

CO.10 Freedom of Information

Authors: Winfried Veil

Last update: 2021-07-08 23:06:49 | By: Winfried Veil

Created at: 2021-05-12 10:46:04

The right to protection of personal data is not an absolute right, but must be balanced against other fundamental rights, in accordance with the principle of proportionality [\[Tile CO.01\]](#). The right to informational self-determination “must be balanced against the freedom to gather, process and use information for one’s own purposes, including for changing purposes” [\[BVerfG, Order of 6 November 2019 - 1 BvR 16/13 -, para. 87\]](#).

This multidimensionality of fundamental rights is insufficiently recognised by the GDPR as a whole. Among the rights and freedoms of natural persons that the GDPR seeks to protect, the fundamental rights of the controller are hardly explicitly taken into account.

Therefore, the fundamental rights of the Charter of Fundamental Rights must be used for the interpretation of the term “rights and freedoms”. Insofar as the controller makes use of the freedom of information through data processing, he can base this on Art. 11 I CFR:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

Freedom of information naturally also includes the freedom to receive and impart personal data about others. This creates a tension with data protection law, because if the information is provided by means of automated data processing, the GDPR would apply “per se”. However, only a few provisions of the GDPR cover this tension: Art. 9 II e, 17 III a, 85 and 86 as well as Rec. 153 and 154 GDPR.

Art. 85 GDPR leaves the balance between data protection and freedom of information largely to the law of the Member States [for situation in Germany see [Tile GL.09](#)]

See in the context of the right to erasure also Rec. 65 sent. 5 GDPR:

“However, the further retention of the personal data should be lawful where it is necessary,

for exercising the right of freedom of [...] information [...].”

See for public access to official documents Art. 86 and Rec. 156 GDPR.

In the context of freedom of information, there is also processing for archival purposes [**Tiles [CO.21](#) and [P.18](#)**] and access to public registers (see Art. 10 and 49 I g/II as well as Rec. 73, 111 sent. 2-4 and 157 GDPR).

In order to balance the rights of the data subject and the freedom of information of the controller (see Practical Concordance, **[Tile P.04](#)**), the principle of proportionality (Art. 52 I CFR) must be applied in addition to the provisions of the GDPR. Cf. furthermore **[Art. 1 II GDPR](#)** and especially Rec. 4 (2) GDPR:

“The right to the protection of personal data is not an absolute right; it must be [...] balanced against other fundamental rights, in accordance with the principle of proportionality.” [**see also [Tile CO.01](#)**].