Institute for Development of Freedom of Information

N20190808 August 22, 2019

Mrs. Sophio Kiladze, Chairperson of the Committee on Human Rights and Civil Integration of the Parliament of Georgia

Copy: Mr. Anri Okhanashvili, Chairperson of the Committee on Legal Affairs of the Parliament of Georgia

Copy: Ms. Tamar Khulordava, Chairperson of the Committee on European Integration of the Parliament of Georgia

Mrs. Sophie,

We present the views of the "Institute for Development of Freedom of Information" on the Draft law on Personal Data Protection initiated by the Parliament of Georgia on May 22, 2019.

In the era of technical progress and information technology, existence of strong legislative guarantees of personal data protection is especially significant. However, at the same time, ensuring a reasonable and proportionate balance between protection of personal data and freedom of expression/access to information is essential.

The Association Agreement between Georgia, on the one hand, and the European Union and the European Atomic Energy Community and their member states, on the other hand, covers both personal data protection and access to public information. That is why the annual National Action Plans for the implementation of the Association Agenda from 2014 to present included the obligations to improve national legislation on freedom of information. The obligation is also enshrined in the current 2019 Action Plan. It is problematic that for years the state has failed to fulfil its obligation under the Action Plan to improve legislation related to public information in Georgia. However, if the Draft

Law is adopted, access to public information will not improve in Georgia but quite contrary, it will be significantly restricted in some areas.

IDFI considers that in order to ensure fulfillment of obligations undertaken by Georgia and establish proper guarantees of freedom of expression and access to information, it is necessary to make changes to the Draft Law in the following directions:

1. Grounds for the processing of personal data

Similar to the current version of the Law on Personal Data Protection, Article 5 of the Draft Law provides an exhaustive list of the grounds for processing personal data, indicating that in the absence of the grounds set forth by this provision, personal data will not be processed/disclosed. IDFI believes that the legal framework provided by the Draft Law significantly restricts access to court decisions and other public information.

A) Access to court decisions

On June 7, 2019 the Constitutional Court of Georgia ruled that the statutory content of Articles 5 and 6(1) and 6(3) of the Law on Personal Data Protection, which restricts access to the full text of court decisions delivered within the scope of a public hearing, is unconstitutional. It is essential that the Georgian Parliament takes into consideration the standards set by the Constitutional Court while considering the Draft Law on Personal Data Protection and reflect it in the relevant legislative acts.
In case the regulation provided by the Draft Law is maintained, it will still be impossible to obtain judicial decisions from the Common Courts. According to the Draft Law, data processing is admissible if it is "necessary to protect the legitimate interests of a data controller or a third party, except when there is prevalent interest to protect the rights of the data subject (including a minor)." Regarding this matter the Constitutional Court clarified that this provision is applied to exceptional cases and the "legitimate interest" indicated[1] therein is narrower than the general interest of the person to obtain public information. Nor does any legislative act in force provide any ground whatsoever for a person's access to the personal information indicated in judicial acts to be considered as a "legitimate interest".
In addition, the balance set forth in Article 5 of the Draft Law is still incompatible with the right of access to public information[2] protected by the Constitution, since according to the Draft law, the personal data contained in court decisions will be confidential as a general rule unless the person concerned proves that there is a prevalent interest in the open accessibility of the act.

B) Processing of data for archiving, scientific or historical research or for statistical purposes

[1] Judgment of the Constitutional Court of Georgia of 7 June 2019 on the Case "Media Development Foundation" and "Institute for Development of Freedom of Information" against the Parliament of Georgia, § 63.
[2] Ibid, § 64.

According to the Draft Law, "further processing of data for archiving purposes in line with public interest, scientific or historical research or statistical purposes shall not be considered to be incompatible with the initial purposes. For this purpose, personal data may be stored for longer periods if appropriate technical and organizational measures are taken in order to safeguard the rights of the data subject[3]." This provision is related to the purpose limitation principle[4] meaning that data should be collected/obtained only for specified, explicit, legitimate, predetermined purposes. No further processing of the data may be allowed for any other purpose incompatible with the initial purpose.
While this provision is in line with EU data protection regulation, it does not address access to data for scientific or historical research purposes. Abovementioned norm only regulates data collection rules. The issue of data processing for archiving, scientific or historical research or for statistical purposes is not mentioned in Article 5 of the Draft Law. Consequently, if the Draft Law is adopted in the current form, disclosure of this information to interested parties will continue to be inadmissible.

It is noteworthy that the processing of information for the purposes set out in this Draft Law is foreseen with regard to special category of personal data (Article 6). In particular, under Article 6 (j), data processing is admissible if it is "necessary for archiving purposes in public interest, for scientific or historical research or for statistical purposes, in accordance with a law providing for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject." We believe that the approach provided for in Article 6 should also apply to information that does not represent special category of personal data. This necessity should not cause dissenting opinions, given that in its essence a special category of personal data enjoys a much higher degree of protection than other types of personal data.

In order to ensure access to any information stored in the archive for scientific and research purposes, it is important that Article 5 of the draft law provides the abovementioned ground for data processing.

C) Access to other public information

Compared to current version of the law, the grounds for data processing under the Draft Law are narrower. The Draft Law no longer provides for the following ground for data processing: "Data processing is provided for by Law", which could pose a significant threat to access to information. Current legislation prescribes publicity of personal data in asset declarations, access to personal data contained in public registry data, etc. In the absence of the aforementioned ground for data processing in the Personal Data Protection Act, access to information provided by other laws may be restricted.

[3] Article 4, paragraph 2.
[4] General Data Protection Regulation, Article 5(1)(b). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN

Moreover, the Draft Law no longer provides for the following ground: "Data processing is necessary to protect a significant public interest under the Law." Instead, it provides a more specific and restrictive wording: "Data processing is necessary for the performance of tasks carried out in the public interest, inter alia: crime prevention, crime investigation, prosecution, administering justice, enforcement of imprisonment and deprivation of liberty; For the purposes of operational-investigative activities, and ensuring public security and public order."[5]

Maintaining such formulation of exhaustive grounds for data processing may prejudice access to public information that is in the public interest or processing of which is provided for by law. Moreover, it is unclear to what extent "legal interest of third parties", which is one of the grounds for data processing, covers those situations where there is a public interest towards certain information.

According to the General Administrative Code,[6] a public institution shall not disclose personal data without the consent of the person concerned, except as provided for by law insofar as is necessary to ensure national security and public safety, for protecting public interest, health or the rights of others. The personal data of officials as well as nominees for such positions are public. Although the personal data of the official/nominee are public, under certain circumstances, there may also be public interest towards other information not directly related to the official/nominee. Although the General Administrative Code envisages the disclosure of data in the public interest, the law on Personal Data Protection should also include such provision in order to avoid legal ambiguity.

Furthermore, IDFI considers that the Draft Law should also lay down the following ground for data processing which is included in the current version of the law[7]: "According to the law, data are publicly available or a data subject has made them publicly available," as there is no interest in protecting personal data once it has been disclosed.

2. Grounds for the processing of special categories of data

Compared to the current law in force, the Draft Law lays down broader grounds for the processing of special categories of data, which should be positively assessed. It should also be welcomed that the Draft Law no longer provides an additional barrier[8] to disclose special categories of data and to make it available for the third parties. However, in order to provide solid guarantees for access to information, the Draft Law should be improved in this regard.

[5] Article 5(1)(e).
[6] "General Administrative Code", Article 44.
[7] Subparagraph (f) of Article 5.
[8] Under the current Law on Personal Data Protection, it is inadmissible to disclose data to a third party without the consent of the data subject, which constitutes a blanket restriction.

A) Adequate safeguards for the protection of the rights and interests of the data subject as a prerequisite for data processing

According to the Draft Law, processing of special categories of data is admissible only if there are appropriate data protection guarantees of the rights and interests of the data subject and one of the grounds for data processing under the Draft Law. It is unclear, in this case, what exactly is meant by "appropriate data protection guarantees of the rights and interests of the data subject" and whether it should be a prerequisite for data processing. This precondition for data processing is also not covered by EU regulation[9]. Such provision may create an additional barrier when it comes to one type of data processing - disclosure of data and endanger the access to information.

It should also be noted that Chapter IV of the Draft Law, which deals with the obligations of a data controller and processor, provides for measures related to data security as well as protection of the rights and interests of the data subject. Consequently, it is unclear what is the purpose of duplicating this issue in grounds for processing of special categories of data and determining it as a prerequisite for data processing.

B) Substantial public interest

One of the grounds for the processing of special categories of data is formulated in the Draft Law as follows: "Data processing is necessary for reasons of substantial public interest, on the basis of law, and if suitable and specific measures to safeguard the rights and the interests of the data subject are provided."[10] Given that the current law in force does not provide for the processing of special categories of data in case of substantial public interest, such provision constitutes a positive novelty.

At the same time, it should be noted that conviction and criminal record constitute a special category data, which, under current law, forms the basis for a blanket refusal to grant access to court decisions in criminal cases. Although the Draft Law allows for the disclosure of special category data in the public interest, in the context of access to judicial acts, the balance prescribed by the proposed regulation is still incompatible with the constitutional right of access to public information. Under such provision, judicial acts will still remain confidential and will only be disclosed in case of substantial public interest, contrary to the standard already established by the Constitutional Court.

According to the Constitutional Court, the high public interest in accessibility of court decisions exists by default regardless of the legal issue concerned, addressee of a judgment or the importance attached

[9] General Data Protection Regulation, Article 9.
[10] Subparagraph (h) of Article 6, paragraph 1.

to an individual decision at a specific time or under specific circumstances.[11] Moreover, the Constitutional Court does not exclude the legitimate possibility of the legislator to establish such a balance with regard to certain special categories of personal data when, as a rule, the data will not be disclosed without the consent of the data subject. Such a regime may be established in cases where due to its content, subject, form, timeframe or method of revelation or other circumstances, disclosure of information will have an intrusive impact upon private life. For example, such categories may include data regarding minors, information on intimate aspects of private life, etc.[12] Accordingly, the Court's reasoning demonstrates that the ground for concealing the information may be not merely information about a person's conviction, but exceptional cases that underlines a prevalent interest in protecting the confidentiality of information.

This interpretation of the Constitutional Court indicates that the disclosure of information about a person's conviction, in the absence of other additional circumstances, will not have such an intense impact on personal life that would necessitate establishing such a balance when, as a rule, the personal data contained in judicial acts will not be disclosed. The provision of the Draft Law establishes such a balance.

Accordingly, in the context of access to court decisions, Article 6 of the Draft Law does not comply with the constitutional standards and the interpretation of the Constitutional Court.

C) Making data public by the data subject

One of the grounds for the processing of special categories of data is making data public by the data subject, without an explicit prohibition of their use.[13] IDFI believes that the disclosure of such data by the data subject himself/herself should in itself constitute the ground for the processing of the data without any additional reservations ("explicit prohibition of their use"). It should be noted that the EU General Data Protection Regulation does not provide such a reservation and considers public disclosure of data by the data subject as a legitimate ground for processing.[14]

3. Termination of data processing, erasure or destruction of data

The Draft Law provides for the possibility of termination of data processing, erasure and destruction of data in the following cases:

[11] Judgment of the Constitutional Court of Georgia of 7 June 2019 on the Case "Media Development Foundation" and "Institute for Development of Freedom of Information" against the Parliament of Georgia, § 51.
[12] Judgment of the Constitutional Court of Georgia of 7 June 2019 on the Case "Media Development Foundation" and "Institute for Development of Freedom of Information" against the Parliament of Georgia, § 66.
[13] Article 6 (1) (g).
[14] General Data Protection Regulation, Article 9(2)(e). https://eur-lex.europa.eu/eli/reg/2016/679/oj

a) The personal data are no longer necessary in relation to the purposes for which they where collected or otherwise processed;
b) The data subject withdraws consent, and where there is no other legal ground for the processing;
c) The data have been unlawfully processed.[15]
The Draft Law also provides for circumstances when the data controller has the right to reject this request.
Moreover, in case data is processed in publicly available form and one of the abovementioned grounds apply, the data subject may also request any data controller to restrict access to the data and/or delete any copies or links to the data. The data controller shall notify all data recipients, as well as all other data controllers and processors to whom controller delivered the data, of the termination of data processing, erasure or destruction, unless delivery of such information can not be carried out due to the vast number of data controllers/processors or data recipients and the disproportionately high costs. These persons are obliged, after receiving the relevant information, to terminate data processing and to erase or destroy the data.[16]

IDFI believes that the extension of such regulation to publicly disclosed data is related to both practical and legal difficulties. This article serves the purpose of keeping people in control of their personal data, but on the other hand, in the era of internet and technologies, controlling once publicized data and limiting its subsequent dissemination attains practical difficulties. Given the simplicity of copying and dissemination of information, it is virtually impossible to completely erase data from the internet. Despite the fact that one of the grounds for rejecting a request for erasure/destruction of data is the case where data processing is necessary for the exercise of the right to freedom of expression, some difficulties may arise in practice in this respect[17]. It is disputed to what exent each data controller will ensure a fair balance between personal data protection and freedom of expression. Moreover, it is unclear what happens when different data controllers give advantage to different interests, in particular, when one of them thinks that data is necessary for the exercise of freedom of expression and the other data controller acts contrary to this approach.

It is also problematic that freedom of information is not considered as one of the grounds for refusal to comply with the request for erasure/destruction of data, contrary to the requirements of EU regulation.[18]

Given that sanctions are imposed in case rights of the data subject are infringed, such regulation may have a chilling effect, taking into account that the burden of proof rests with the data controller to

[15] Article 18.
[16] Article 18, paragraphs 5-7.
[17] Article 18, paragraph 2 (c).
[18] General Data Protection Regulation, Article 17(3)(a).

assess whether there are grounds for refusing to comply with the data erasure/destruction requirement. As a result, in the light of sanctions, the data controller may in most cases give advantage to the protection of personal data, which poses risks of disproportionally restricting right to freedom of expression/access to information.

4. Blocking of data

The Draft Law envisages the possibility of blocking data[19], which poses a risk of disproportionate restriction on access to information. The grounds for exercising this right include the following: The data subject contests truthfulness or accuracy of the data; The data subject requests termination of data processing, erasure or destruction of the data and this request is in progress.[20]

In the absence of specific reservations, it is presumed that the right to block the data also extends to the processing of the publicly available data. It is problematic that the protection of freedom of expression/access to information and the existence of public interest do not constitute the grounds for rejecting the claim for blocking.

Despite the fact that blocking of data has a temporary character and according to the Draft Law, data will be blocked only throughout the validity period of the reasons for such blocking, this regulation still poses the threats because certain data might have significant importance for ensuring access to information and freedom of expression at a specific time and under certan circumstances.

Conclusion

IDFI considers that in the process of protecting personal data, freedom of expression/access to information should not be disproportionately restricted, as it is the most important value, which is a necessary precondition for the establishment of a democratic state.

State inspector's service – a body for protection of personal data – is functioning in Georgia. However, there is no body, which would balance its work. Existing practice reveals that the balance between freedom of information and personal data protection is disrupted. When enforcing the regulation foreseen be the Draft Law, this balance can be further disrupted.

The opinion submitted by IDFI discusses those issues, which will have a negative impact upon freedom of expression and access to information. Taking into account the fact there is no Law on Freedom of Information in Georgia, which would ensure strong guarantees of access to information, while

[19] Article 19.
[20] Article 19, paragraph 1.

enforcing the strict legal regime of personal data protection, such challenges might also emerge which cannot be predicted in advance.

IDFI calls on the Parliament to take into consideration the interest of personal data protection as well as freedom of expression/access to public information when discussing the Draft Law and not to deteriorate the existing standards of freedom of information.

Sincerely,

Giorgi Kldiashvili

Executive Director

Author:
Ketevan Kukava
Parliamentary Secretary