



Case number:
Antecedent: NAIH/441/2021.

To

[REDACTED]

[REDACTED]

Dear Sir/Madam,

Nemzeti Adatvédelmi és Információszabadság Hatóság (Hungarian National Authority for Data Protection and Freedom of Information, hereinafter: Authority) had earlier informed you that the Slovak Data Protection Authority (hereinafter: Slovak Authority) objected to processing carried out by [REDACTED] (hereinafter: Foundation or controller) as the presumed controller of the websites [REDACTED] and [REDACTED].

In view of the fact that both website are Hungarian language sites, have a domain name registered in Hungary and, furthermore, the operator of the websites i.e. the controller, has its registered office in Hungary, the Authority designated itself as the lead authority in the procedure initiated by the Slovak Authority to identify the lead supervisory authority according to Article 56 of the General Data Protection Regulation¹.

According to the Slovak Authority, the processing with regard to content accessible at the following links [REDACTED]

[REDACTED] presumably breaches the provisions of Article 5 and 6 of the General Data Protection Regulation.

The recordings feature children performing and singing specifically from the [REDACTED] and children from other Slovak, Hungarian and Romanian schools.

The Authority watched the recordings and found that their mode of presentation is not individual, the children perform a group programme on stage and the group photos made were uploaded to the websites. Sensitive information on the data subjects were not shared. In this context, the

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC. The regulation can be accessed here: <https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:32016R0679&from=EN>

Authority also notes that no complaints objecting to the processing were launched, instead the Slovak Authority launched a procedure ex officio.

The Authority disagreed with the Slovak Authority and its draft decision of 24 August 2020 informed the Slovak Authority of its position, according to which the information available does not make it likely that the provisions of the General Data Protection Regulation referred to were breached, hence it did not launch an inquiry in the case. However, the Slovak Authority raised objections against the Authority's relevant draft decision of IMI [REDACTED], arguing that in contrast to the wording in the Authority's draft decision, it was irrelevant whether a photo showed a crowd or the depiction was unique, and also noted that the content objected to was still accessible on 10 September 2022. It declared that a "national complaint" was lodged against the school, because the school published a few photos and videos on the Internet without the consent of the parents. In its objection, the Slovak Authority emphasised that it disagreed the Authority's position according to which the available information does not give rise to a suspicion of unlawful processing by the Foundation on its websites. Furthermore, according to its position, it has to be established whether the Foundation uploaded any of the objectionable contents (photos or videos) and it has to justify the legal basis of processing and if there is no legal basis, it is necessary to issue a notice against the Foundation, calling it to remove the data processed without a legal basis. In view of the reasons detailed above, the Slovak Authority repeatedly expressed that in its view, there is a possibility of infringement, hence it is necessary to conduct an inquiry.

The Authority found that the recordings objected to are no longer accessible on the internet.

The Authority reviewed the websites concerned in this inquiry and based on the information on the websites and the statements of the Foundation found the following in relation to the Foundation's activities:

The [REDACTED] is a Hungarian language initiative on the occasion of the Earth Day. The participants of the initiative sing the song Light a candle for the Earth together in Hungarian. The purpose of the initiative is to use music to educate children about sustainability, and through that to educate them about environmental culture i.e. to shape their lifestyles, thinking and behaviour. According to the initiative "music is a wonderful instrument with the help of which attention can be directed to a sustainable and fair world view for human society, nature and the planet, and to finding a way to lead us to a more beautiful future". The initiative connects Hungarian communities in all parts of the world and directs their attention to the love of the Earth.

According to the information provided by the Foundation, the [REDACTED] programme (hereinafter: programme) is an experience-based educational methodology built on psychological research. The programme addresses the psychological wellbeing of both teachers and children, moreover, it provides an opportunity for the involvement of parents. It can be an excellent supplement to preschool or school work, because it provides an opportunity for bringing the traditional sharing of knowledge in line with the development of personal and social competencies needed for life. In every month of the academic year, the programme reflects on a subject matter, which will support and help children in dealing with everyday problems and develop their personal and mental health skills through continuous self-awareness and techniques intensifying a sense of happiness.

The goal of the [REDACTED] is not to present a problem-free life model to the young, but to provide guidelines to children of preschool and school age to enable them to face challenges more easily, to overcome problems and to provide an opportunity for studying the factors needed to maintain bodily and mental health and to raise awareness concerning these.

Institutions can join the network of [REDACTED] by submitting an application.

Although the Hungarian Authority disagreed with the need for an inquiry, granting the request of the Slovak Authority, it launched an inquiry based on Article 57(1)(h) of the General Data Protection Regulation and Section 38(3)(a) of Act CXII of 2011 on the Right to Informational Self-Determination and the Freedom of Information (hereinafter: Privacy Act), in the course of which the Authority contacted the Foundation based on Article 58(1)(a) and (e) of the General Data Protection Regulation² and Section 54(1)(a) and (c) of the Privacy Act³.

In view of the objection raised by the Slovak Authority to the Authority's decision, in its inquiry procedure the Authority examined what role the Foundation had in relation to the processing objected to by the Slovak Data Protection Authority and whether there was an infringement of Articles 5 and 6 of the General Data Protection Regulation.

Upon the request of the Authority, the Foundation - through [REDACTED], president of the Board – provided detailed information on the processing objected to in its statement of 4 January 2021 and 20 October 2021.

The Foundation created the [REDACTED] program. Individual teachers, as well as educational institutions, may join the programme; joining is conditional upon participation in the [REDACTED] network. Those teachers who would like to join the programme individually have to complete the thirty-hour accredited course run by the Foundation, which provides an adequate basis for acquiring the methodology of the [REDACTED].

The website [REDACTED] was created on the occasion of the Earth Day in 2017 and was still active in 2018. The initiative can be joined either individually or in a group by registering on the website.

The [REDACTED] programme was introduced and represented by the [REDACTED] (hereinafter: School) in Slovakia based on the cooperation agreement concluded

² Article 58(1)(a) and (e) of the General Data Protection Regulation: *“Each supervisory authority shall have all of the following investigative powers:*

a) to order the controller and the processor, and, where applicable, the controller's or the processor's representative to provide any information it requires for the performance of its tasks.

[...]

e) to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks.”

³ Privacy Act Section 54(1)(a) and (c): *“In the course of its inquiry, the Authority*

a) shall be given access to, and may make copies of, all data processed by the controller under inquiry that are presumed to relate to the case at hand, and shall have the right of access to, and may request copies of, such documents, including documents stored in an electronic data medium,

[...]

c) shall have the right to request written or oral information from the controller under inquiry, and from any employee of the controller.”

with the Foundation. There was a title awarding ceremony for the Slovak institutions in the first half of 2019, in which the representatives of the schools participated and, inter alia, children gave performances. The Foundation shared the photos made at this ceremony in the news reporting on the ceremony. The Foundation presented that it was not aware that the school did not obtain consent to making and using the photos of the persons participating in the ceremony, particularly in view of the fact that the face of one of the participants was blurred out upon request. Further, requested by the [REDACTED], the Foundation deleted the content objected to.

It was the Foundation's idea to enable users registering with the programme to upload reports illustrated with photos and videos, as well as persons joining the initiative to upload photos and videos to the website related to the specific programme and initiative. The Foundation informed users of the possibility to upload on the websites [REDACTED] and [REDACTED].

According to the Foundation's position, it acted as processor and not as controller with regard to the processing under inquiry, in view of the fact that all it provided was an interface for uploading photos and videos on both the websites [REDACTED] and [REDACTED]. As the operator of the websites, the Foundation pursues only the tasks of a moderator, i.e. it deletes entries that may constitute infringements; however, the entries are published not by the Foundation as they are uploaded to the websites by the users. Persons uploading content may delete them from the website at any time. The Foundation underlined that the schools uploaded the videos objected to to YouTube, and the YouTube videos were only embedded as external content on the websites.

The Foundation stores the photos and files uploaded by the users to the websites on its server protected by SSL encryption and exclusively authorised persons may have access to these data through the password protected admin interface of the website, others cannot edit them, only view them. The Foundation's administrator can delete the uploaded materials. Only the dedicated staff member of the Foundation has access to the server of the websites. The Foundation underlined that only the appropriately authorised staff members of the Foundation can see and edit the personal data of users through the admin interface, except for the password which is stored in an encrypted format.

The Foundation stores the recordings on its server until they are deleted by the uploading user, or if it is an infringing content, it is immediately deleted once the Foundation becomes aware of it.

Further, the Foundation stated that it did not pursue processing with regard to the recordings involved in this case, but with regard to the other personal data processed by them in the context of the websites, they guarantee the exercise of data subject's rights in line with the General Data Protection Regulation and their Privacy Statement was available on both websites. In the Privacy Statement accessible on the programme's website, the Foundation emphatically called attention to the fact that by uploading a photo/video containing the image of a third person, the uploading person assumes responsibility for obtaining the prior written consent of any person displayed on the photo/video and, in the case of children below the age of 16, the legal representative of the child must consent to making a photo/video recording of him/her and his/her child below the age of 16 and also to having the photo/video shared on the website.

The Foundation stated that the Privacy Statement related to [REDACTED] initiative did not include the provision concerning responsibility for the legal basis of processing the personal data of the data subjects; however, the Foundation maintained its statement, namely that it is the responsibility of the person making the photo or the video recording to obtain the consent of the data subjects, i.e. to have the appropriate legal basis partly in relation to making the recording and partly with regard to its publication, and according to the Foundation's position this responsibility exists irrespective of whether the Foundation specifically draws the attention of the publisher of the photo/video to this fact.

The Authority reviewed the Privacy Statement published on the programme's website and found that Section 4.4 of the Privacy Statement contained the following: "Registered members can share reports of the classes they held, illustrated by photos and/or videos on the page "The Children's Works" of the portal. (...) We emphatically call attention to the fact that by uploading a photo/video containing the image of a third person, you assume responsibility that in the event of using the image of all the persons in the photo/video or in the case of using the image of a child below the age of 16, the legal representative of the child, must give his/her written consent in advance to having a photo/video recording made of him/her or the child below the age of 16 and also to sharing the photo/video on the portal.

The Foundation attached a copy of the cooperation agreement concluded with the School on 2 May 2018 concerning participation in the programme. The Foundation informed the Authority that no document was signed by the Foundation and the School, which would have laid down the decision-making competences related to the determination of the purposes and means of processing.

I. The jurisdiction of the Authority

In the course of clarifying the fact of the case, the Authority established that the processing under inquiry can be associated with the Foundation registered in Hungary and the School in Slovakia. Pursuant to Article 55 of the General Data Protection Regulation and Section 38(2)(a) of the Privacy Act, the jurisdiction of the Hungarian Authority covers the Foundation which has its registered office in Hungary, consequently the Hungarian Authority is not authorised to investigate processing by the School. In view of all this, the Authority only investigated processing by the Foundation in this procedure.

II. Establishing the capacity of controller

II.1 Pursuant to Article 4(1) of the General Data Protection Regulation, "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

II.2 Pursuant to Article 4(2) of the General Data Protection Regulation, "processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring,

storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

II.3 Pursuant to Article 4(7) of the General Data Protection Regulation, “controller” means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.

II.4 Pursuant to Article 26(1) of the General Data Protection Regulation, when the purposes and means of data processing are jointly determined by two or more controllers, they qualify as joint controllers. The joint controllers shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subjects and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement may designate a contact point for the data subjects. According to paragraph (2), the arrangement referred to in paragraph (1) shall duly reflect the respective roles and relationships of the joint controllers, vis-a-vis the data subjects. The essence of the arrangement shall be made available to the data subject. According to paragraph (3), irrespective of the terms of the arrangement referred to in paragraph (1), the data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers.

II.5 In its response to the Authority, the Foundation stated that as the operator of the website of the programme, the page [REDACTED] and of the website of the initiative, the page [REDACTED], it does not qualify as controller with regard to the processing under investigation. In this context, the Foundation pointed out that it does not pursue processing activities with regard to the photos and video recordings uploaded to the websites. It is not the Foundation that publishes recordings on the websites as they are uploaded and published by the users. The Foundation stores the photos on the servers of the websites, while users have to upload video recordings to YouTube and it is from there where the links are embedded on the website. Besides, it was the Foundation that uploaded the photos made of the title awarding ceremony organised in the first half of 2019 to the programme’s website when the photos were transferred to it by the deputy master of the School.

II.6 When stipulating the status as controller, the Authority examined who determined – whether independently or together with others – the purposes and means of processing, i.e. who has the decision-making role with regard to the purposes and means of processing.

II.7 According to the Foundation’s statement, the programme was created by the Foundation and the initiative is also linked to the name of the Foundation. The programme was introduced by the School and also represented by it in Slovakia based on the cooperation agreement concluded with the Foundation. It was the Foundation that provided the possibility of uploading photos and videos for the users for both the [REDACTED] and the [REDACTED] websites; it was also the idea of the Foundation that persons participating in the programme or joining the initiative can upload photos and videos to the websites linked to the specific programme and initiative.

II.8 According to the Authority's position, the Foundation over and above providing an interface for uploading photos and videos also determined the purpose and means of processing and it provided an interface for those participating in the programme or joining the initiative for uploading their recordings linked to the programme and the initiative, and this interface served the purpose of promoting the Foundation's activities.

II.9 When determining the status of controller, the Authority also examined the issue on whose behalf the persons making and uploading the recordings took action when making the recordings and uploading them to the website. In examining this, the Authority found that the persons uploading the recordings did not act on behalf of the Foundation but in their own name when making the recordings, they uploaded the recordings in their own name, and they decided whether to make recordings, what sort of recordings to make and whether to publish them on the websites. The Foundation had no control over whether or not the specific institutions and individuals would produce these recordings and upload them to the websites, the specific decisions concerning these were made exclusively by the persons making and uploading the recordings, i.e. with respect to the processing under investigation, the school made them irrespective of the Foundation.

II.10 According to Guidelines 07/2020 of the European Data Protection Board (hereinafter: EDPB) (hereinafter: Guidelines)⁴ if the entities do not have the same purpose with regard to the processing, then in the light of the case law of the CJEU, joint processing takes place, if the entities concerned pursue closely related or supplementary purposes. This may arise, for instance, if mutual benefits arise from the same processing operation, provided that each of the entities concerned participate in the determination of the purposes and means of processing.

II.11 According to the Guidelines, decisions are considered to be coordinated as regards their purposes and means if they are complementary and necessary to ensure that the processing is carried out in such a way that they have a tangible impact on the purposes and means of the processing. According to the Guidelines⁵, decisions can be considered to be coordinated with regard to their purposes and means if they are complementary and necessary for the processing to take place in such manner that they have a tangible impact on the determination of the purposes and means of the processing. As such, an important criterion to identify coordinated decisions in this context is whether the processing would not be possible without both parties' participation in the purposes and means in the sense that the processing by each party is inseparable, i.e. inextricably linked. It is also important to underline as clarified by the CJEU⁶ that an entity will be considered as joint controller with the other(s) only in respect of those operations, for which it determines jointly with others the means and the purposes of the processing. Where one of these entities independently determines the purposes and means of upstream or downstream operations in the chain of processing, this entity must be considered the sole controller of the upstream or downstream operation.

II.12 Pursuant to Section 1 of the cooperation agreement concluded by and between the Foundation and the School on 2 May 2018, "based on this agreement, the parties intend to cooperate with a view to facilitating the objectives of the Foundation (...)". According to Section 3,

⁴ EDPB Guidelines, Point 60

⁵ EDPB Guidelines, Point 55

⁶ Judgment Fashion ID, C-40/17, ECLI:EU:2018:1039

the School undertakes to carry out the tasks set forth in the cooperation agreement with a view to the attainment of the objectives specified under Section 1 and the Foundation provides assistance to the School for this. Based on the content of the cooperation agreement and the statements of the Foundation and in the light of the Foundation's activities, the Authority found that by creating the programme and the initiative, the Foundation determined their fundamental purposes and the fundamental framework of cooperation with the institutions; however, the institutions joining the programme and the initiative identified with the objectives specified by the Foundation and, linked to the Foundation's objectives, they became their own coordinated objectives with respect to the programme and the initiative. Consequently, although according to the cooperation agreement, the parties set it up with a view to facilitating the attainment of the Foundation's objectives, the purposes of the processing carried out based on the agreement, thus in particular, making the photos and uploading them to the websites, are not determined exclusively by the Foundation; instead, the School and the Foundation pursued closely related and complementary purposes and mutual benefits arose from the same processing operation, i.e. the making of the photos and uploading them to the websites.

II.13 Summarising the above, the joint participation in processing between the School and the Foundation in terms of purposes was achieved by the entities concerned pursuing closely related or complementary purposes.

II.14 In terms of fundamental means, joint participation in processing arose from the coordinated decisions of the two entities, with the Foundation providing the interface for uploading the recordings on the websites, while the specific decisions whether to make those recordings and whether to upload them to the websites were brought independently by the School, irrespective of the Foundation, and the School made the recordings themselves to be uploaded based on its own decision.

II.15 Article 26(1) of the General Data Protection Regulation requires joint controllers to transparently determine and adopt their respective responsibilities for compliance with the obligations under this regulation. Hence, joint controllers have to determine who is going to do what, by themselves making the decision on who has to carry out what tasks in order to ensure that processing complies with the obligations related to joint processing in accordance with the General Data Protection Regulation.

II.16 According to the Foundation's statement, there was no arrangement between the School and the Foundation as joint controllers within the meaning of Article 26(1) of the General Data Protection Regulation.

II.17 The Authority records that it is not authorised to investigate the processing by the School in view of Section I above.

II.18 The Authority established that through the fact that there was no arrangement between the Foundation and the School within the meaning of Article 26(1) of the General Data Protection Regulation with regard to joint processing and their respective responsibilities because the cooperation agreement concluded by and between them did not cover the regulation of these issues, the Foundation breached the provisions of Article 26(1) of the General Data Protection Regulation.

III. The legal basis of processing the personal data

III.1 The Authority examined whether the processing investigated in the present procedure breaches the provisions of Articles 5 and 6 of the General Data Protection Regulation.

III.2 Under Point 58 of the Guidelines, joint processing does not necessarily mean that the individual actors have the same responsibility with regard to the same processing. On the contrary – as also clarified by CJEU – since these actors can participate in different stages of the processing and to different degrees, the extent of their responsibility has to be assessed taking into account all the relevant circumstances of the specific case.

III.3 Irrespective of the fact that, based on the Foundation's statement, the arrangement within the meaning of Article 26(1) of the General Data Protection Regulation has not come into being between the School and the Foundation as joint processors, in practice they actually shared the processing activities carried out with a view to attaining the purposes of processing among themselves: while the School produced the photos and the video recordings and uploaded them to the websites, the Foundation assisted in achieving the complementary purposes by providing the interface needed. The sharing of these tasks in practice implies sharing of the responsibilities for compliance with obligations according to the General Data Protection Regulation related to the processing activity. With respect to making the recordings and uploading them to the websites, only the School was in a position to have a valid legal basis for processing by obtaining the consents of the data subjects to processing, in view of the fact that the Foundation was not in direct contact with the data subjects and did not have an opportunity to request their consent to processing.

III.4 In the Privacy Statement of the programme (Section 4.4), the Foundation expressly drew the attention of the participants to the fact that by uploading a recording, the person doing so assumes responsibility for getting the consent of the person in the photo/video – or in the case of data subjects below the age of 16, his/her legal representative – to having recordings made and shared on the website in advance. Consequently, the Foundation acted properly to ensure that both it and the School have a valid legal basis for the processing under investigation.

III.5 With regard to the photos transferred by the School to the Foundation and uploaded to the website by the Foundation, the Authority accepted the arguments of the Foundation that the fact that the face of one person blurred out on one of the photos sent by the School to the Foundation was an indication that the School took care to have a legal basis. It follows that the Foundation had good reason to assume that the School took steps to obtain the consent of the persons concerned – i.e. to establish an appropriate legal basis – since any person who had not given his consent to the processing of his image was prevented from being identified by the School.

III.6 In summary, in this case the requirements set against controllers in Articles 5 and 6 of the General Data Protection Regulation cannot be interpreted as obligations for the Foundation.

IV. Notice

Based on Article 58(2)(d) of the General Data Protection Regulation and Section 56(1) of the Privacy Act⁷ and taking into account the above, the Authority

gives notice

to the Foundation to meet the requirements for joint controllers in the course of its joint processing activities in the future.

Date: Budapest, 2023

Yours sincerely,

Dr. habil. Attila Péterfalvi
President
Honorary university professor

⁷ **Section 56(1) of the Privacy Act** "If the Authority finds that there is an infringement relating to the processing of personal data or concerning the exercise of the right to access data of public interest or data accessible on public interest grounds, or that there is an imminent threat of such an infringement, it shall require the controller to remedy the infringement and eliminate the imminent threat of such an infringement."

Delivery clause to case file number

To:

	Name and correspondence address of the addressee	To be enclosed	Mode of mailing
1.	To [Redacted] [Redacted]	-	by mail with acknowledgement of receipt
2.	Archives	-	-