

DEROGATIONS FROM THE RIGHTS OF DATA SUBJECTS FOR ARCHIVING IN THE PUBLIC INTEREST

FEASIBILITY ASSESSMENT REGARDING PSEUDONYMISATION, NECESSITY ASSESSMENT AND PROPORTIONALITY ASSESSMENT

1. LEGAL REQUIREMENTS FOR THE ESTABLISHMENT OF DEROGATIONS

Article 25(4) of Regulation (EU) 2018/1725 (the 'Regulation') provides that:

'Where personal data are processed for archiving purposes in the public interest, Union law, which may include internal rules adopted by Union institutions and bodies in matters relating to their operation, may provide for derogations from the rights referred to in Articles 17, 18, 20, 21, 22 and 23 subject to the conditions and safeguards referred to in Article 13 in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.'

Article 25(5) of the Regulation provides that:

'Internal rules referred to in paragraphs 1, 3 and 4 shall be clear and precise acts of general application, intended to produce legal effects vis-à-vis data subjects, adopted at the highest level of management of the Union institutions and bodies and subject to publication in the Official Journal of the European Union.'

Consequently, there are the following requirements to establish and apply derogations from the rights of data subjects when archiving in the public interest:

- **Legal nature of the internal rules:** Adoption of internal rules by the European Commission 'at the highest level of management'. Therefore, they have to be a Commission Decision (a SEC document is not sufficient);
- **The derogations are subject to the conditions and safeguards referred to in Article 13 of the Regulation:**
 - Appropriate safeguards for the rights and freedoms of data subjects should be in place. Those safeguards shall ensure that technical and organisational measures are taken in particular in order to ensure respect for the principle of data minimisation;
 - Further processing of personal data for archiving purposes shall be done in a manner not permitting or no longer permitting the identification of data subjects, unless it is not feasible to achieve the purposes of archiving in the public interest in this way¹.
- Furthermore, the **necessity of derogations** to fulfil the purposes of the archiving in the public interest needs to be established based on Article 25(4) of the Regulation. The derogations need to **be proportionate**. This is in line with Article 52(1) of the Charter of Fundamental Rights of the EU:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

¹ Recital 33 of Regulation (EU) 2018/1725 provides guidance in relation to the requirements of Article 33 of this Regulation in this respect. This recital states that '[...] The processing of personal data for archiving purposes in the public interest, [...] is to be carried out when the controller has assessed the feasibility to fulfil those purposes by processing data which do not permit or no longer permit the identification of data subjects, provided that appropriate safeguards exist (such as, for instance, pseudonymisation of the data).[...].'

Unlike restrictions of data subjects rights on the basis of Article 25(1) and (2) of the Regulation, which are implemented following a case-by-case assessment, derogations based on Article 25(4) of the Regulation are of general application ('across the board') based on an advance assessment of their necessity and proportionality².

2. LEGAL NATURE OF THE INTERNAL RULES

The internal rules referred to in Article 25(4) and (5) of the Regulation will be laid down in a Commission Decision on records management and archives.

3. APPROPRIATE SAFEGUARDS FOR THE RIGHTS AND FREEDOMS OF DATA SUBJECTS IN ACCORDANCE WITH ARTICLE 13 OF THE REGULATION

Appropriate safeguards are implemented by the Commission at three levels:

1. Elimination of personal data under the records management archiving rules and the common retention list:
 - Structured sets of personal data, such as staff and medical files as well as records relating to administrative investigations and disciplinary proceedings are not archived but are eliminated at the end of their administrative retention period (which can be very long, in the case of staff files 100 years);
 - Many documents and files containing personal data are eliminated at the end of their administrative retention period. This generally includes all personal data that was collected for administrative purposes, such as mailing or contact lists, that has no enduring historical or legal value;
 - Established procedures are in force to ensure that sensitive information or personal data is not included in the document metadata and, for some predefined categories of files, to eliminate documents potentially containing such data before the transfer of the file to which they belong to the historical archives. There is also the possibility of administrative elimination, which allows DGs to eliminate documents from files for well specified reasons, including the protection of personal data³.
2. DGs have to flag sensitive information when they transfer files to the historical archives, including files that contain personal data. The Historical Archives Service restricts access to these files and will consider whether they fall under the exception for the opening to the public when they are thirty years old⁴. More generally, the Commission restricts access to both its paper and digital archives repositories to prevent unauthorised access, damage, theft or loss. Access is role based and controlled regularly.
3. More generally, many files are subject to review by the Historical Archives Service before they are opened to the public⁵.

The principle of data minimisation, in addition to the rules and procedures of elimination of personal data explained under point 1, **is already taken into account in the very process of the Commission's archiving policy**. Files are not archived by default but only files selected for permanent preservation

² The European Data Protection Supervisor has issued specific guidance on Article 25 of Regulation (EU) 2018/1725 and internal rules restricting data subjects rights, in which it clarifies that the specific derogations that may be provided for where personal data are processed for, inter alia, archiving purposes in the public interest pursuant to Article 25(4) of Regulation (EU) 2018/1725 need to be addressed separately from restrictions under Article 25(1) and (2) of this regulation.

³ Draft Commission Decision Article 15.4.

⁴ Draft Commission Decision Article 15.4.

⁵ Draft Commission Decision Articles 1, 5, 12, 14 and 15.

in the common retention list of the European Commission will be archived based on their legal, administrative or historical value for the institution

FEASIBILITY ASSESSMENT OF ARCHIVING IN THE PUBLIC INTEREST BY PROCESSING DATA THAT DO NOT PERMIT OR NO LONGER PERMIT THE IDENTIFICATION OF DATA SUBJECTS

Article 13 of the Regulation, as further interpreted in light of recital 33, requires the controller to assess the feasibility of fulfilling the purpose, i.e. archiving in the public interest, by processing data which do not permit or no longer permit the identification of data subjects, provided that appropriate safeguards exist such as, for instance, pseudonymisation of the data.

The very nature of archiving and the Commission's statutory obligation⁶ data to preserve the integrity of files which are selected for permanent preservation in accordance with its common retention list, make it impossible to fulfil the purpose of archiving in the public interest by pseudonymising data which may be contained in those files. Personal data contained in documents form an integral part of those documents and pseudonymisation, applied as a general rule, would undermine the underpinning principle of preserving the integrity and authenticity of the Commission's archives.

Ensuring the authenticity, integrity and legibility over time of electronic and digitised documents and of the relevant metadata is a requirement under Commission Decision 2004/563/EC, Euratom, in particular Articles 1, 3 and 4 of the Annex thereof. It is moreover one of the fundamental characteristics of authenticated and/or signed and/or sealed electronic documents under Regulation (EU) No 910/2014 (eIDAS Regulation).

Furthermore, pseudonymising every file of the Commission would involve a disproportionate administrative effort.

4. NECESSITY OF DEROGATIONS FROM DATA SUBJECT RIGHTS

It is indispensable to assess the necessity of any restrictions of fundamental rights, such as the right to the protection of personal data. According to the case law of European Courts, limiting the fundamental right to the protection of personal data must be strictly necessary because of the role the processing of personal data entails for a series of fundamental rights,

In relation to archiving in the public interest, the provisions in Regulation No 2018/1725 on the rights of data subjects provide for a number of standing exceptions. For these cases, derogations are not necessary.

Exceptions to the rights of data subjects in relation to archiving in the public interest exist for the following cases:

- The **right of information**, based on the exception established under Article 16(5)(b) of the Regulation ('would involve a disproportionate effort');
- The **right to erasure**, based on the exception established under Article 19(3)(d) of the Regulation;
- The **right to restriction of processing**, based on the exception established under Article 20(2) of the Regulation for 'storage'.⁷

⁶ Draft Commission Decision Articles 1, 5, 12, 14 and 15. The authenticity and integrity of archived documents is a sine-qua non for the validity of Commission documents as legal evidence and is in accordance with the widely recognised ISO standard 15489-1:2016.

⁷ As per EDPS recommendations of 3 March 2020, '[t]he right to restrict processing under Article 20 is an interim safeguard before the controller has taken a decision on a data subject's request e.g. for rectification and/or objection. Since this is an interim phase, it is unlikely that any of the grounds for the right to restrict processing under 20(1) would still apply at the archiving phase.'

No general exceptions to the rights of data subjects exist in the following cases:

- The **right of access**;
- The **right to rectification**;
- The **notification obligation** regarding **rectification** or **erasure** of personal data or **restriction of processing**;
- The **right to data portability**;
- The **right to object to the processing**.

The necessity of derogations from several of these rights follows from the effects that granting these rights to data subjects would have on the Commission's archiving in the public interest and the fulfilment of its purposes. It must be emphasised that ensuring archiving, namely the preservation of files selected for that purpose in order to ensure the memory of the institution, is of a general interest recognised by the Union. Cf. mainly:

- article 41 of the Charter of Fundamental Rights of the European Union about the right to good administration;
- article 15 of the Treaty on the Functioning of the European Union, in which it is stated that '[A]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies';
- article 298 of the Treaty on the Functioning of the European Union about an open, efficient and independent European administration;
- Council Regulation (EEC, EURATOM) No 354/83, in particular the preamble: 'Whereas the processing and critical analysis of Community archives is not only of value to historical research in general but can at the same time facilitate the activities of bodies involved in Community affairs and thereby contribute to the better attainment of all the Communities' objectives'.

As regards **the right of access by the data subject**, the main circumstance establishing the necessity for the derogation is that granting such right to its full extent would require a disproportionate administrative effort by the Commission. There is no objection in principle to giving a data subject access to his or her personal data. However, in many cases it will be de facto impossible to know which documents contain personal data, and which personal data specifically, unless the data subject is in a position to provide specific information allowing for the identification of the document(s) and file(s) concerned. If a data subject requests access to their personal data without providing this information, it will be an impossible task to fulfil because the Commission will simply not be able to locate the document(s) concerned in the case of paper archives nor in the case of digital archives that are not fully (text) searchable.

As regards **the right to rectification and the right to object to the processing**, the Commission's statutory obligation to preserve the integrity of documents and files selected for permanent preservation would be seriously prejudiced as a result of the exercise of such rights, since:

- In case of rectification of personal data, the content of the archived file would be altered. Personal data contained in archived documents are an integral and indispensable part of those documents. Rectification of personal data contained in such documents would therefore undermine the authenticity and integrity of those documents and defeat the purpose of archiving in the public interest.

Under justified circumstances, the Commission could nevertheless decide to include a supplementary statement to the file concerned. In case of archives opened to the public, it may also be possible in certain cases to join an annotation to data related to a request for rectification.

- In case of **objection to the processing**, the archiving of files selected for archiving could no longer be ensured and would need to be terminated. Personal data contained in archived documents are essentially processed as part of the archiving process of the documents that contain those personal data. The right to object to the processing of personal data contained in archived documents would therefore imply the right to object to archiving in the public interest itself.

As a consequence of the exceptions applicable to the right to erasure and right to obtain restriction of processing by the controller, as well as the established necessity for a derogation from the right to rectification, **the notification obligation regarding rectification or erasure** of personal data or restriction of processing becomes obsolete. However, personal data may be contained in documents that are eliminated for archiving purposes (because they no longer have any historical, legal and/or administrative value). Identifying these personal data and notifying the data subjects concerned would impose an excessive administrative burden on archives that would render archiving in the public interest impossible.

Regarding the right to portability, the EDPS in its recommendations of 3 March 2020 clarifies that '[t]his right only applies when the lawful basis for processing this information is consent (Article 5(1)(d) of the Regulation) or the performance of a contract (Article 5(1)(c) of the Regulation) and when carrying out the processing by automated means. Since Article 5(1)(a) is the most common ground for lawfulness of processing in the EU institutions, the scope of the right to data portability is rather narrow in the EU institutions. Indeed, it is possible that the EC does not carry out any processing operations to which the right to portability applies. It is even more unlikely that personal data to which the right to data portability applies have 'transfer to historical archives' as the post-retention action under the Common Retention List. On the basis of those considerations, the EDPS recommends removing the possibility to apply a derogation to the data portability.'

As a consequence of this clarification and recommendation, the data controller has decided not to establish any derogation from the right to data portability for archiving purposes in the public interest.

5. PROPORTIONALITY OF THE PROPOSED MEASURE

Proportionality requires that advantages obtained by limiting the right are not outweighed by the disadvantages to exercise the right. In other words, the limitation of the right must be justified. Safeguards accompanying a measure can support the justification of a measure. A pre-condition is that the measure is adequate to achieve the envisaged objective. In addition, when assessing the processing of personal data, proportionality requires that only the personal data which are adequate and relevant for the purposes of the processing are collected and processed.

For the proportionality test and its conclusion, the following aspects should be assessed:

- *Importance ('legitimacy') of the objective of the proposed measure and whether and to what extent the proposed measure would meet this objective:*

The objective of the establishment of derogations from rights of data subjects concerning the Commission's archiving in the public interest is to ensure compliance with the Commission's statutory obligation to preserve the integrity of the documents and files that are selected for permanent preservation in accordance with the common retention list. The purpose of the Commission's archiving policy is to preserve the institution's memory, facilitate the exchange of information, be able to provide evidence of its actions and meet its legal obligations. Effective and proper records management and archiving are indispensable to fulfil transparency obligations, in particular by promoting efficient public access to documents.

The establishment of the above-mentioned derogations will ensure the integrity of the archives of the Commission and good administration by preventing the creation of a disproportionate administrative burden on the Commission archiving service.

- *Scope, the extent and the intensity of the interference in terms of impact on the fundamental rights to privacy and data protection of the data subjects*

It is important to note that the personal data processed for archiving purposes in the public interest are not directly received from the data subjects by the Commission's archives, but are first collected and processed in the context of a different processing operation. Personal data are only transferred to the historical archives, and processing for archiving purposes in the public interest starts, at the end of the retention period established for the original processing operation. **The present derogations are without prejudice to the data subjects' rights over the duration of the original processing operation.** The interests of data subjects to exercise their rights are naturally higher in relation to the processing operation for which their personal data were collected and processed in the first place. Consequently, the impact on data subjects by establishing derogations for the follow-up processing operation of archiving in the public interest is limited. Furthermore, access to the personal data contained in documents and files archived by Commission services is very limited. In case of external requests for access to these files, the personal data are protected, for example based on the exception of Article 4(1)(b) ('protection of privacy and the integrity of the individual') of Regulation (EC) No 1049/2001 on public access to Commission documents.

The opening of the archives to the public after 30 years may include the publication of some personal data but safeguards are in place. The Historical Archives Service reviews all files before they are opened to the public to ascertain whether they contain any documents covered by the exception relating to the privacy and integrity of the individual, as defined in article 4(1)(b) of Regulation (EC) No 1049/2001.

Given the limited negative consequences for data subjects and the clearly established public interest in ensuring the integrity of the Commission's archives, the advantages of the proposed measure outweigh its disadvantages. The proposed measure is therefore considered as being proportionate with the objective pursued.