REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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By attachment

February 23, 2022

Supreme Administrative Court of Sweden
Birger Jarls Torg 13
111 28 Stockholm, Sweden

Re: Decision of the Administrative Court of Appeal in Gothenburg on 30 November 2021 in Case No. 2232-21, Swedish Authority for Privacy Protection v. Google LLC.

Dear Justices of the Supreme Administrative Court of Sweden,

The Reporters Committee for Freedom of the Press respectfully writes to offer this third-party opinion in support of Google LLC in this matter.[1] Specifically, we urge the Court to reverse the decisions below and to affirm that notifying publishers when their webpages have been delisted from a search engine is not a violation of the General Data Protection Regulation ("GDPR") and, indeed, to the contrary, serves the public interest.

The right to erasure ("right to be forgotten") in Article 17 of the GDPR is strong medicine. By its nature, it operates to constrain the store of information available to the public—and has the potential to do so on a vast scale. For that reason, Article 17.3(a) itself clarifies that the obligations of a data controller under the provision do not apply when processing is necessary for exercising the rights of freedom of expression and information. This balancing is essential because a legally enforceable right to delist material from search engines creates a potent incentive for individuals to misuse the right to suppress information that is truthful and in the public interest but may be perceived as derogatory.

The rule articulated by the lower courts here—that notifying affected webmasters, including news publishers, of a delisting determination by

[1] The Reporters Committee for Freedom of the Press, a non-profit organization advocating for freedom of the press and the rights of news publishers, has coordinated numerous briefs and comments in matters implicating the right to be forgotten in both European and Canadian proceedings. *See, e.g.*, Case C-507/17, Statement of Reporters Comm. for Freedom of the Press et al., *Google v. CNIL*, E.C.J. (Nov. 29, 2017), available at https://perma.cc/36DW-VL2G; Voluntary Submission in Intervention, Reporters Comm. for Freedom of the Press et al. Supporting Google Motion no. 399.922, *Google v. CNIL*, French Council of State and the French Supreme Court (Nov. 4, 2016), available at https://perma.cc/4ZSE-XXXR; Letter from Reporters Comm. for Freedom of the Press et al. to Daniel Therrien, Privacy Commissioner of Canada (Apr. 27, 2018), available at https://perma.cc/6FGN-AHBT; Third Party Intervention by Reporters Comm. for Freedom of the Press et al., Application No. 77419/16, *Biancardi v. Italy*, Eur. Ct. H.R. (May 28, 2020), available at https://perma.cc/RDY4-KVYL.

Google violates the GDPR—would skew that balancing. And this would be particularly true in cases involving, for instance, news about official corruption, crime, public health, corporate misconduct, and public safety, where the reporting subject may have a vested interest in limiting the public's access to that information, and the public need for that information is strong. *Cf.* Requested Content by Website Category, Requests to Delist Content Under European Privacy Law, Google Transparency Report, https://bit.ly/3rWW9Il (last visited Feb. 17, 2022) (showing that more than half of all news delisting requests involved criminal activity, professional information, political activity, or professional wrongdoing).

In practice, news publishers are going to be *more* likely than search engine providers to properly apply the Article 17.3(a) balancing to a particular news story for which a data subject requests delisting. For instance, a political candidate convicted of criminal activity in the past may request delisting of a story reporting on the misconduct, arguing, among other things, that the news story is old and no longer relevant. The news organization that published the original story, however, may understand better why the information in the story is of continued relevance, and have a more informed sense of the harm that would accrue for the public at large if the delisting is permitted to continue.

Precluding notice to the news outlet would make it highly unlikely for that outlet to learn that their reporting had been delisted. As such, the news outlet would be unable to contest the delisting or provide that additional context to allow the search engine to better apply the balancing required under Article 17.3(a).

The Administrative Court dismissed this consideration, arguing that the balancing must take place *before* the search engine decides to grant the delisting request, and that notification after the decision is made cannot contribute to the balancing. But balancing privacy interests with the rights of freedom of expression and information is inherently difficult and subjective, must be applied case-by-case, and is an exercise where search engines may not have sufficient information to make the right decision. This complexity is compounded by the sheer volume of delisting requests. *See* Google Transparency Report, *supra* (showing almost five million delisting requests for individual URLs since 2014, close to a fifth of which since 2016 have been for news).

As such, to properly effectuate the balancing required by the GDPR, search engines should be able to receive input from affected webmasters to ensure the most informed decision possible. To leave webmasters unaware of a delisting decision would seriously tip the scale in the requisite balancing to the unchallenged assertions of the data subject in their delisting request.

Beyond just the effect on publishers whose content is delisted, a policy precluding a search engine from notifying affected publishers would weaken the GDPR's own structural protections for free expression, a matter of democratic governance itself. Notice to the publisher ensures that publishers can, in appropriate cases, provide supplemental information and request a re-review, ensuring that right to erasure determinations by the search engine are made with proper information.

As such, getting that balancing correct is not just a matter between the individual data subject and the search engine, as the lower courts effectively held. Rather, given the central role of search engines in how individuals seek out news and other information online, an improperly calibrated balancing will impact public discourse writ large across Sweden (and beyond, if other data protection authorities adopt similar prohibitions on webmaster notifications).

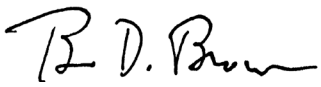
The representative examples of delisting requests and their outcomes in the Google Transparency Report include instance after instance of individuals requesting the delisting of news reports whose substance is plainly in the public interest. Google Transparency Report, *supra*. Across numerous countries, requestors included public officials; prominent figures in business, entertainment, the arts, law, medicine, and academia; convicted criminals; and individuals accused of professional misconduct. *Id.* In many of these cases, the subjects requested the delisting of numerous URLs on news sites featuring stories reporting on ongoing controversies. Keeping those stories visible to readers is plainly in the public interest. *Id.*

Although the Google Transparency Report does not indicate how the notification policy played into any of these individual cases, the larger point is that these examples plainly reflect information that is essential for an informed electorate to hold public officials and others accountable—the essence of public interest journalism. The notification policy serves as a counterbalance to ensure that when delisting requests such as these are made, a search engine has the information necessary to balance accurately. In the aggregate, accurate balancing becomes important for self-government.

Finally, we respectfully submit that the adoption of the lower courts' proposed finding that the notification policy violates the GDPR could directly undermine Sweden's pioneering protections for freedom of the press and public access to government information. *See* Elin Hofverberg, *250 Years of Press Freedom in Sweden*, U.S. Library of Congress (Dec. 19, 2016), https://perma.cc/AAU5-2VZL (recounting Sweden's enactment of the first freedom of information law in history). The press utilizes its access to report on government officials and activities. A one-sided delisting process—that is, one where members of the news media are unable to even know that delisting has taken place—could create substantial harm to the public accountability fostered by Sweden's press and access protections.

In sum, an enforceable legal right to limit public access to truthful information, particularly public interest news reporting, can have dramatically suppressive effects on public policy debates and the free flow of information to the public. The GDPR, recognizing this danger, requires a balancing of the individual right of erasure against the rights of free expression and information. Upholding the lower courts' categorical prohibition on notifying affected webmasters would lead to the undue suppression of free expression. We urge the Court to reject that outcome.

Sincerely,



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