<sup>2</sup> In this article, we refer mainly to RIAS as it is the main correspondent (legally represented by VDK) regarding Dr. Younes' case.

respect certain rights of data subjects when personal data are processed for scientific or historical research purposes.

For the purpose of this article, we will focus on the argument regarding Article 85 GDPR.<sup>3</sup>

### III. INVOKING FREEDOM OF EXPRESSION TO AVOID GDPR DUTIES

RIAS' legal defence is mainly grounded in its claim that its conduct enjoys journalistic privilege, and should be exempted from the rights of data subjects including the right of access under Article 15 GDPR.

In the well-known [Satakunnan and Satamedia case](#), the European Court of Human Rights ('ECtHR') pointed out that "*derogation from data protection rules for journalistic purposes is intended to allow journalists to access, collect and process data to be able to perform their journalistic activities.*" The Court of Justice of European Union ('CJEU') [interpreted the notion of 'journalistic purposes' broadly](#) and stated that activities "*may be classified as 'journalistic activities' if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium used to transmit them.*"<sup>4</sup> In line with the CJEU, the German Federal Court of Justice stated in the [Sedlmayr decision](#) that "*data is processed for journalistic-editorial purposes if the objective is to publish something for an unspecified group of people.*"

If we look at Dr. Younes' case, RIAS, through its research and information centres, "[reports and monitors antisemitic incidents in Berlin](#)", regularly [publishing biannual and annual reports](#) on their website, next to other publications such as articles. It can thus reasonably be said that RIAS is carrying out journalistic activities within its defined mandate since its research and publications correspond exactly to the objective identified in the above-mentioned case law, namely informing the public. Although the general activities of RIAS could fall under the broad definition of journalism, this **does not provide exemption from data protection laws in every activity it carries out.**

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<sup>3</sup> Article 85(1) and (2) GDPR states: "1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression. 2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information."

<sup>4</sup> *Tietosuoja- ja valtuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, paragraph 61.

RIAS might rely on the journalism exemption for the reports it publishes, but every data processing activity must be examined separately, and **the application of the exemption must be verified on a case-by-case basis**. The latter has been confirmed by the [UK Information Commissioner](#):

*“[t]he focus here is on **what the specific information in question is being used for, rather than the purposes of the organisation as a whole**. The exemption can still apply if the particular data is collected and used with the exclusive aim of disseminating some information, opinions or ideas to the public. However, **if it is also used for the organisation’s other purposes** – eg in political lobbying or in fundraising campaigns – **the exemption will not apply.**”*

In the case of RIAS, the data processing that is to be examined is the composition and transfer of the dossier by RIAS to the organiser of the event. This transmission **cannot be considered as disclosing information to the public**, unlike publishing a report on a website, since the recipient was a single person with a political mandate in the city of Berlin. It follows from the [CJEU’s settled case-law](#) that without the [‘public’ aspect](#) in disclosure of personal data, a processing activity cannot be considered as an exercise of the freedom of expression in the sense of Article 85 GDPR. The aim of informing the public is the key element for Article 85 GDPR and without this, the controller is not different from any traditional controller such as social media platforms who profile their customers for their own purposes. In that case, the GDPR applies to the full extent including principles of data processing and data subject rights. Regarding the dossier organised and disclosed by RIAS, it clearly did not have the objective of disclosure of information to the public. To the contrary, the data processing in question appears to have been motivated by attaining the cancellation of Dr. Younes’ invitation to the aforementioned event. If the aim of collecting information on Dr. Younes was to inform the public in the course of journalistic work as RIAS states, why did it not share its ‘findings’ about her in one of its reports, or on its website, instead of sharing this information with a specific person through closed and personal channels? This position is further contradicted by RIAS’ assertion that the document is meant for “informational purposes” only and shall “not be shared publicly”. Since the journalistic exemption provided in Article 85 GDPR and its implementing provision, § 19 BDSG, are not applicable to this case, RIAS’ argument in favour of disregarding the right to access guaranteed under GDPR is unfounded. Indeed, RIAS is responsible for complying with the GDPR fully in the current case, including respecting the rights of data subjects and providing information to them when requested.

#### IV. AN IMPORTANT PRECEDENT FOR GDPR RIGHTS AND FREEDOM OF EXPRESSION

As explained above, the communication of the dossier on Dr. Younes was clearly not done within the scope of journalistic activities, which RIAS is seeking to rely on. It is concerning

that the exemption in Article 85, intended by EU legislators to protect the freedom required by journalistic, academic and artistic work, is being employed to work against the right to freedom of academic/scholarly expressions. While this case might look like a complex situation from the outset where freedom of expression must be balanced with rights of individuals to privacy and data protection, **in fact it is a clear-cut case where an exemption laid down for specific activities is invoked out of scope.** Therefore, the DPA should not be tempted to avoid giving a decision with political or competency concerns and to leave the case to courts to resolve. One of the important tasks of DPAs is deciding whether there is a breach of the GDPR on the basis of complaints made.

If the arguments developed by RIAS were to be endorsed by the DPA, the decision would set a dangerous precedent for the protection of digital rights in Germany. This could not only dissuade people from exercising their rights and from holding organisations that unlawfully use their data accountable, but could also pave the way for data protection laws to be used to silence critical voices. This very possibility threatens the values of any pluralistic democratic society.

As the Advocate General of the European Court of Justice acknowledged in his [Opinion dated 12 December 2013](#), surveillance includes the collection, processing and retention of personal data without the subject's knowledge or consent. In the present case, RIAS' preparation of a secret dossier containing Dr. Younes' processed personal data, along with its subsequent distribution of the dossier to a third party, matches the features of surveillance as described by the Advocate General. This practice is alarming as it has the apparent intention of limiting Dr. Younes' freedom of expression by instilling in her the fear that her personal data could be constantly tracked and used against her, thereby preventing her from exercising her academic activities. In turn, it has the **dangerous potential of creating a [chilling effect](#)** within Dr. Younes' community of scholars and activists. A rejection by the DPA of Dr. Younes' claim would thus **further legitimate the unrestricted use of monitoring and surveillance of individuals through false claims of operating under journalistic and research exemptions.**

In conclusion, in this particular case there is a clear violation by RIAS of its obligation to give individuals access to their data. This obligation ensures individuals are aware of the collection and use of their data. It also guarantees the exercise of other fundamental rights, which are conditional on the information regarding the processing itself. Thus, a decision by the DPA in favour of Dr. Younes' claims would strengthen the protection of rights guaranteed by the EU data protection law, as well as, clarify the scope of the journalistic exemption for future use.

European Legal Support Center

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