



SUPREME COURT OF NORWAY

J U D G M E N T

given on 7 December 2021 by the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Wilhelm Matheson
Justice Knut H. Kallerud
Justice Ingvald Falch
Justice Erik Thyness

HR-2021-2403-A, (case no. 21-055809SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 5 February 2021

The Norwegian Medical Association

(Counsel Cecilie Tandberg Hallan)

v.

The State represented by the Norwegian
Privacy Appeals Board

(The Office of the Attorney General
represented by Stein-Erik Jahr Dahl)

- (1) Justice **Thyness:**

Issue and background

- (2) The case concerns the Privacy Appeals Board's decision of 21 January 2019, and the validity of its item 5 establishing that Legelisten.no has a legal basis – a *basis for processing* – for recording and publishing subjective user reviews of health personnel. The issue is whether the decision is compatible with Article 6 (1) (f) of the EU's General Data Protection Regulation (GDPR). According to section 1 of the Privacy Act, the GDPR applies as Norwegian law.

Legelisten.no

- (3) Legelisten.no is an online platform for sharing information regarding physicians and other health service providers. The purpose is to make it easier for patients to make suitable choices. The website was launched in May 2012 and initially only included information on physicians. The website has later been expanded to include dentists, medical specialists operating outside public health care, chiropractors, psychologists and video doctors. The website is owned and operated by Legelisten.no AS – in the following referred to as Legelisten.
- (4) The website is structured so that a search on for instance a physician's name returns objective information such as full name, contact information, gender, age etc. This corresponds to information in the list of physicians on the public health portal helsenorge.no. However, Legelisten.no also contains reviews of the relevant health personnel. The reviews are posted by persons stating that they have been treated by the relevant health service provider.
- (5) An individual review must contain a headline and a description of at least 100 characters. The user is also asked to rate the health service provider on a scale from one to five stars based on specific criteria. For instance, in addition to an overall rating, family doctors are also rated based on availability, trust, communication and service.
- (6) The user posting a review is asked to specify what is good and what could be improved, and to give constructive feedback. The user is requested to avoid offensive language, accusations of malpractice or criminal acts, personal attacks, other people's experience and hearsay. Then, a box must be ticked off to confirm that the review is based on personal experience and that the user does not have a close private or professional affiliation with the person reviewed.
- (7) Next, Legelisten sends out an email, in which the user is requested to confirm the review. This procedure is part of Legelisten's quality check and is aimed to ensure that the review is written by a genuine person and not generated by a computer or other similar device.
- (8) Legelisten examines the user's review. If a statement violates the internal guidelines, it is either moderated by agreement between Legelisten and the user or stopped from being published. This procedure is referred to as Legelisten's moderator function. All statements that are considered to comply with Legelisten's internal guidelines are published.

- (9) According to Legelisten, some 111 000 reviews had been submitted as of 28 May 2020, some 89 000 of which were published.

Regulatory proceedings

- (10) The case started in July 2015 when a dentist contacted the Data Protection Authority after having received negative comments on Legelisten.no. Invoking the Privacy Act in force at the time, she requested that all information on her be deleted. The Data Protection Authority rejected her request in a decision of 6 October 2016.
- (11) The dentist filed an appeal to the Privacy Appeals Board, which sent the case back to the Data Protection Authority for a new consideration.
- (12) While the Data Protection Authority was working on the case, nearly 40 inquiries came in from health personnel, most of whom wanted to opt out from being reviewed on Legelisten.no. During the same period, the Data Protection Authority was also contacted by users who were positive to the service. On its own initiative, the Norwegian Consumer Council delivered a consumer interest report.
- (13) The Data Protection Authority considered the case under the Data Protection Act of 2000, and issued a decision on 8 November 2017 with numerous instructions that Legelisten had to follow to comply with applicable data processing law. Among other things, it had to be possible for health personnel to “opt out from being reviewed on Legelisten.no and from having reviews published on the website”.
- (14) After Legelisten.no was ordered to introduce a general right to opt out, some 1 100 requests to that effect came in – mostly from family doctors.
- (15) Both Legelisten and the dentist appealed against the Data Protection Authority’s decision to the Privacy Appeals Board. Upon Legelisten’s request, the Data Protection Authority postponed implementation of the order to introduce a right to opt out until after the appeal was finally decided.
- (16) The Privacy Appeals Board handled the case in accordance with the GDPR. A majority of five members found that Legelisten had a legal basis under Article 6 (1) (f) GDPR for collecting and publishing subjective reviews on health personnel without offering a right to opt out. In the majority’s view, the legitimate interests in communicating the users’ subjective reviews overrode the consideration for the health professionals’ privacy. On the other hand, a minority of two members found that the privacy interests overrode the consumer interests. To remedy the privacy drawbacks, the minority found that it was necessary to introduce a general opt-out right, as the Data Protection Authority had concluded. Item 5 of the decision reflected the majority’s conclusion:

“Legelisten has a legal basis under Article 6 (1) (f) for collecting and publishing subjective reviews of health personnel without offering the health personnel the right to opt out from receiving such reviews.”

Court proceedings

- (17) The Norwegian Medical Association brought an action against the State represented by the Privacy Appeals Board, requesting that item 5 in the Privacy Appeals Board’s decision be ruled invalid.
- (18) On 17 December 2019, Oslo District Court ruled as follows:
- “1. The District Court finds in favour of the State represented by the Privacy Appeals Board.
 2. The Norwegian Medical Association is to pay costs of NOK 107 300 to the State represented by the Privacy Appeals Board, within two weeks of the service of the judgment.”
- (19) The Medical Association appealed against the District Court’s judgment to Borgarting Court of Appeal, which conducted a written hearing. On 5 February 2021, the Court of Appeal ruled as follows:
- “1. The appeal is dismissed.
 2. Costs are awarded in neither the District Court nor the Court of Appeal.”
- (20) The Court of Appeal, like the District Court, found that the processing of health personnel’s personal data on Legelisten.no pursued legitimate interests. The Court of Appeal also found that the processing was necessary for the purposes of the legitimate interests. Finally, the Court found – after a balancing of interests – that the freedom of expression and the interest in publication overrode the health personnel’s interests and right to private life.
- (21) The Medical Association has appealed to the Supreme Court. The appeal challenges the application of the law and the findings of fact.

The parties’ contentions

- (22) The appellant – *The Norwegian Medical Association* contends:
- (23) The key issue in the case is whether Legelisten has a legal basis under Article 6 (1) (f) GDPR for recording and publishing subjective reviews of health personnel. This relies on a broad assessment. The Court of Appeal is incorrect in linking the issue of review to whether or not a general opt-out right must be offered. The correct issue of review is whether conditions for having a basis for processing under (f) were met at the time of the Data Protection Authority’s decision.
- (24) For an enterprise to have a basis for processing under Article 6 (1) (f) GDPR, the controller or third parties must have a legitimate interest in processing the relevant personal data. This requirement is met in our case.
- (25) However, the two other requirements in Article 6 (1) (f) GDPR are not met.

- (26) The second requirement in Article 6 (1) (f) GDPR is that the processing must be “necessary for the purposes of the legitimate interests”. This is a high threshold. Any infringement on privacy must be strictly necessary, and processing of personal data is not necessary if the purposes may be fulfilled by less intrusive means.
- (27) Without affecting the object of the processing, Legelisten could ensure that the effects on the health personnel are less intrusive. Two possible measures are mentioned specifically: First, Legelisten could prevent the reviews of health personnel on Legelisten.no from appearing on top after a simple search on the health professional’s name. Secondly, Legelisten could monitor more systematically compliance with website’s guidelines.
- (28) When the recording and publication thus exceed what is necessary, one of the requirements in Article 6 (1) (f) GDPR is not met.
- (29) The Medical Association contends in the alternative that the third requirement in Article 6 (1) (f) GDPR – that the legitimate interests must not be overridden by the interests or fundamental rights of the data subject – is not met.
- (30) The Privacy Appeals Board and the Court of Appeal have placed too much emphasis on the interests of the public. The informational value of the website is in fact very limited. At the same time, the Court of Appeal has placed too little weight on the privacy drawbacks. It should also be stressed that Legelisten has not taken privacy-enhancing measures that notably reduce the drawbacks for the health personnel.
- (31) In addition, many of the negative comments are posted by anonymous users who have been denied certain services, such as sick leave, prescriptions or specialist referrals. The publication of negative comments may cause physicians to give in to patient demands without sufficient reasons.
- (32) When the right to private life conflicts with the right to freedom of expression, a fair balance must be struck. In the Medical Association’s view, the health personnel’s interests override the interests of Legelisten and the users. That is not the case here.
- (33) The Medical Association asks the Supreme Court to rule as follows:
- “1. Item 5 of the Privacy Appeals Board’s decision of 21 January 2019 is invalid.
 2. The State represented by the Privacy Appeals Board is liable for costs in all instances.”
- (34) The respondent – *the State represented by the Privacy Appeals Board* – contends:
- (35) When reviewing an administrative decision, the court must start with the disputed part of the decision. The Court of Appeal is not wrong in linking the legal issue at hand to the lack of a general opt-out right, given that this is what forms the basis for the decision.
- (36) Since the parties’ agree that the first requirement in Article 6 (1) (f) GDPR is met, the question is whether the two other requirements – necessity and proportionality – are also met.
- (37) The necessity requirement is met. The purpose of collecting and publishing subjective reviews is to share the patients’ own experiences in order to give users a better basis for finding health

personnel suited for their individual needs. This purpose is fulfilled by the publication of subjective user reviews.

- (38) The publication of user reviews does not exceed what is necessary. The reviews are limited to the users' own experiences with the services provided by the health personnel and concern aspects of the services that are relevant with regard to the choice of health personnel.
- (39) The general starting point is not changed by the fact that some unreasonable or unserious reviews pass through Legelisten's moderator function. Legelisten normally has a basis for processing under Article 6 (1) (f) GDPR when it comes to collecting and publishing subjective user assessments on Legelisten.no – also in cases whether health personnel wish to opt out.
- (40) In the balancing of interests, it is an important principle that Legelisten's sharing of user experiences is protected by the freedom of expression. It follows that the case law from the European Court of Human Rights on the balancing of the right to private life and the right to freedom of expression is relevant as an interpretative factor and for the balancing of interests.
- (41) The Court of Appeal has correctly concluded that the interests of Legelisten override the interests of the health personnel. In this context, it must be emphasised that the user experiences are of public interest and that they cannot be found elsewhere. Also, Legelisten protects the interests of the health personnel to the extent possible, among other things by monitoring the user reviews' compatibility with Legelisten's guidelines. In the overall assessment, one must keep in mind that the comments concern the exercise of a profession, and that the health personnel are persons with a role in public life. It is unlikely that these persons would allow fear of negative reviews to influence them in connection with issuing prescriptions, granting sick leaves or the like.
- (42) The State represented by the Privacy Appeals Board asks the Supreme Court to rule as follows:
 - “1. The appeal is dismissed.
 - 2. The State represented by the Privacy Appeals Board are awarded costs in the District Court, the Court of Appeal and the Supreme Court.”

My opinion

The law

- (43) The case concerns the validity of item 5 of the Privacy Appeals Board's decision of 21 January 2019 based on Article 6 (1) (f) of Regulation (EU) 2016/679 (General Data Protection Regulation) of 27 April 2016. The Regulation, referred to as the GDPR, applies directly as Norwegian law according to section 1 of the Privacy Act.
- (44) The validity of the Privacy Appeals Board's decision depends exclusively on legal and factual issues. The courts may therefore review all aspects of the case.
- (45) The case concerns “processing of personal data” as such term is used in the GDPR.

- (46) “Personal data” is defined in Article 4 (1) and covers “any information relating to an identified or identifiable natural person”. The data may relate to the natural person’s physical, economic, cultural or social identity. The persons to which the data relate are referred to as the “data subjects”.
- (47) “Processing” is defined in Article 4 (2) as “any operation or set of operations which is performed on personal data...”. Such operations include collection, recording, organisation, storage or disclosure, or a combination of such methods of use.

Article 6 (1) (f) GDPR

- (48) Legelisten’s collection and publication of subjective user reviews must have a legal basis – a basis for processing – under the GDPR. The key provision in this case is Article 6 (1) (f):

“Art. 6 GDPR. Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:
- ...
- f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”

- (49) Article 6 continues the corresponding provision in the former Directive 95/46/EC of 24 October 1995. Case law related to the provisions of that Directive is thus applicable to the interpretation of the current provision, see the ECJ judgment of 17 June 2021 in Case C-597/19 *M.I.C.M* paragraph 107.
- (50) For there to be a basis for processing under Article 6 (1) (f) GDPR, three requirements must be met: First, there must be *legitimate interests* that justify the processing. Second, the processing must be *necessary* to protect these interests. Third, the legitimate interests, after a *balancing of interests*, must override the interests of fundamental rights and freedoms of the data subject.

Legitimate interests

- (51) The parties agree that legitimate interests are pursued in the case at hand. The following is stated in the District Court’s judgment regarding this requirement:

“There are several ‘*legitimate interests*’, including patients’ freedom of expression, consumer interests, competitive interests, other public interests such as the possibility of better health services and Legelisten’s economic objectives.”

- (52) Like the parties and the Court of Appeal, I agree with this point. I will return to the weight of the individual factors balanced against each other.

The necessity requirement

- (53) For the conditions in Article 6 (1) (f) to be met, the processing must be “necessary for the purposes of the legitimate interests pursued”.
- (54) This requirement is expressed slightly differently in other sources. As I understand it, the word “necessary” does not mean that all aspects of the processing must be absolutely required. I refer to the European Court of Justice’s judgment 11 December 2019 in Case C-708/18 *Asociația de Proprietari*. The case concerned the use of a video surveillance system in a residential building, which the owner of one of the apartments opposed. After the reference in paragraph 46 to a statement in a previous judgment that “derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary”, the following is stated in paragraph 47:

“That condition requires the referring court to ascertain that the legitimate data processing interests pursued by the video surveillance at issue in the main proceedings — which consist, in essence, in ensuring the security of property and individuals and preventing crime — cannot reasonably be as effectively achieved by other means less restrictive of the fundamental rights and freedoms of data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed by Articles 7 and 8 of the Charter.”

- (55) As I understand this, the issue is whether legitimate interests may *reasonably be as effectively* achieved by other means less restrictive of the fundamental rights protected in Articles 7 and 8 in the Charter of Fundamental Rights of the European Union (2012/C 326/02). The Charter’s Article 7 corresponds to Article 8 of the European Convention on Human Rights (ECHR) on the right to respect for private and family life, including personal reputation, which according to section 2 of the Human Rights Act applies as Norwegian law. The Charter’s Article 8 concerns the protection of personal data and reads:

”Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

- (56) The Medical Association contends that the link between Legelisten.no and frequently used search engines – with the result that a review of for instance a physician appears high on the result list after a simple name search – is an aspect of the service that does not meet the necessity requirement. Name searches are made on the Internet for various reasons. Many searches are not motivated by a desire to gain information relating to the health services provided by the persons subject to the search. The consequence of this is a significantly increased dissemination of degrading comments etc. on Legelisten.no, to the detriment of both the persons directly affected and their children and other family members.

- (57) As I understand the facts following the pleadings before the Supreme Court, the potential measure to be implemented in this context is to remove completely the link between the reviews on Legelisten.no and the relevant search engines. With such a limitation in place, persons seeking information regarding, for example, a physician would first have to find the website Legelisten.no, and then look up the reviews posted there.
- (58) I assume that such a removal of the link with the search engines would give significantly reduced traffic on Legelisten.no, which in turn would affect Legelisten's income and growth potential. Legelisten has limited economic resources; its operating income in 2020 was NOK 770,000 – a slight increase from the two preceding years. Such a measure would create a genuine risk of the website being closed down. In addition, simple searches would no longer lead directly to the reviews on Legelisten.no, which means that persons actually seeking that type of information more frequently would have to terminate their searches with unfinished business.
- (59) Against this background, I find it clear that removing the link between the reviews on Legelisten.no and the most used search engines would imply that the legitimate interests behind the website would not be pursued as effectively as they are today. The current link to the search engines thus meets the necessity requirement. I add that this might have been different if possible adjustments were available that reduced the information-seeking audience's use of Legelisten.no only to a limited extent. However, no such options have been presented to the Supreme Court.
- (60) The Medical Association does not have significant objections to control systems established by Legelisten to prevent publication of statements in breach of the guidelines on the website. However, the Medical Association contends that the *enforcement* of the control systems is so flawed that the privacy drawbacks in practice become unnecessarily large.
- (61) The necessity requirement points to measures necessary to *realise* the purposes of the legitimate interests. More extensive control would have had another and practically reverse purpose, namely to *limit* negative collateral effects of measures taken to pursue the legitimate interests. The potential relevance of such measures is best determined by a balancing of interests, to which I will soon return.
- (62) Against this background, I conclude that the necessity requirement is met.

Balancing of interests

General comments

- (63) It is left for me to carry out an individual assessment with a view to finding a fair balance between the conflicting fundamental rights and freedoms protected by the EU legal order, see the ECJ's judgment of 24 November 2011 in Joined Cases C-468/10 *ASNEF* and C-469/10 *FECEMD* paragraph 43. The methodical approach here is similar to that in cases where a balance must be struck between the freedom of expression and the right to private life, but is only partially similar with regard to the interests involved.

- (64) As discussed under the necessity requirement, the fundamental rights at issue are particularly the right to respect for private and family life, including personal reputation, and the right to protection of personal data, which covers the data minimisation principle in Article 5 (1) (b) GDPR.
- (65) It is set out in *Asociația de Proprietari* paragraph 54 that a relevant factor in the assessment is whether the data are already accessible in public sources. Furthermore, paragraphs 56–57 set out that the seriousness of the infringement of the data subject’s rights and freedoms is an essential component of the balancing, and that in this respect, account must be taken of the sensitivity of the data, the number of persons having access to those data and the methods of accessing them.

The legitimate interests of Legelisten and the public

- (66) Legelisten’s economic interests, considered in isolation, carry relatively limited weight compared to the privacy of the health personnel.
- (67) The interests of the public are therefore essential when assessing the legitimate interests. An important initial point is that Legelisten.no allows users of health services to exercise their fundamental right to freedom of expression.
- (68) It is also clear that Legelisten.no fills an important need for information. The health personnel reviewed on Legelisten.no provide services in competition with others based on the principle of free user choice. The users have few other sources of information regarding the quality of the services, apart from what they hear from family, friends and acquaintances. The users value the professional expertise and interpersonal skills of health personnel, and their need for information is therefore vital.
- (69) It may be argued that the informational value of the user reviews is limited, as they only express subjective opinions and are not based on professional competence. Some reviews reflect the users’ disappointment in not having obtained their objective, for example a sick leave or a prescription. Although such factors entail that the reviews do not entirely fill the public’s need, I believe that they are a significant source of information.
- (70) In a written statement, Marit Hermansen, who until recently was president of the Medical Association, argues that a physician “must preserve the doctor-patient relationship – most importantly the personal interaction and dialogue with the patient”. Despite most users’ limited professional basis for assessing the professional skills of health personnel, the reviews are a proper indicator of the satisfaction of other potential users. This is strengthened by the increasing number of reviews posted for each health service provider. It appears from the Privacy Appeals Board’s decision that, at that time, some 67 000 reviews had been posted in respect of 12 000 physicians and other health personnel, i.e. an average of 5.6 reviews per individual reviewed. The overall picture for each health service provider is therefore relatively nuanced.
- (71) Finally, I point out that user reviews may have a positive competitive effect in the market and provide the persons reviewed with useful feedback.

- (72) In a memorandum of 26 January 2018 to the Patients' Injury Compensation Board, the Norwegian Consumer Council expressed that Legelisten.no has an important function. The Council writes the following regarding the need for information:

“Legelisten.no ... appears as the only undertaking in Norway that gives consumers the possibility to orient themselves and collect relevant information on physicians. We therefore believe that the public interest in the publication of such information is strong. In addition, our perception is that Legelisten is the only tool fulfilling the patients' wish for a feedback service, which was one of the main findings in our Patient Survey from 2016.”

- (73) As concerns unserious and arbitrary statements, the Consumer Council states that its experience with similar services shows that “the consumers have a good understanding of what such ‘review sites’ are, and that such services have strengths and weaknesses.”
- (74) The Medical Association has pointed out that Legelisten.no may have a negative effect on society as a whole, as physicians out of fear of negative reviews may be influenced in their role as a “gatekeeper” for public services, for instance when it comes to requests for sick leave, attestations and similar.
- (75) The study “Rumor has it: How do patients respond to patient-generated physician ratings” by Statistics Norway researchers Bensnes and Huitfeldt, included in *Journal of Health Economics* 76 (2021), supports to some extent the usefulness of Legelisten.no and indicates that the website does not have a negative impact on the physicians' “gatekeeper role”. The survey revealed that there *is* concurrence between the reviews on Legelisten.no and the choice of physician, and that the physicians are *not* influenced by the reviews in the performance of their “gatekeeper role”. On the other hand, there are no findings in the survey suggesting that physicians change their professional practices as a result of the reviews.

The consideration for the privacy of health personnel

- (76) The Medical Association contends that a high number of physicians and other health personnel perceive negative comments on Legelisten.no as highly onerous. Examples of such comments are:

- “Terrible doctor. Arrogant and ice cold. In total lack of humanity.”
- “This man should retire. He has a nasty and improper conduct ...”
- “a disrespectful, rude, arrogant and irritable doctor”
- “an arrogant, dated and condescending doctor that neither listens nor follows up”
- “is only occupied with being paid and getting rid of the patient”
- “grumpy old man”

- (77) The Medical Association also mentions that Legelisten.no, contrary to its own guidelines, has published reviews expressing concrete accusations of malpractice or wrong diagnosing. Among these statements are:

- “Irresponsible, production-line treatment, hasty, sloppy and bad work with unsuccessful result.”
- Only cares about blood-test results and ignores symptoms and proof of various conditions that arise”

- “She removed a mole on my shoulder and stitched it up. It turned out catastrophically. First of all, she failed to stitch it properly together, leaving me an open wound and an intense infection.”

- (78) According to a written statement to the Court of Appeal from A, technical manager of Legelisten, the website has some 2.2 million unique users per year. That, together with the fact that a link to Legelisten.no appears high on the result lists of the most-used search engines on the Internet, implies that the reviews may be widely spread. They will not only be disseminated among those seeking, for instance, a physician, but also among those searching a health professional’s name for other reasons.
- (79) This implies that the burden of receiving negative comments on Legelisten.no may be substantial, not only in a professional context, but also within the local community and among family members, friends and acquaintances. The Medical Association has emphasised that the strain may be perceived as particularly burdensome for physicians, who have recently been assigned constantly new tasks, and thereby an increased workload. They also perceive the “gatekeeper role” as demanding.
- (80) However, most reviews on Legelisten.no are positive. According to the mentioned statement from A, the average score in all reviews is 4.1 out of 5 possible stars. Only one out of five reviews gives one or two stars. This suggests that, for many, being reviewed on Legelisten.no is mainly a positive experience. For some, however, the fear of negative reviews may in itself be perceived as a burden, regardless of whether any such reviews are posted.
- (81) With reference to Recital 47 of the GDPR Preamble, the Medical Association stresses the importance of the health personnel’s “reasonable expectations” with regard to Legelisten’s processing of the personal data. This criterion may give guidance where the data subject actively surrenders personal data, for instance as a customer to a supplier or as an employee or employment seeker to an employer. In a case like ours, this criterion gives less guidance. The health personnel must expect to be assessed and discussed by their users. However, when it comes to the form and scope of the dissemination of their patients’ opinions, they can only base their reasonable expectations on what is generally accepted, including privacy regulations. This largely brings us back to the assessments I have already presented.
- (82) The burden on the health personnel must be considered in the light of the fact that the reviews on Legelisten.no relate to the performance of professional services. Negative comments have a smaller impact than would be the case if strictly personal factors had been assessed. Health personnel must be able to take objective, negative criticism. Moreover, multiple reviews are posted for each of them, which means that individual unreasonable or arbitrary reviews are often balanced by positive ones.

Measures to limit the privacy drawbacks

- (83) During the balancing of interests, the Medical Association has also stressed the significance of the personal data appearing when Google and other search engines are used. It is correct that Legelisten does not use privacy-enhancing technology that shields the subjective reviews from the search engines, and I agree that this, in itself, suggests that Legelisten does not have a basis for processing. In my view, however, this aspect has limited relevance in the balancing of interests. As I mentioned in my discussion of the necessity requirement, removing the link

with the search engines would reduce accessibility for the users, which in turn would reduce the legitimate interests pursued by the website.

- (84) As mentioned, the Medical Association contends that the weak control of the compliance with the guidelines on Legelisten.no implies that the privacy drawbacks become unnecessarily large. A reference is made to an auxiliary document containing 181 published reviews that the Medical Association considers to violate the guidelines. The examples I have already given, are taken from this auxiliary document. The Medical Association has stressed that the list is generated from random examples found on Legelisten.no – a complete study of the high number of user assessments has by no means been made.
- (85) The Medical Association has also mentioned that health personnel have no general right to opt out from Legelisten.no, and that the many examples of non-compliant reviews show that the control systems are flawed.
- (86) Initially, I presented Legelisten's guidelines for user reviews and procedures to verify the users' identity, and to ensure that they are familiar with and accept the guidelines, as well as Legelisten's moderator function whose purpose is to filter out reviews that do not comply with the guidelines. As mentioned, non-compliant reviews pass through nonetheless. At the same time, a high number of reviews violating the guidelines are followed up by Legelisten and are never published.
- (87) To detect violations, health personnel and others may mark reviews they react to with a flag notification. Health personnel may also contribute to a balancing of the information on Legelisten.no by submitting a response. The duty of confidentiality and the lack of knowledge of who has posted the review, and thus of the situation described, create a rather inefficient system. However, revoking the users' anonymity does not seem to be an option, as anonymity for many is a condition for contributing honest reviews to the website.
- (88) The health personnel may also request the deletion of comments, and Legelisten offers them the possibility to opt out "if weighty reasons demand it". The way the system is practised, the drawbacks must exceed what any other health professional may generally assert. In other words, the threshold for succeeding with a request to opt out is high. At the time of the Data Protection Authority's decision in 2017, just under 50 opt-out requests had been received, of which only eleven had been granted. In other words, the possibility to opt out has limited practical significance.

Balancing of interests and conclusion

- (89) The public has a great need for information as a basis for choosing physicians and other health service providers. Legelisten.no currently appears to be the most effective platform for such information, although a system exclusively based on subjective reviews have obvious flaws.
- (90) It is natural that persons receiving negative comments and partially unreasonable criticism on a website with a high number of users find this burdensome. However, most of the reviews are positive, and any such evaluation system must necessarily entail that some receive weaker results than others do. I also rely on the Consumer Council's statement that most people understand what "review sites" are, and therefore read arbitrary comments with a critical eye.

- (91) In my opinion, Legelisten's measures to limit the privacy drawbacks satisfy the requirements that may reasonably be imposed, despite reviews in violation of the guidelines passing through.
- (92) Following an overall balancing of relevant factors, I find that the legitimate interests pursued by Leglisten.no – in particular the public's need for information on health service providers – override the consideration for the health personnel's privacy.
- (93) Consequently, I agree with the Privacy Appeals Board's conclusion that Legelisten had a basis for processing.

Conclusion and costs

- (94) I conclude that the Privacy Appeals Board's decision 21 January 2019 is valid, with the consequence that the appeal must be dismissed.
- (95) The case has raised issues of principle that have not previously been dealt with by the Supreme Court, and it involves issues that require a difficult and discretionary balancing of interests. These are weighty reasons for not awarding costs to any of the parties, see section 20-2 subsection 3 of the Dispute Act.
- (96) I vote for this

J U D G M E N T :

1. The appeal against item 1 of the conclusion of Court of Appeal's judgment is dismissed.
2. Costs are not awarded in any instance.

- (97) Justice **Falch:** I agree with Justice Thyness in all material respects and with his conclusion.
- (98) Justice **Matheson:** Likewise.
- (99) Justice **Kallerud:** Likewise.
- (100) Justice **Skoghøy:** Likewise.
- (101) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal against item 1 of the conclusion of Court of Appeal's judgment is dismissed.
2. Costs are not awarded in any instance.