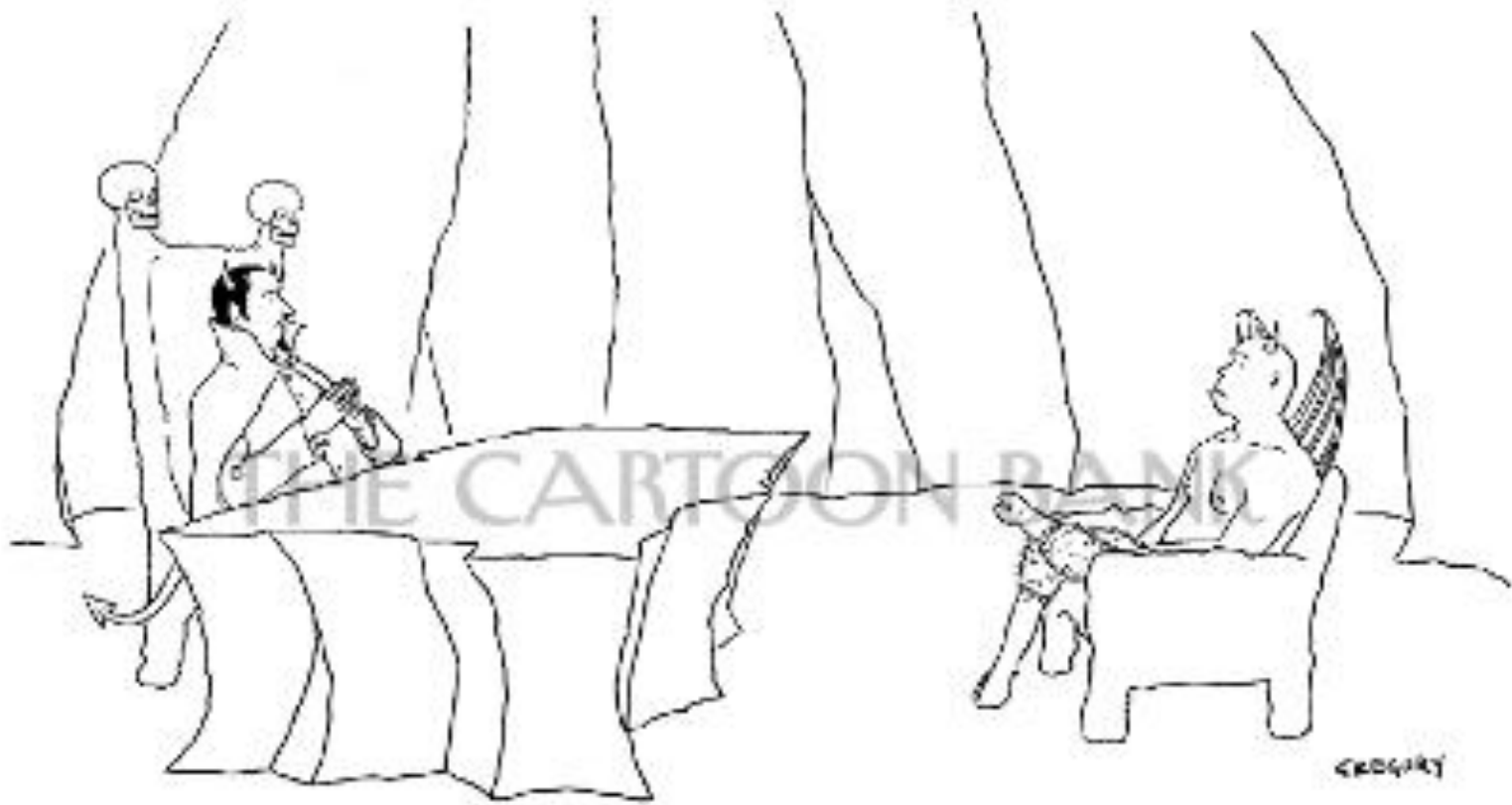




EUROPEAN DATA PROTECTION SUPERVISOR

Access under Article 13 and its restriction under Article 20

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Presentation to DG HR.DS
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"I need someone well versed in the art of torture—do you know PowerPoint?"



Two fundamental rights

Privacy

“Right to be left alone”

Art. 8 ECHR (1950):
“Everyone has the right to respect for his or her private and family life, home and correspondence “

Article 7 EU-Charter (2000): “and communications...”

Data protection

Article 8 EU-Charter
Article 16 TFEU
“Everyone has the right to the protection of personal data concerning him or her.”

“self-determination”

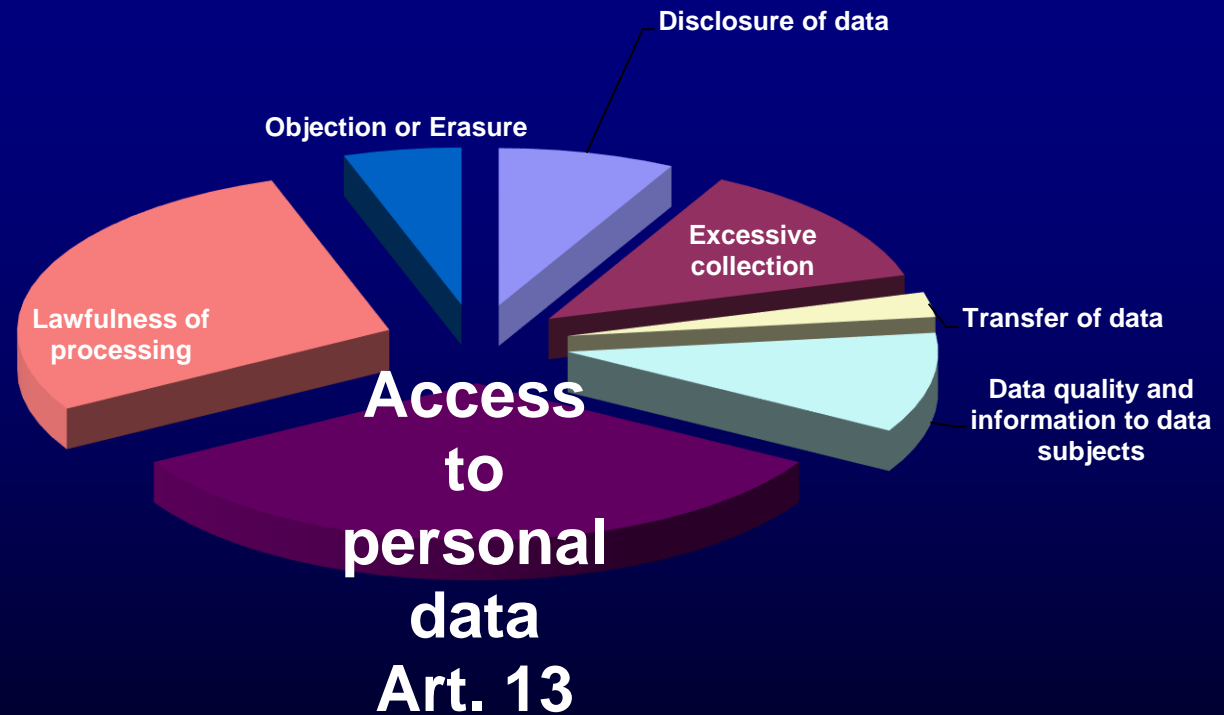


2009: Treaty of Lisbon

Data protection principles Art. 16 TFEU

- Everyone has the right to the protection of personal data concerning them
- EP + Council shall lay down the rules on processing of personal data by EU administration + Member States for activities under Union law, and the rules relating to the free movement of such data.
- Compliance with these rules shall be subject to the control of independent authorities.

Why this training?!





Right to access (1)

Article 13

Right of access

The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller:

- (a) confirmation as to whether or not data related to him or her are being processed;
- (b) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;
- (c) communication in an intelligible form of the data undergoing processing and of any available information as to their source;
- (d) knowledge of the logic involved in any automated decision process concerning him or her.

Right to access (2)

Article 13

= access to

personal data



Reg. 1049/2001

= access to

documents



Right to access (3)

Article 13

Right of access

The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller:

- (a) confirmation as to **whether or not** data related to him or her are being processed;
- (b) information at least as to the **purposes** of the processing operation, the **categories of data** concerned, and the **recipients** or categories of recipients to whom the data are disclosed;
- (c) communication in an intelligible form of **the data undergoing processing** and of any available information as to their **source**;
- (d) knowledge of the logic involved in any automated decision process concerning him or her.

Example: How to...

Date	Description of document / recipient(s)	Category of personal data	Personal data of data subject under processing by institution	Source of personal data
DD/MM/YYYY	Email from DS (A) to X	Name, contact details, professional status + involvement in project XYZ,	A is official working for EU institution, involvement in project XYZ, allegation of fraud brought forward by A	Source: Data subject (A) him/herself
DD/MM/YYYY	Assessment of initial info, email X to Y	Name, contact details, assessment of credibility (whistle-blower)	A is official working for EU institution, involvement in project XYZ, allegation of fraud brought forward by A, no reason to doubt reliability of source	Data subject (A) him/herself, X
...
...
...



NB: The right to access is meant to enable data subjects to control the quality of their personal data and the lawfulness of the processing.



Right to access (4)

- **Format of the data:** *Usually* access is granted by providing paper copies or electronic copies. But that's not obligatory (not Reg. 1049/2001)! Sometimes, need to adapt to the data subject, e.g. for blind person, who needs electronic copies.
- **Intelligible form:** The right to access is meant to enable data subjects to control the quality of their personal data and the lawfulness of the processing. E.g. medical practitioner must interpret the data (such as blood analysis) and/or make the data decipherable.



Right to access (5)

- Access granted **to the fullest extent**, as it helps data subjects to
 - understand which of their data are processed;
 - verify the quality of their own data;
 - verify the lawfulness of the processing;
 - exercise their other data protection rights.
- **Unless** an exemption under Article 20(1) applies:
 - narrow interpretation, on a case-by-case basis;
 - must not be restricted more broadly than necessary.



Exemptions and restrictions

Article 20

Exemptions and restrictions

1. The Community institutions and bodies may restrict...Article...13... where such restriction constitutes a necessary measure to safeguard:

- (a) the prevention, investigation, detection and prosecution of criminal offences;
- (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters;
- (c) the protection of the data subject or of the rights and freedoms of others;
- (d) the national security, public security or defence of the Member States;
- (e) a monitoring, inspection or regulatory task connected, even occasionally, with the exercise of official authority in the cases referred to in (a) and (b).

Example Art. 20(1)(a)

OLAF investigations

- *Providing information to the data subject while the investigation is still ongoing could jeopardise the success of the investigation, which is why a deferral of access might be justified under **Article 20(1)(a)**.*
- *However, any deferral must be decided on a case-by-case basis. These provisions may not be used to deny access systematically.*
- *Information must to be supplied to the data subject as soon as exemptions no longer apply.*



Example Art. 20(1)(c)

Selection procedures

(pre-selection tests, interviews and written examinations)

- Principle (see above): **Access** to evaluation results at all stages of procedure
- Possible exception under **Article 20(1)(c)** to protect
 - the independence of the jury;
 - the confidentiality of the jury's deliberations;
 - decision-making Selection Committee / individual members;
 - safeguard the rights of other candidates.

But: Data subjects should nonetheless be provided with evaluation **criteria** and **aggregated results**.



Example Art. 20(1)(c)

Harassment

- Alleged harassers may have their right to access restricted if necessary to safeguard "*the protection of the data subject or of the rights and freedoms of others*", **Article 20(1)(c)**;
- Access is subject to them having been informed by the controller, with the agreement of the alleged victim, of the existence of an informal procedure against them;
- Article 20(1)(c) also applicable to protect the rights of other persons concerned, especially of witnesses.

Example Art. 20(1)(c)

Indirect access

Access psychological or psychiatric data through a doctor



- case-by-case assessment: no direct access can be given in order to protect *the data subject* based on **Article 20(1)(c)**;
- In such cases, EU administration should ensure that data subjects have indirect access.



Article 20(3)

Article 20

Exemptions and restrictions

3. If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor.
4. If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made.
5. Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.



Article 20(3): How *not* to...

“...your personal data are covered by the exemptions and restrictions of Article 20(1), in particular as regards:

- (1) the prevention, investigation, detection and prosecution of criminal offences;*
- (2) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters;*
- (3) the protection of the data subject or of the rights and freedoms of others;*
- (4) the national security, public security or defence of the Member States.*

Hence, I am not at liberty to transmit these data to you. You have the right to have recourse the EDPS.”

Article 20(3): How *not* to...

- The mere citation of an exception does not **inform** the data subject of the principal reasons on which the application of the restriction is based;
- The mere citation (or the ticking of a check-box) also does nothing to **document** that you have properly **examined** the application of the exception on a **case-by-case** basis.



Article 20(3): How to...

“...your personal data are covered by an exemption and restriction under Article 20(1).

Your personal data at stake consist of a witness statement regarding your behaviour in dealing with project XYZ, which is currently under investigation (ref. no. ...).

Given the particular content of the statement, giving you access to these personal data would allow you to identify the witness, which in turn, might jeopardize the ongoing investigation.

In order to protect the ongoing investigation as well as the rights and freedoms of the witness, I have decided to deny your request for access under Article 20 (1)(a) + (c).

You have the right to have recourse the EDPS....”



Article 20(4)

Article 20

Exemptions and restrictions

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4. If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made.
5. Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.



Article 20(4)



Accountability:
Comply with Article 20(1) +(3) and demonstrate compliance.



The EDPS will look at

- the principal reasons on which the application of the restriction was based vis-à-vis the complainant (properly informed?);
- the conclusiveness (rather than veracity) of their application (reasonable to apply?);
- the case-by-case examination of the principal reasons as documented (any trace in file?).

Fictitious example

“...your personal data are covered by an exemption and restriction under Article 20(1).

Your personal data at stake consist of a witness statement regarding your behaviour in dealing with project XYZ, which is currently under investigation (ref. no. ...).

*Given the **particular content of the statement**, giving you access to these personal data **would allow you to identify the witness**, which in turn, might jeopardize the ongoing investigation.*

In order to protect the ongoing investigation as well as the rights and freedoms of the witness, I have decided to deny your request for access under Article 20 (1)(a) + (c).

You have the right to have recourse the EDPS....”





Exemptions and restrictions

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4. If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made.
5. Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.

Article 20(5)



Temporary exception:

- **Principle:** The personal data can only be withheld for a defined period (e.g. end of investigation);
- Implies that initial decision to withhold the personal data needs to be **reviewed periodically**;
- The information must be provided to the data subject as soon as possible, e.g. in case of Article 20(1)(a), as soon as this can no longer endanger the detection of an infringement;
- **Exception:** Informants, whistle-blowers, possibly witnesses (next slide).

Article 20(5)

Administrative inquiries and disciplinary proceedings

- **Witnesses** in principle: no confidentiality required. However: case-by-case analysis.
- Identity of **whistleblowers and informants** is kept confidential, unless infringement of national rules on judicial procedures and/or malicious false statements.
- Vulnerability of whistleblowers and informants remains the same **after closure** of investigation. Risks to privacy and integrity independent of whether investigation is opened or closed with no follow-up.



Thank you for your attention!

For more information:

**Guidelines on the Rights of Individuals with regard
to the Processing of Personal Data**

EDPS website > Supervision > Thematic Guidelines

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