



**Twinning project “Implementation of the best European practices with the aim of strengthening the institutional capacity of the apparatus of the Ukrainian Parliament Commissioner for human rights to protect human rights and freedoms (apparatus)”  
No. EuropeAid/137673/DD/ACT/UA**

**Activity 2.3.5. Developing guidelines for effective monitoring by the Office of the Ombudsperson of the state of compliance by relevant stakeholders with the legislation in the field of access to public information**

<b>Document</b>	Draft of minimum amendments to the Law of Ukraine on Access to Public Information, necessary for the purpose of harmonization with the (draft) Law on Personal Data Protection
<b>Short description of the document</b>	In this document, the experts identify minimum amendments to the Law of Ukraine on Access to Public Information, that would be necessary for the purpose of harmonization with the (draft) Law on Personal Data Protection.
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## **Draft of minimum amendments to the Law of Ukraine On access to public information, necessary for the purpose of harmonization with the (draft) Law On personal data protection**

The purpose of the Ukrainian Law on Access to Public Information is to ensure the transparency and openness of the public authorities and to create effective mechanisms for exercising the common right to access to public information.

Concerning the right to receive information, there is a growing awareness of the importance of government transparency for the functioning of a democratic society. Transparency is an objective of general interest that could thus justify an interference with the right to data protection, if necessary and proportionate<sup>1</sup>. However, “no automatic priority can be conferred on the objective of transparency over the right to protection of personal data”.<sup>2</sup> That means that it is necessary to find a balance between the different rights at stake.

The representatives of the Office of the Parliament Commissioner have noted the lack of understanding by enterprises, institutions and organizations about the rules determining what kinds of public bodies and private entities are to be considered to be information processors for the purposes of the Law and what kind of information shall be provided to requesters or even published: The representatives have noted that information processors often refuse to provide information due to the fact that part of a document contains personal data of other persons.

The analysis of the existing legal provisions of the Ukrainian Law on Access to Public Information revealed that there are very few rules on balancing the right to access to information and the right to personal data protection.

In Article 6 (“Public information with restricted access”), a concept of information with restricted access is established. However, personal data do not explicitly fall into this concept. The only rules of the Law concerning protection of personal data are mentioned in the context of public information in the form of open data. Article 10 (“Access to information about the person”), para. 3 sets conditions for publishing information in the form of open data containing personal data, such as de-personalisation, data subject's consent, legal determination of publishing or providing data or legal prohibition of restrictions to provide data.

It should be noted that the Law does not provide comprehensive rules for information processors when to refuse to satisfy a request for information due to the fact that part of the document contains personal data of other persons.

Examples of rules on such balancing can be found both in international case-law (Court of Justice of the European Union, C-28/08 P, *European Commission v. The Bavarian Lager Co. Ltd.*, 29 June 2010; C-615/13P, *ClientEarth, Pesticide Action Network Europe (PAN Europe)*)

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<sup>1</sup> Handbook on European data protection law, 2018 edition

<sup>2</sup> Court of Justice of the European Union, Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, 9 November 2010

v. European Food Safety Authority (EFSA), European Commission, 16 July 2015) as well as in EU Member States' law. For example, Article 2 para. 4 of the Law of the Republic of Lithuania on the Right to Obtain Information from State and Municipal Institutions and Bodies sets a general principle that personal data shall be processed in accordance with the Law on the legal protection of personal data of the Republic of Lithuania:

*“4. Personal data shall be processed in accordance with the Law of the Republic of Lithuania on Legal Protection of Personal Data.”*

That means that both publishing and providing personal data contained in official documents must be performed in accordance with the requirements of Article 6 and 9 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter – GDPR), notably, in case of absence of other legal grounds for publishing or providing information, the legitimate interest of the requester or other persons must be proven.

Therefore, the experts suggest to supplement the Law on access to public information concerning ‘public information with restricted access’ with a new category ‘personal information’, also introducing special rules on access to personal information by third parties and highlighting that the access to personal information may be granted also on grounds of legitimate interest of the requester or other persons, including the public interest, in disclosure of personal information, provided that the interest in disclosure overrides the data subject’s interests in protection of his/her fundamental rights, especially the right to data protection.

The representatives of the Office of the Parliament Commissioner have noted the lack of understanding of the difference between the right of access by the data subject according to the Law on Personal Data Protection and everybody’s right to access to public information. In the interest of harmonizing these two rights, the following changes in the Law of Ukraine on access to public information are proposed:

**Draft of minimum amendments to the Law of Ukraine On Access to Public Information, necessary for the purpose of harmonization with the (draft) Law On Personal Data Protection**

**Article 1.**

A third paragraph shall be added in Article 2 with the following text:

*“3. This Law does not impair the data subject’s right to access his/her own data according to Art. 15 of the Law of Ukraine on personal data protection, where such data are held by processors of public information. .”*

## **Article 2.**

1. Paragraph 1 of Article 6 shall be supplemented with subparagraph 4:  
“4) personal information (Article 9<sup>1</sup>).”
2. The opening sentence of paragraph 2 shall read as follows:  
“2. Restriction of access to public information according to paragraph 1 subparagraphs 1) to 3) is carried out according to the law, provided that the following requirements are met: ....”
3. A paragraph 2a shall be added to Article 6:  
“2a. Restriction of access to personal information is carried out according to Article 9<sup>1</sup>.”

## **Article 3.**

The Law shall be supplemented with an Article 9<sup>1</sup>:

### **Article 9<sup>1</sup>. Personal information**

1. Personal information means personal data in the sense of Art. 4 (1) of the Law of Ukraine on personal data protection.
2. If access is requested to public information which contains personal data about natural persons other than the requestor, access shall be granted if
  - 1) such information is reliably de-personalized, which means also blackened in documents which are subject to access, or
  - 2) access complies with Art. 6 (1) of the Law of Ukraine On personal data protection. This requires either
    - a) consent of the data subject to the disclosure, or
    - b) vital interests of the data subject or a third party in disclosure, or c) a special legal provision ordering or allowing for granting access, or
    - d) a legitimate interest of the requestor or others, especially also of the general public, in disclosure; this, however, only if the requestor plausibly demonstrates that the interests in disclosure are overriding interests of fundamental rights and freedoms of the data subject, which require protection of personal data. The requestor's interest in disclosure is in any case overridden by protection interests of the data subject, if disclosure would unduly harm the data subject.

## **Article 4.**

1. Article 10 shall be deleted.
2. Article 10<sup>1</sup> shall become Article 10
3. Paragraph 3 of Article 10 shall read as follows:  
“3. If access to public information is granted by publishing information which contains personal data, the requirements for lawful access named under Article 9<sup>1</sup> must pertain explicitly to disclosure in form of publication.”

## **Article 5.**

Paragraph 2 of Article 19 shall be amended and worded as follows:

“Requests for information shall not be reasoned except for requests for personal information according to Article 9<sup>1</sup> paragraph 2.”

## **Article 6.**

Paragraph 5 of Article 19 shall be supplemented with subparagraph 2a:

“2a) the reasons for the request for personal information according to Article 9<sup>1</sup> paragraph 2.”

**Article 7.**

Paragraph 1 of Article 22 shall be supplemented with a subparagraph 1a:

“1a) the requirements set out in Article 9<sup>1</sup> for the disclosure of personal information to a requestor are not met.”