Der Hamburgische Beauftragte für Datenschutz und Informationsfreiheit

Der Hamburgische Beauftragte für Datenschutz und Informationsfreiheit
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Hamburg, den 27.1.2021

Consultation prior to an order pursuant to Article 58 (2) (g) GDPR

[redacted]
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The Hamburg Commissioner for Data Protection and Freedom of Information (HmbBfDI) has initiated administrative proceedings against Clearview AI Inc. 214 W 29th St, 2nd Floor, New York City, NY, 10001, represented by [redacted] and intends to order Clearview AI Inc. to:

1. **Delete the hash value mathematically generated by Clearview AI Inc. for the person of the complainant, Mr Matthias Marx (Face Search Results Report, May 18, 2020).**
2. **To confirm to the HmbBfDI the deletion of the mathematically generated hash value for the person of the complainant referred to in point 1.**

I.

The reason for opening the administrative procedure is Mr Matthias Marx‘ complaint about Clearview AI Inc. The complainant made use of the possibility provided by Clearview AI Inc. to obtain information about his personal data stored there. The information dated May 18th 2020 (annex) from Clearview AI. Inc. contained positive (as well as false-positive) results. Mr Marx is a German citizen and resides in Hamburg. Mr Marx has not given his consent to the biometric processing of his personal data.

II.

Pursuant to Art. 51, 55 of Regulation (EU) 2016/679 (GDPR), Section 40 (1) of the Federal Data Protection Act, Section 19 (1), (2) sentence 2 of the Hamburg Data Protection Act (HmbDSG) in conjunction with Art. 58 (2) (g), 17 (1) (d) GDPR, the HmbBfDI is authorised to order the deletion of personal data if they have been unlawfully processed.

1.

The HmbBfDI's competence is not precluded by the fact that Clearview AI Inc. has its registered office in the US and does not maintain an EU establishment. Regulation (EU) 2016/679 (GDPR) applies to the processing of personal data of data subjects who are based in the EU by a controller or processor not established in the Union, where the processing activities are related to the monitoring of their behaviour as far as their behaviour takes place within the EU.

Behaviour is monitored when it is recorded in a targeted manner and stored in the form of personal data. Systematic recording is not necessary. The sensitivity of the monitored behaviour is irrelevant. The motive for the monitoring is also irrelevant (*Hornung*, in: Simitis/Hornung/Spiecker gen. Döhmann, Datenschutzrecht, DSGVO Art. 3 Rn. 57). According to recital 24, sentence 2 of the GDPR, the question of whether a controller is monitoring the behaviour is based on whether the internet activities of the data subject are being tracked.

Clearview AI Inc. is aiming to record the behaviour of individuals and store it in the form of personal data. In particular, it is the purpose of the company to be able to identify individuals. Such identification is possible by storing publications/profiles/accounts of users linked to a photograph, such as in particular in social networks, forums or blogs, in a profile, or at least being able to create a profile of an individual at any time. This subsequent use of personal data processing techniques aimed at profiling is a decisive indicator (*Hornung*, in: Simitis/Hornung/Spiecker gen. Döhmann, Datenschutzrecht, DSGVO Art. 3 Rn. 59).

These requirements are also met with regard to the information provided on May 18th 2020, whereby the accuracy of the profile is irrelevant. A specific compilation of the concerned person's internet activities was compiled and provided with corresponding sources. The fact that the systematic compilation is also subject to errors is irrelevant for the assessment. The fact that the compilation does not claim to be complete and that this may not be the intention is also of no consequence.

Insofar as Clearview AI Inc. has argued that there is no monitoring because there is no monitoring over a certain period of time ("*observations of an individual over a certain amount of time*") and Clearview AI Inc. accordingly only provides a snapshot ("*snapshot of some photos available on the internet*"), this counter-argument is not valid, as the report of May 18th 2020 already contains an archive entry ("*an*

archive photo dated 28 November 2012 shows students Henning Stock Photo (...)") and an updated entry ("*Students Henning Stock Photo & Students Henning Stock Images*"). Accordingly, Clearview AI Inc. does not offer a snapshot, but evidently also archives sources over a period of time.

Furthermore, it can be seen from the report that the archive photo shows the complainant as a student („*shows students*“). Accordingly, contrary to its statement (*"Clearview AI does not collect or provide any information about the (...) behaviour of a person who appears in the Clearview AI search results (...)"*), Clearview AI Inc. also processes the behaviour of data subjects.

Ultimately, the condition "*conduct within the Union*" is also to be affirmed in the present case, since the person concerned was physically present in a territory designated in Art. 52 EUV, Art. 355 AEUV, namely the Federal Republic of Germany, while using the internet.

2.

The requirements for a deletion order have been met. A separate request by the person concerned is not necessary (*Polenz*, in: Simitis/Hornung/Spiecker gen. Döhmann, Datenschutzrecht, DSGVO Art. 58 Rn. 42).

Pursuant to Art. 17 (1) (d) GDPR, the order for erasure requires the unlawful processing of personal data. This is the case with regard to the mathematically generated hash value relating to the person of the complainant.

In particular, it must be stated that biometric processing is involved which necessitates a qualified legal basis within the meaning of Art. 9 (2) GDPR is given.

According to Art. 4 No. 14 GDPR, „biometric data” means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data. Clearview AI Inc. uses a specially developed mathematical procedure to generate a unique hash value of the data subject which enables identification. In this respect, the extracted hash value is a biometric data within the meaning of Art. 4 No. 14 GDPR.

Such biometric data are subject to the general processing prohibition of Art. 9 (1) GDPR. This general ban on processing leads to the necessity of a specific legal basis pursuant to Art. 9 (2) GDPR. However, the requirements of such a specific legal basis pursuant to Article 9 (2) GDPR are not fulfilled for the data processing carried out by Clearview AI Inc. In particular, there is no consent of the data subject pursuant to Art. 9 (2) (a) GDPR. Therefore, the personal biometric data of the data subject (the hash value) is being processed unlawfully pursuant to Art. 17 (1) (d) GDPR.

III.

We request that the situation described above be remedied by 12.2.2021 and expect a notification on the deletion of the hash value.

[redacted]

Annex: Face Search Result, Report prepared Max 18, 2020.