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How Can Data Privacy Regulations Limit the Ability to Present Evidence in a Litigation?

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The French Supreme Court sanctions a company for having produced complete employee pay slips in a litigation.

It is not news that the rules of evidence and data privacy laws may be conflicting. A recent decision of the French Supreme Court[1] illustrates this tension and highlights the need for litigators to take into account data privacy principles before producing evidence containing personal information.In this case, a company had organized mandatory staff representatives' elections. The company had started a court action against three election candidates aiming at opposing their candidature due to certain requirements related to their job classifications not being met. Among the evidence produced by the company were the complete pay slips of the three employees. All of the trade unions that were participants in the election process were also parties to the litigation and as such, they all received copies of the evidence produced by the company.

The employees started an emergency proceeding to have the pay slips immediately removed from the court file, claiming that it was an invasion of privacy. The employees based their claim, among other things, on Article 8 of the European Convention on Human Rights. The company argued that it needed to provide the pay slips to evidence its claim.

The French Supreme Court disagreed and ruled in favor of the employees, recognizing an invasion to the employees' privacy. The French Supreme Court pointed out that the pay slips mentioned the age, salary, personal address, bank domiciliation and sick-leave days, which were not relevant evidence for the case. Only two items of information on the pay slips were relevant for the case and, the court said, the non-relevant information should have been redacted. In addition to the removal of the pay slips from the litigation file, the French Supreme Court granted all three employees damages.

Employee data-protection notices often contain broad statements that the employees' personal data may be shared by the employer to protect its rights and if the sharing of data is in the employer's legitimate interests. This type of statement does not protect employers if they produce evidence containing personal data not strictly relevant for a litigation. In such a situation, only the express consent of the individual is a protection, as mentioned by the French Supreme Court. Furthermore, express consent of an employee practically cannot be obtained due to the power imbalance between employers and employees.

The right to privacy appears as paramount and the fact that the European Convention on Human Rights is among the regulations supporting this decision indicates that the decision in this specific case is to apply in all litigation.

The General Data Protection Regulation raised awareness among the individuals as to their rights to privacy and the existence of data-protection laws. It is therefore likely that litigations surrounding the production of certain evidence because of the personal data they contain is going to become more and more common and should lead litigators to adapt their practice.

Litigators should exercise caution and consider, depending on the nature of a litigation and the parties involved, whether and how to produce evidence containing personal data. Evidence containing personal data that is only in part relevant to a case should systematically be redacted to only keep the relevant data, especially if a third party is part of the litigation.

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[1] Social Chamber of the French Supreme Court (Cass. Soc., November 7, 2018, no. 17-16.799)