Overview of mediation by the Dutch Data Protection Authority concerning the delisting of search results by Google

25 May 2016

Since July 2014, the Dutch Data Protection Authority (Dutch DPA) has received 111 requests to delist search results on a person's name in a search engine. All requests related to Google. In 32 cases the Dutch DPA has mediated between Google and the data subject. In 24 cases the search results were delisted.

Searching for someone's name in a search engine may lead to search results that infringe on the privacy of this person. The European Court of Justice has ruled on 13 May 2014 that people have the right to request search engines to delist certain results from a query on their name. If the search engine refuses to delist, they can ask the Dutch DPA for help. In July 2014 the Dutch DPA received the first such request for assistance.

Procedure: mediation, not complaints handling
The Dutch DPA considers such requests to be a request for mediation, as opposed to a complaints handling procedure. In case of mediation between the data subject and a search engine, the search engine has no obligation to follow the advice of the Dutch DPA. However, mediation is often an appropriate method to find a solution for a dispute between a search engine and the data subject.

Mediation is a procedure to reconcile interests, and often helps avoid (costly and lengthy) legal procedures. Separate from possible mediation by the Dutch DPA, or if the mediation does not produce the desired result, a data subject can go to civil court and request the court to order the delisting of one or more search results. The Dutch DPA is not a party in such proceedings.

Primary assessment
When assessing a new mediation request, the Dutch DPA uses the criteria provided by the Article 29 Working Party\(^1\), as well as guidelines provided by national (Dutch) jurisprudence and the initial guidance provided by the European Court of Justice in the Google Spain judgement.\(^2\)

The initial aim of the Dutch DPA is to assess whether mediation is likely to be effective and opportune. A key part of this assessment is to determine whether Google's decision seems legally correct or understandable, given the facts available in the case at hand. A common and difficult hurdle in this process is the assessment whether a claim made by the complainant is true or not. The Dutch DPA is not in a position to determine what is true or false, unless the complainant provides the Dutch DPA with clear evidence to support his claim. A lack of evidence often leaves the DPA no choice but to advise a

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\(^2\) European Court of Justice, ECLI:EU:C:2014:317, C-131/12 (Google Spain SL and Google Inc vs Agencia Española de Protección de Datos), 13 May 2014.
complainant to go to (civil or administrative) court, and/or to file a criminal complaint of slander or fraud with the police.

Statistics
On 26 November 2014, the Dutch DPA has published a first public overview of delisting cases. From July to November 2014 the Dutch DPA received over 30 requests related to delisting of search results.

Total number of requests
The Dutch DPA has so far received 111 mediation requests in total for the delisting of search results (until 18 May 2016). All of these requests were assessed by the Dutch DPA (2 are still under consideration), and in many cases, the Dutch DPA has asked the data subject to provide additional information. All cases concerned search results in Google Search, although some of them also included Bing.

Inadmissible cases
Out of the 111 cases, 16 were found to be inadmissible, for example because the legal term to file a request for mediation to the Dutch DPA had expired, or because the data subject did not respond to a request from the Dutch DPA to send extra information and/or because the data subject did not provide evidence of sending a delisting request to Google, and/or of the refusal by Google.

No mediation
In 61 cases, the Dutch DPA did not mediate between Google and the data subject, because no mistake or incorrect interpretation of the law by Google was apparent, or because the facts of the matter were unclear or still subject to pending legal procedures. In 1 of those cases (and in 2 of the inadmissible cases), the data subjects, on advice of the Dutch DPA, successfully approached the original source of information with a removal request. Those cases concerned the publication of personal data by a government source, where the publication was not necessary for a public task and the interests of the data subject prevailed over the obligation to disseminate the information. If the public body in case would not have honoured the removal request, the Dutch DPA would have started mediation – either with the public body or the search engine.

Mediation
In 32 cases, the Dutch DPA mediated between Google and the data subject. A small set of these cases are repeated requests, relating to the same information and data subjects. Google responded to all of these mediation requests and agreed to re-evaluate its initial decision on the request for removal. As a result of the mediation in these cases, Google decided to grant the requests of the data subject in 24 of the mediated cases and delisted the requested links.

In 8 cases Google denied the delisting request from the Dutch DPA, and decided to maintain its initial conclusions about the case at hand. The Dutch DPA then closed the mediation cases. In these cases the data subject can go to civil court. The Dutch DPA is not a party in such proceedings.

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3 Statement Dutch DPA 26 November 2014, URL: https://autoriteitpersoonsgegevens.nl/nl/nieuws/behandeling-afwijderverzoeken-google
4 A request for mediation has to be filed within 6 weeks after the search engine operator has denied the request to delist, according to Article 47 (1) of the Dutch data protection act (Wet bescherming persoonsgegevens). This 6 week period is similar to the appeal term used in general administrative law (Algemene wet bestuursrecht).
Dutch court cases about delisting

As far as the Dutch DPA knows, 1 data subject has brought his case to court after the Dutch DPA had decided not to mediate. The Dutch DPA was not a party in these proceedings, as it was a matter between Google and the data subject. This judge ruled in favour of the data subject. This concerned a data subject who was convicted in 2012 for a criminal offence in another European country. The Dutch judge concluded (in intermediate proceedings) that this concerned the processing of a special category of data (about a criminal offence), and Google could not rely on any of the exceptions on the prohibition to process such data. Subsidiarily, the judge ruled that even if the prohibition of the processing of sensitive data did not apply, Google should have still granted the delisting request because the data subject (a lawyer) was not a public figure, and the conviction was 'spent' (that is; the data subject was given a 'clean slate'), according to new evidence produced by the data subject during the court procedure. The court decision is not final; appeal is still possible.

In one of the 8 cases where the Dutch DPA had mediated, but Google refused to delist, the data subject took his case to court. The court decided in favour of Google. The case concerned a data subject (journalist) who was accused of plagiarism 16 years ago. It concerned one paragraph in an article of 4,000 words. The court considered that the information was factually correct (the fact that the journalist committed plagiarism) and that the data subject was still active, professionally, as a journalist. The court considered the offence as being of such a serious nature in its profession (journalism) that the information had to remain accessible in the future for future employers. This case is no longer open for appeal.

The Dutch DPA has knowledge of 2 other court cases. The data subjects did not contact the Dutch DPA in these cases. The first case concerned a delisting request from a convicted criminal. The judge (in intermediate proceedings) decided in favour of Google. The judge ruled that the availability of information on a conviction for violent crimes remains in the interest of the general public. The judge ruled that 'negative publicity as a consequence of a serious crime generally remains permanently relevant information about a person'. The data subject appealed against this decision. But the appellate Court also ruled in favour of Google. Even though the data subject was still appealing against the original conviction, the court found that the publication of information about this conviction, and the public interest in this information, are a direct consequence of the behaviour of the data subject. The court reasons: "The public generally has a great interest in having access to information about serious crimes, and therefore also about the public prosecution and conviction of the plaintiff."

The second case was about a data subject that objected to news articles about his (temporary) living conditions. The data subject was a manager of a well-known consultancy firm. The judge (in intermediate

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5 Not all jurisprudence is made publicly available through the official website of the courts, www.rechtspraak.nl. Selection criteria for publication are available at the URL: https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Selectiecriteria.aspx (in Dutch only).
proceedings) ruled in favour of Google. The judge specified that the key question is whether the links in search results are relevant, and not the question whether the contents of the hyperlinked news articles are inadequate, irrelevant or excessive. The judge found the search results relevant because they relate to the data subject, are essentially correct, not excessive, relate to recent events and are not unnecessarily defamatory. In this case Google was entitled to refuse the delisting. The judge added that the right to delete personal data cannot be misused to circumvent the rules on unlawful press publications or to try to keep undesirable information that is not unlawful away from the public. The data subject did not appeal in this case.

General categorisation of delisting requests
In order to protect the privacy of the data subjects that have asked for mediation, the Dutch DPA cannot go into much detail about the content of individual delisting requests. Generally, the Dutch DPA has mediated for the delisting of search results about:

1. information that has been ’reused’ by third parties without the consent of the data subject, such as sites that scrape the content of telephone directories or Whois pages;
2. evidently incorrect/false information (for example supported by a statement issued on honour confirmed by notarial deed or statement of a public prosecutor);
3. evidently outdated information, with defamatory results, while the data subject has no public role in society/there is no prevailing public interest in the availability of these search results;
4. evidently unlawfully published information (where consent or legal obligation were the only legal grounds for the data processing), for example as a result of identity fraud or search results revealing a copy of an identity document containing the national identification number;
5. information about wrongly filed DMCA-requests (in cases where the data subject wrongly filed a DMCA-request, instead of filing a delisting request for the search results).

In general, the Dutch DPA did not mediate in cases that involved search results on:

1. controversial political statements by politicians, also former politicians in case the information was not older than 4 years (election cycle in the Netherlands) and/or remained relevant political history;
2. behaviour of CEOs, people with high management positions in companies or organisations, descriptions of the wealth of very rich people (if the information was not evidently false/factually incorrect);
3. (medical) disciplinary sanctions and convictions for serious crime (if the data subject did not yet qualify for a ’clean slate’, according to the rules in the Netherlands or elsewhere in the EU to obtain a clean slate; in the Netherlands these are the rules to obtain a ’Certificate of Conduct’);
4. highly complex cases with for example pending legal procedures relating to (accusations or convictions or sanctions of) criminal behaviour and/or fraud by data subjects with a public role in society, where the Dutch DPA was unable to assess whether the information was true or false;

5. undesirable, but not incorrect or outdated information about people with a public role in society, especially when they made this information public themselves;
6. slanderous/libellous information (if the information was not evidently incorrect/false);
7. information about a home address or phone number (if the search results did not appear when searching for the name of the data subject).