



Gesellschaft für Datenschutz  
und Datensicherheit e.V.

# GDPR Good Practices - VII

## Transparency obligations in data processing



# TABLE OF CONTENTS

## 1. General information

1.1 Distinction between Art. 13 & 14 GDPR .....	4
1.2 Transparency obligations outside of Art. 13 & 14 .....	4
1.3 Distinction between the respective paragraphs 1 and 2.....	5
1.4 Changing from one media to another.....	5
1.5 Date .....	6
1.6 Transparency reset .....	7
1.7 Exceptions .....	7

## 2. Sample information

2.1 Data processor.....	8
2.2 Scope of processing .....	8
2.3 Transfers of personal data to third countries .....	9
2.4 Rights of the data subject .....	9

## 3. Specific processing situations

3.1 Local store .....	9
3.2 Telephone order.....	9
3.3 Vending machine purchase .....	9
3.4 Lottery by mail.....	9
3.5 Employee data .....	9
3.6 Applicant management .....	10

# Transparency obligations in data processing

The introduction of the General Data Protection Regulation (GDPR) goes hand in hand with an strengthening of the rights of the data subjects. „ Effective protection of personal data throughout the Union requires the strengthening and setting out in detail of the rights of data subjects (...)“ is therefore expressly stated in Recital 11 GDPR. The main pillars of the new rights of the data subject are, in addition to the stricter liability regime and the newly introduced individual rights, the expanded transparency obligations in the context of data processing.

Art. 13 GDPR is dedicated to the information requirements for directly from the data subject collected personal data, Art. 14 GDPR is the counterpart, where personal data have not been obtained from the data subject but from third parties. The data subject should receive the information in a clear and plain language and in a concise, transparent, intelligible and easily accessible form (Art. 12 para. 1 sentence 1 GDPR). Such information shall always be free of charge (Art. 12 para. 5 GDPR).

On 11 April 2018, the Article 29 Working Party adopted its WP 260 on Transparency under General Data Protection Regulation (GDPR).

The working group „GDPR best practices “ of the German Association for Data Protection and Data Security (GDD) presents in the following a hybrid data protection information which meets the respective requirements of Art. 13 & 14 GDPR in equal measure.

# 1. General information

## 1.1 Distinction between Art. 13 & 14 GDPR

According to the editorial heading, Art. 13 GDPR regulates the obligation to provide information when personal data are collected from the data subject. Art. 14 GDPR, on the other hand, regulates the information to be provided where personal data have not been obtained from the data subject. Recital 61 makes a distinction in this regard as to whether the data are collected directly from the data subject or from another source. The distinction between direct and indirect collection follows the approach already mentioned in Art. 10 and 11 Directive 95/46/EC. In this respect, direct collection shall be understood to mean any collection of personal data with the knowledge or the participation of the data subject. The information content of Art. 13 & 14 GDPR are largely identical:

	Art. 13	Art. 14
Controller and representative	(1) letter a	(1) letter a
Data protection officer	(1) letter b	(1) letter b
Purposes of the processing and legal basis	(1) letter c	(1) letter c
Categories of personal data concerned	-	(1) letter d
Legitimate interests	(1) letter d	(2) letter b
Recipients or categories of recipients	(1) letter e	(1) letter e
transfer to a third country	(1) letter f	(1) letter f

	Art. 13	Art. 14
Storage period	(2) letter a	(2) letter a
Right of access (Art. 15); rectification (Art. 16); erasure (Art. 17 para. 1); restriction of processing (Art. 18); object (Art. 21); data portability (Art. 20)	(2) letter b	(2) letter c
Withdraw consent	(2) letter c	(2) letter d
Right to lodge a complaint	(2) letter d	(2) letter e
Obligation to provide personal data	(2) letter e	-
Source of the personal data	-	(2) letter f
Automated decision-making	(2) letter f	(2) letter g

## 1.2 Transparency obligations outside of Art. 13 & 14

Transparency is not only stipulated in Art. 13 and 14 GDPR. Within the GDPR there are further information obligations, such as

- >> the access to the personal data according to Art. 15 GDPR,
- >> informing the data subject in connection with the rectification or erasure of personal data pursuant to Art. 19 sentence 2 GDPR,
- >> the right to object which shall be explicitly brought to the attention of the data subject at the latest at the time of the first communication pursuant to Art. 21 para. 4 GDPR
- >> the provision of the arrangement between joint controllers in accordance with Art. 26 para 2 sentence 2 GDPR or also

>> the communication of a personal data breach to the data subject according to Art. 34 GDPR.

Besides, imprint obligation of website operator, duties to provide information with respect to distance contracts, transparency of conditions etc., continue to apply.



The present practical guidelines deal exclusively with the transparency obligations according to Art. 13 & 14 GDPR.

### 1.3 Distinction between the respective paragraphs 1 and 2

Both, Art. 13 and Art. 14 GDPR include a structural separation of the information content, which is reflected in the respective paragraphs 1 and 2. Consideration has to be given to the separation first with regard to Art. 13 para. 3 and Art. 14 para. 4 GDPR: The Information of paragraph 2 must be communicated in case of subsequent change of purpose (possibly again).

In the Article 29 Working Party's view, the information content of the respective paragraphs 1 and 2 are treated in the same way. It is only apparent that the additional information are only to be communicated when necessary to ensure fair and transparent processing. The requirement of a „fair and transparent processing“ is, of course, according to Art. 5 para. 1 letter a GDPR inherent in the entire GDPR. A qualitative distinction of the information according to para. 1 and 2 therefore is not possible. There is also no indication of which information in para. 2 must be communicated in individual cases and which not. Also, the access to personal data according to Art. 15 para. 1 GDPR doesn't know such a distinction.

In case of doubt, because of the high liability risk (see Art. 83 para. 5 letter b GDPR), more information is always advisable. In particular, if a change from one medium to another occurs by re-

ferring to a website, omitting information on the website is all the more difficult to justify.

### 1.4 Changing from one media to another

Some processing situations do not allow to provide the data subject a multi-page imprint of the transparency information immediately (e.g., vending machine sales, telephone transactions, lottery postcard). Excessive information at once can also overburden data subjects by distracting them from essential information.

The Article 29 Working Party has already stated in Working Paper 100 that „the principle that a fair processing notice does not need to be contained in a single document. Instead – so long as the sum total meets legal requirements - there could be up to three layers of information provided to individuals“ if all these levels meet legal requirements.



Also, the ECJ has decided in case C-146/16 (March 30th, 2017) that spatial or temporal limitations of a communication medium may justify providing the necessary information by other means.

The Article 29 Working Party upholds its position in WP 260 regarding the separate levels of information.

However, the law does not answer the question of a permissible segregation of information when changing from one medium to another within the same communication with the data subject. Only easy access is always emphasized. Of course, providing only easy access is of a different quality than, for example, immediate provision or addition of information. Overall, the GDPR is characterized by the promise of a data protection legislation for the digital age. This promise will now be honored.

Which information must be given to the data subject directly (1st level) and which information content may be provided on a separate website or

by fax, etc. (2nd level) depends mainly on whether the respective information is essential for the decision for making personal data available.

The 1st level information must be a kind of deal breaker. By contrast, 2nd-level information is intended for those who are particularly interested in privacy-related issues or in the case of conflict.



The following overview presents the scheme of the 1st and 2nd level information as an example. Depending on the processing or display type, shifts may occur.

1st level	2nd level
Identity and the contact details of the controller	Identity and the contact details of the controller's representative
	Contact details of the data protection officer
Purposes of the processing	Legal basis for the processing
Legitimate interests pursued by a third party	Legitimate interests pursued by the controller
Categories of recipients	Recipients
The controller's intention to transfer personal data to a third country or international organisation	Existence or absence of an adequacy decision by the Commission, or reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available
	Period or the criteria used to determine that period for which the personal data will be stored

1st level	2nd level
	Existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability
Obligation to provide the personal data and of the possible consequences of failure to provide such data	Provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract
	Existence of the right to withdraw consent at any time,
	Existence of the right to lodge a complaint with a supervisory authority
Existence of automated decision-making, including profiling	Meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject
Categories of personal data concerned (only for data have not been directly obtained from the data subject)	
Source of personal data (only for data have not been directly obtained from the data subject)	

## 1.5 Date

In the case of a collection from the data subject, the information must be provided "at the time when personal data are obtained" (Art. 13 para. 1 GDPR). Outside the direct collection, the controller shall provide the information pursuant to Art. 14 para. 3 GDPR

a) within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed,

b) if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or

c) if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.

The one-month time limit of Art. 14 para 3 letter a GDPR indicates the maximum duration, while the time limits of letters b and c shall never lead to a delay.

The Article 29 Working Party recommends that, even when transparency information does not materially change, controllers facilitate data subjects to have continuing easy access to the information to re-acquaint themselves with the scope of the data processing.

There is no reason for this. Data subjects who no longer have an overview of the transparency information can obtain this overview in the context of the right of access by the data subject pursuant to Art. 15 GDPR. In accordance with the accountability principle, controllers should also consider whether, and at what intervals, it is appropriate for them to provide express reminders to data subjects as to the fact of the privacy statement/notice and where they can find it.<sup>1</sup>

Providing all those data subjects with information at regular intervals without being asked merely leads to „transparency fatigue“. The information will then no longer be taken into account in the event of an actual change in content. Moreover, it seems unreasonable to make controllers liable under Art. 83 GDPR for something that is not prescribed in Art. 13 and 14 GDPR.

## 1.6 Transparency reset

It should be noted that the GDPR does not provide for a mandatory information as of 25 May 2018, i.e. there is no „transparency reset“ deriving of a change of the data protection regime. The starting point for the transparency requirements is always the collection of data. The phase of collecting data is in most of the cases already completed with the application of the GDPR. Thus, there is no triggering event that would entail the transparency requirements of Art. 13 and 14 GDPR. The notification deadlines laid down in the GDPR cannot apply for ‘old cases’ taking which have taken place in the past.

As a result, any mandatory transparency reset would per se be delayed. Finally, it should be noted that the data were already collected under the conditions of an appropriate transparency regime in accordance with Art. 10 and 11 of Directive 95/46/EC. Insofar as the former provisions have been complied with, it can be assumed that a processing is transparent, i.e. comprehensible within the meaning of Art. 5 para. 1 lit. a GDPR.

## 1.7 Exceptions

In the GDPR transparency rights are not unconditionally granted. According to Art. 13 para. 4 GDPR, information is not required in the case of direct collection if and to the extent that the data subject already has the information. Outside the direct collection, the transparency rules pursuant to Article 14 para. 5 GDPR do not apply if and insofar as

a) the data subject already has the information;

b) the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render

<sup>1</sup> Article 29 Working Party, WP 260 Rev. 1, 11.4.2018, no. 32.

impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available;

c) obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests; or

d) where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.

In addition, the opening clauses in Art. 23 and 88 GDPR provide for the possibility of imposing national restrictions. The federal legislator in Germany has made use of this possibility by adopting the new Federal Data Protection Act (FDPA). Sections 4 para. 2, 29, 32 and 33 FDPA contain minor exceptions in this respect.

## 2. Sample information

The following is an exhaustive set of information in accordance with Art. 13 and 14 GDPR. Depending on the processing, only those aspects that really apply to the processing (e.g. international transfers, profiling, legitimate interests) have to be included in the information towards the data subject.

### 2.1 Data processor

- >> Identity and the contact details of the controller (1st Level)
- >> Identity and the contact details of the controller's representative (possibly 2nd level)
- >> Contact details of the data protection officer (possibly 2nd level)

### 2.2 Scope of processing

- >> Categories of personal data concerned (1st level)
- >> Source of personal data, if applicable, whether they come from publicly available sources (1st level, only for data have not been directly obtained from the data subject)
- >> Period or, if this is not possible, the criteria used to determine that period for which the personal data will be stored (possibly 2nd level)
- >> Purposes of the processing (1st level)
- >> Legal basis for the processing (possibly 2nd level)
- >> Legitimate interests within the meaning of Art. 6 para. 1 letter f GDPR pursued by the controller (possibly 2nd level)
- >> Legitimate interests within the meaning of Art. 6 para. 1 letter f GDPR pursued by a third party (1st level)
- >> Provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract (possibly 2nd level)



In cases in which legitimate interests are pursued in accordance with Art. 6 para. 1 letter f GDPR, the obligation to inform the data subject about the right to object pursuant to Art. 21 para. 4 GDPR must be observed. The notice must be intelligible and provided separately from other information.

- >> Provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract (possibly 2nd level)
- >> Obligation to provide the personal data and of the possible consequences of failure to provide such data (1st level)
- >> Existence of automated decision-making, including profiling according to Art. 22 para. 1 and 4 GDPR (1st level) and - at least in those cases - meaningful information (possibly 2nd level)

about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

## 2.3 Transfers of personal data to third countries

- >> Recipients (possibly 2nd level) or categories of recipients (1st level) of personal data
- >> Fact that the controller intends to transfer personal data to a third country or international organisation (1st level)
- >> Existence or absence of an adequacy decision by the Commission (possibly 2nd level)
- >> Reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available (possibly 2nd level)

## 2.4 Rights of the data subject

- >> Existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability (2nd level, where applicable)
- >> Existence of the right to withdraw consent within the meaning of Art. 6 para. 1 letter a or Art. 9 para. 2 letter a GDPR at any time (possibly 2nd level)
- >> Existence of the right to lodge a complaint with a supervisory authority (possibly 2nd level)

# 3. Specific processing situations

## 3.1 Local store

In a shop location, where personal data is collected in order to offer goods and services (e.g. personalised ticket sales, collection of contact information etc.), the relevant information can be indicated by

a notice. Data subjects should be provided with printouts in case he/she demands it.

## 3.2 Telephone order

When ordering or making a reservation by telephone, voice reproduction of the entire transparency information does not appear to be useful and appropriate for the purpose. Such information could, for example, be provided as a menu function (voice response or link via SMS to the mobile phone) and otherwise be linked to an (easily remembered) URL.

## 3.3 Vending machine purchase

Even with vending machines, it does not seem appropriate to provide the customer (who may even be under time pressure) with all information on the screen at once. Here, the display should be limited to the essential 1st-level information and the reference to an (easy to remember) URL should be given or noted on the ticket printout. However, it is possible to make the information available in full to interested data subjects as a menu option.

## 3.4 Lottery by mail

Competitions by postcard should not overburden data subjects with data protection information. Although the information does not have to fit on the postcard itself (because the data subject sends it away immediately), a magazine insert, for example, may be limited to essential 1st-level information and offer a different form of presentation for the remaining information.

## 3.5 Employee data

Employees do not necessarily have all the information relevant to data protection simply because they have a close contractual relationship with the data controller. Necessary transparency requirements can be communicated as an attachment to the employment contract. In addition, it is advisable to keep

corresponding information, which may be subject to constant change and updating, on a company intranet site.

### 3.6 Applicant management

A distinction must be made in the application procedure: In an online applicant portal, the transparency information must be provided immediately. In the case of purely online processing, it is permitted to provide 1st and 2nd level information on separate subpages. The application by analogous mail is either directed specifically at a job advertisement or is made on the data subject's own initiative. In both cases, personal data will only be collected when the application is being reviewed. A possible job advertisement may therefore be limited to basic information if the final information is supplied subsequently.



This is a direct collection within the meaning of Art. 13 GDPR, but atypically the data subject is not present. Art. 14 GDPR does not apply. Under certain circumstances, research in career portals can also be regarded as direct collection, since the data are fed into the net at the instigation and with the will of the data subject for all interested parties.



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**Status:**

Version 1.0 (Juni 2020)