



PERSONAL DATA PROTECTION VS. FREEDOM OF EXPRESSION AND INFORMATION

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This research was not intended to assess the compatibility of national standards and practices concerning personal data protection with relevant European and international standards. Instead, it aimed to analyze the current situation related to personal data protection in terms of its ability to ensure the right to freedom of expression and access to information in an effort to provide the fullest possible picture of both the current legislation and existing limitations in terms of personal data protection vs. public interest and journalists' access to personal information.

The last section of this paper contains suggestions and recommendations for improving practices and principles for guaranteeing the right to personal data protection in correlation with the freedom of expression and information.

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SECTION I: The Context and Framework of European and National Legislation on Access to Personal Data

A. European Regulations on Personal Data Protection

The protection of individuals in relation to the processing of their personal data is a fundamental right and part of the right to respect for one's private and family life, home and correspondence that was for the first time mentioned in Article 12 of the Universal Declaration of Human Rights¹ and later regulated by other legal instruments at the European level.

Right to protect personal data is protected by Article 8 of the European Convention on Human Rights² which also guarantees the right to respect for one's private and family life, home and correspondence. Member states of the Council of Europe must abide by the Convention; the European Court of Human Rights (ECHR) ensures compliance with countries' obligations under the Convention by examining complaints from injured parties. ECHR case law contains solutions for various aspects related to personal data protection such as general principles; combating terrorism; modern scientific techniques; detention (restriction of correspondence for detainees); wire tapping and correspondence; telephone interception (by secret services, police and judicial bodies); home bugging; databases regarding secret surveillance; records and data access (social services and national security); access to data stored by secret services; court records; medical information, etc.³

By the mid-1970's, the Committee of Ministers of the Council of Europe had adopted various resolutions on the protection of personal data referring to Article 8 of the Convention.⁴ In 1981, the Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data (Convention 108)⁵ was opened for signature. It is still the only legally binding international instrument in the data protection field. Convention 108 applies to all data processing carried out by both the private and the public sectors such as data processing by judiciary and law

1 United Nations (UN), Universal Declaration of Human Rights (UDHR), 10 December 1948.

2 Convention for the Protection of Human Rights and Fundamental Freedoms approved in Rome on 4 November 1950.

3 http://echr.coe.int/Documents/FS_Data_ROM.pdf

4 Council of Europe, Committee of Ministers (1973), Resolution (73) 22 on the Protection of Privacy of Individuals Vis-à-vis Electronic Data Banks in the Private Sector, 26 September 1973; Council of Europe, Committee of Ministers (1974), Resolution (74) 29 on the Protection of the Privacy of Individuals Vis-à-vis Electronic Data Banks in the Public Sector, 20 September 1974.

5 Council of Europe, Convention for the Protection of Individuals with regard to Automated Processing of Personal Data, Council of Europe, CETS 108, 1981.

enforcement authorities. It protects the individual against abuses that may accompany the collection and processing of personal data and seeks at the same time to regulate the transborder flow of personal data. As regards the collection and processing of personal data, the principles laid down in Convention 108 concern, in particular, fair and lawful collection and the automatic processing of data stored for specific, legitimate purposes and not for use for ends incompatible with those purposes nor kept for longer than necessary. They also concern the quality of the data, in particular that they must be adequate, relevant and not excessive (proportionality) as well as accurate.⁶

In 2001, an additional protocol to Convention 108 was adopted that introduced provisions on transborder data flows to countries that are not parties to it—so-called third party countries—and on the mandatory creation of national data protection surveillance authorities.⁷

Convention 108 is currently being updated and adjusted to data protection challenges related to the latest telecommunication technologies.⁸

Currently, the European Union's (EU's) main legal instrument on data protection is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data. At the time of the directive's adoption, several member states had already adopted national data protection laws. The free movement of goods, capital, services and people within the internal market required the free flow of data that could not be realized unless member states could rely on uniform, high-level data protection.⁹

On 27 April 2016, a new regulatory framework was approved for the protection of personal data at the EU level: Regulation (EU) 2016/679 of the European Parliament and of the Council on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation); it will repeal Directive 95/46/EC when it comes into force on 25 May 2018. It updates the principles set out in Directive 95/46/EC, which will cease to be effective, and prescribes a unique set of rules directly applicable to all EU member states that are meant to ensure the more efficient protection of privacy of individuals on EU territory.

The principles and rules set in the General Data Protection Regulation refer to a fundamental right of an individual: the right to personal data protection guaranteed

6 Handbook on European data protection law, page 16

7 Council of Europe, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, CETS 181, 2001.

8 http://dataprotection.ro/?page=europa_council&lang=ro

9 Handbook on European data protection law, page 18

in Article 8 of Chapter II (Freedoms) of the EU Charter of Fundamental Rights.¹⁰ The Charter became legally binding as a primary EU law at the same time the Treaty of Lisbon came into force on 1 December 2009.

A comentat [J1]: To distinguish it from Article 8 of the Convention.

The General Data Protection Regulation (i) highlights the responsibility of controllers processing personal data; (ii) consolidates the rights guaranteed to individuals concerned (those whose data are processed); (iii) expands their right to information (enabling them to request more accurate and comprehensive information from the controller about the purpose of and legal grounds for processing personal data, the period of storage of such data and the rights available to them) and (iv) introduces new rights of persons concerned (the right to be forgotten, applicable in the online medium, and data portability).

The regulation's main provisions shall not apply in cases of:

- data processing for the purpose of preventing, investigating and prosecuting a criminal or executing a criminal punishment in which cases national legislation transposing the General Data Protection Regulation shall apply;
- activities beyond EU authority which include processing data related to the national security of member states and external relations;
- data processing carried out by an individual within an exclusively personal activity.

Item 4 of the General Data Protection Regulation expressly states:

The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

The General Data Protection Regulation refers to all rights and freedoms enshrined in the Charter of Fundamental Rights, particularly the right to respect for private and family life, home and communications; the protection of personal data; the freedom of thought, conscience and religion; the freedom of expression and information; the freedom to conduct a business; the right to an effective remedy and to a fair trial and the right to cultural, religious and linguistic diversity.

One of the rights that can come in conflict with the right to protect personal data is the freedom of expression and information. For the purpose of balancing them, the regulation stipulates the following:

"Member State law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and/or literary expression, with the

10 EU (2012), European Union Charter of Fundamental Rights, MO 2012 C 326.

right to the protection of personal data pursuant to this Regulation. The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights. Member States should adopt such exemptions and derogations on general principles, the rights of the data subject, the controller and the processor, the transfer of personal data to third countries or international organizations, the independent supervisory authorities, cooperation and consistency, and specific data-processing situations. Where such exemptions or derogations differ from one Member State to another, the law of the Member State to which the controller is subject should apply. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.”

The regulation also allows the principle of public access to official documents to be taken into account during its application: “Public access to official documents may be considered to be in the public interest. Personal data in documents held by a public authority or a public body should be able to be publicly disclosed by that authority or body if the disclosure is provided for by Union or Member State law to which the public authority or public body is subject. Such laws should reconcile public access to official documents and the reuse of public sector information with the right to the protection of personal data and may therefore provide for the necessary reconciliation with the right to the protection of personal data pursuant to this Regulation”.

B. Access to Personal Data in Moldova

Access to official information is part of an individual's fundamental right to be informed and is a way to control the activities of public authorities/institutions and the management of public funds and to stimulate the generation of opinions and the active participation of people in decision making in the spirit of democracy.¹¹

Respect for the right to information implies that a restriction thereof shall be prohibited, and Article 34 (1) of the Constitution of the Republic of Moldova provides specifically for non-limitation of the right to information.¹² The Constitution has a number of other articles related to the right to information: Article 23 (Right of Every Person to Know His/Her Rights and Duties), Article 31 (Freedom of Conscience), Article 32 (Freedom of Opinion and Expression), Article 37 (Right to a Healthy Environment), Article 39 (Right of Take Part in Administration), Article 52 (Right to Lodge Petitions) and Article 54 (Restrictions on the Exercise of Certain Rights or Freedoms).

The main legal document in Moldova applicable to access to information is the organic Law on Access to Information No. 982-XIV of 11.05.2000. This law aims:

- to create a general regulatory framework on access to official information;
- to increase the effectiveness of providing public information and of citizens' control over the activity of public authorities/institutions;
- to stimulate the formation of opinions and the active participation of people in decision making in the spirit of democracy.

The law defines official information (not "information of public interest" provided for in the Constitution), general categories of applicants and holders of official information and the conditions for exercising the right to access to information.

Official information is defined as all information held and administered by information providers that has been developed, selected, processed, systematized and/or adopted by official bodies or persons or that is provided to them in conformity with the law by other subjects. Documents bearing information include (i) any piece of paper or other material that carries an inscription; (ii) a map, chart, drawing or

¹¹ Resolution No 1 of the Plenum of the Supreme Court of Justice of the Republic of Moldova of 02.04.2007 on examining cases concerning access to official information, Bulletin of the Supreme Court of Justice of the Republic of Moldova, 2007, No 5, page 4

¹² "(1) The right of a person to have access to any kind of information of public interest shall not be curtailed. (2) Public authorities, according to their assigned competence, shall be committed to ensure that citizens are correctly informed both on public affairs and issues of personal interest. (3) The right of access to information shall not prejudice either the measures taken to protect citizens or national security. (4) The State and private public media shall be bound to provide correct information for public opinion. (5) Public media shall not be subject to censorship."

photograph; (iii) any paper or other material that carries markings, figures, symbols or perforations that have a meaning to people qualified to interpret them; (iv) any object or material that can be used to reproduce sound, images or inscriptions with or without the help of another object or device and (v) any other register of information that appeared as a result of technological progress.

According to Article 34 (2) of the Constitution, public authorities according to their assigned competence shall be committed to ensuring that citizens are correctly informed both on public affairs and on issues of personal interest. The category *public authorities* includes bodies of state power in their diversity (both at the central and local levels), as well as other structures and institutions that fulfill auxiliary functions but are indispensable to institutions of power. Any public authority has the right and at the same time the obligation to provide information about public affairs within its competence as well as to inform citizens about problems it is competent to examine and to decide upon. At the same time, a public authority shall not be allowed to interfere in another authority's area of competence, even if applicants have the impression that said authority has refused to solve their problems and their access to information has thus been limited. The notion of "public affairs" implies proper information about the decisions made and actions taken by authorities in respect of problems affecting a large circle of persons: the entire population, the population of an administrative territorial unit, representatives of a certain profession, social groups and local communities among others. The expression "problems of personal interest" implies providing proper and prompt information to citizens as well as to any individuals, regardless of citizenship or social status, about actions and measures taken by the public authority with regard to their personal problems.¹³

Article 5 (2) of the Law on Access to Information stipulates that *information providers*, that is holders of official information, required to provide such information to applicants are (i) local and central public authorities (authorities of state administrations as stipulated in the Constitution); (ii) local and central public institutions; (iii) organizations founded by the state in the person of public authorities and financed from the state budget that are responsible for administration, social and cultural activities or non-commercial activities and (iv) individuals and legal entities that under the law or contract with a public authority or institution are empowered to provide some public services and to collect, select, hold, preserve and use official information including personal information. The provision of information by competent public authorities is guaranteed not only by the Law on Access to Information but also by other laws in Moldova.¹⁴

All public authorities defined under the law shall communicate the following information *from their respective offices*:

13 "Constitution of the Republic of Moldova. Comment", published by the Constitutional Court of the Republic of Moldova with the financial support of the Hanns Seidel Foundation, Germany, page 149

14 Law on the Press No 243-XIII of 26.10.1994 (MO No 2/12 of 12.01.1995), articles 3 and 20; Broadcasting Code, Law No 260-XVI of 27.07.2006 (MO No 131-133/679 of 18.08.2006), articles 1 and 10.

- a description of the institution's structure and its address;
- a description of the institution's functions, directions and forms of activity;
- a description of the institution's subdivisions and their competencies as well as working hours specifying visiting days and hours of officials in charge of providing information and official documents;
- final decisions on the main issues examined.

Communications "from the office" imply an obligation of the authorities; however, other official information may be obtained upon request with certain exclusions expressly provided for in the law. Article 34 (3) of the Constitution expressly stipulates a number of restrictions on the right to information stating that this right should not prejudice the protection of citizens or of national security. The exercise of the right to seek, obtain and disseminate official information may be restricted for specific reasons in accordance with international law including for the protection of national security or a of person's private life.¹⁵ It is natural for a law to provide certain limitations, specifying cases when information cannot be made public as it would prejudice the rights, legal interests and security of citizens. Such restrictions are contained in a number of legal documents:

- Law on Access to Information No 982-XIV of 11.05.2000 (MO No 88-90/664 of 28.07.2000), Article 8;
- Law on State Secrets No 245-XVI of 27.11.2008 (MO No 45-46/123 of 27.02.2009), articles 1 and 7;
- Law on Health Care No 411-XIII of 28.03.1995 (MO No 34/373 of 22.06.1995), articles 14 and 27;
- Law on Civil Service and Status of Civil Servants No 158-XVI of 04.07.2008 (MO No 230-232/840 of 23.12.2008), Article 22;
- Law on Electronic Communications No 241-XVI of 15.11.2007 (MO No 51-54/155 of 14.03.2008), articles 5 and 41;
- Law on Commercial Secrets No 171-XIII of 06.07.1994 (MO No 13/126 of 10.11.1994), articles 3, 8 and 11;
- Law on Notary Activity No 1453-XV of 08.11.2002 (MO No 154-157/1209 of 21.11.2002), articles 6 and 19;
- Law on Financial Institutions No 550-XIII of 21.07.1995 (republished in MO No 78-81/199 of 13.05.2011), Article 22;
- Law on the State of Emergency,¹⁶ Siege and War No 212-XV of 24.06.2004 (MO No 132-137/696 of 06.08.2004), Article 22.

¹⁵ Article 4 (2) of the Law on Access to Information.

¹⁶ "Constitution of the Republic of Moldova. Comment", published by the Constitutional Court of the Republic of Moldova with the financial support of the Hanns Seidel Foundation, Germany, page 150.

Restricting access to official information is an absolutely exceptional departure from the principle of free access to this category of information. Access to official information cannot be restricted except in the following cases:

- information considered a state secret as regulated by organic law, the unauthorized disclosure or loss of which could affect the interests and/or security of the Republic of Moldova;
- confidential information in the business area provided to public institutions under the terms of confidentiality regulated by the law on commercial secrets and related to production, technology, administration, finance or other economic activity, the disclosure (transmission or leakage) of which could affect the interests of the business person;
- **personal information, the disclosure of which is considered to interfere in a person's private life and that is protected by the law on personal data protection;**
- information related to criminal investigations and prosecutions by competent authorities but only in cases when the disclosure of such information could prejudice the said activities, interfere with legal proceedings, deprive a person of the right to a proper and fair trial or endanger the life or physical safety of any person as regulated by law;
- information about the final or intermediary results of scientific research, the disclosure of which would infringe the researcher's priority right of publication or would affect other rights protected by law.

One of these categories is of special interest, namely **personal information** that is expressly defined by the **Law on Access to Information** as data referring to an identified or identifiable individual, the disclosure of which would violate the right to respect for a person's private, intimate and family life.¹⁷ Access to personal information is provided under the legislation on the protection of personal data,¹⁸ specifically the Law on Personal Data Protection No 133 of 08.07.2011.

Thus, for information to be considered personal under current national law, it must fulfil **all** of the following conditions:

1. **INFORMATION SHALL REFER TO AN INDIVIDUAL.** Individuals are the only beneficiaries of data protection. Personal data protection does not apply to legal persons, i.e., to businesses with legal personalities or to the contact details of a legal person.
2. **THE INDIVIDUAL SHALL BE IDENTIFIED OR IDENTIFIABLE.** The said law defines personal data as any information related to an identified or

17 Article 8 of the Law on Access to Information.

18 Article 8 (2) of the Law on Access to Information.

identifiable individual. An identifiable individual is one who can be identified, directly or indirectly, by means of an identification number or by one of several elements specific to his/her physical, physiological, psychic, economic, cultural or social identity.

Such data also relate to persons if the content of information indirectly reveals data about a person. In cases where there is a close link between an object or an event—a mobile phone, a car, an accident—on the one hand and a person—its owner, user, victim—on the other, information about an object or about an event ought also to be considered personal data.¹⁹

- 3. INFORMATION DISCLOSURE SHALL BE A VIOLATION OF RESPECT FOR ONE'S PRIVATE, INTIMATE AND FAMILY LIFE.** An individual's privacy may be defined as non-disclosure of their characteristics, actions and personal data to the public. A number of factors shall be taken into consideration in determining the degree of privacy of information including the specific conduct and subjective feelings of the person. In a narrow sense, privacy is ensured through respect for home and correspondence as well as the protection of personal data.²⁰ Information about private and family life is any information, including images, about family life and home life, correspondence and its contents, health and physical defects, sexual orientation and life as well as the behavior of the person when the individual reasonably counts on privacy.²¹

According to Article 10 (2) of the Law on Freedom of Expression, the right to protect private and family life does not extend to information about an individual's private and family life that is disclosed with the individual's express or implied consent or becomes known in public places when the individual cannot reasonably count on privacy. An individual's implied consent for disclosure of information about his/her private life is presumed when the information appears in a public place and that fact is known to the individual but the individual does not react to it.

When all of the above criteria are met, the information is qualified as personal which means that the holder of such information can protect it and not disclose it.

Although the Law on Access to Information expressly stipulates that access to personal information shall be provided in accordance with the legislation concerning personal data protection, we find that the Law on Personal Data Protection does not regulate aspects pertaining to the accessibility of personal information and its protection in relation to making it available. Furthermore, the Law does not define

¹⁹ Handbook on European data protection law, page 43

²⁰ "Constitution of the Republic of Moldova. Comment", published by the Constitutional Court of the Republic of Moldova with the financial support of the Hanns Seidel Foundation, Germany, page 150.

²¹ Article 2 of the Law on Freedom of Expression.

the subjects of access to personal information (the information provider and the person requesting information). The contents of Article 3 of the Law on Personal Data Protection leads to the following conclusions.

1. Information providers (holders of personal information) are:
 - controllers—natural or legal persons governed by public law or by private law including public authorities or any other institution or organization that alone or jointly with others determines the purposes and means of processing personal data expressly provided by the legislation in force;
 - processors—natural or legal persons governed by public law or by private law including public authorities and their territorial subdivisions that process personal data on behalf of controllers based on instructions from controllers;
 - third parties—natural or legal persons governed by public law or by private law other than the subject of the personal data, the controller, the processor and the persons who under the direct authority of the controller or the processor are authorized to process personal data.
2. The person requesting information is the *recipient*—a natural or legal person governed by public law or by private law including public authorities and their territorial subdivisions to whom personal data are disclosed, whether a third party or not. The bodies responsible for national defense, state security and public order, criminal prosecutions and courts that receive personal data in the framework of exercising their duties established by law are not regarded as recipients.

The Law on Personal Data Protection does not regulate the phrase “provision of information.” This can be found in the notion of “processing of personal data”²² with the following meaning: any operation or set of operations that is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, keeping, restoring, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making it available, alignment or combination, blocking, erasure or destruction.

At the same time, the abovementioned regulation does not stipulate in an express and restrictive manner cases when the information provider that holds personal data has the right to provide it upon request. Such cases can be taken out of certain provisions of the Law on Personal Data Protection and the Law on Freedom of Expression. Thus, information providers can disclose personal data upon request in the following cases:

- the person requests access to his/her own personal data;

22 Article 3 of the Law on Personal Data Protection.

- the person to whom the request for personal data refers has consented to their disclosure;
- the personal data have been made public voluntarily and openly by the subject of such data;
- the personal data are closely connected with the public quality of the subject of the data or the public nature of facts in which the person is involved under the Law on Freedom of Expression;
- the personal data are to be processed exclusively for journalistic, artistic or literary purposes.

Every data subject has a right to obtain the following information from the controller:

- confirmation as to whether or not data relating to him/her are being processed;
- the purpose(s) of processing;
- the categories of data concerned;
- the data undergoing processing;
- the recipients or categories of recipients to whom the data are to be disclosed;
- any available information about the source of the data undergoing processing;
- in the case of automated decisions, the logic involved in any automatic processing of data.²³

Article 5 of the Law on Personal Data Protection stipulates that personal data shall be processed **with the consent of the subject**. Thus, any collection, storage, extraction, disclosure through transmission, dissemination or otherwise making personal data available shall require the consent of the subject. The consent of the subject is any freely, expressly and unconditionally given indication of will, in written or electronic form according to the requirements of the electronic document, through which the subject agrees to the processing of personal data.

Consent is not required when processing is necessary for:

- the performance of a contract to which the subject is a party or for taking actions prior to entering into a contract at the subject's request;
- the fulfillment of an obligation of the controller under the law;
- the protection of the life, physical integrity or health of the subject;
- the performance of tasks carried out in the public interest or in the exercise of public authority prerogatives vested in the controller or in a third party to whom the personal data are to be disclosed;

- the realization of the legitimate interest of the controller or of a third party to whom personal data are to be disclosed provided that such interest does not prejudice the interests or fundamental rights and freedoms of the subject;
- purposes of statistical, historical or scientific research provided that the personal data remain anonymous.²⁴

At the applicant's request, information providers shall also provide personal data that have been voluntarily and openly made public by the subject. This obviously implies that the individual's disclosure of data should be interpreted as consent to the use of such data. The right to respect for private and family life does not cover information about an individual's private and family life that has been disclosed with the individual's express or implied consent or that becomes known in public places when the individual cannot reasonably count on privacy.²⁵

Although the Law on Access to Information expressly stipulates that persons are free from the obligation to justify their interests in requesting information,²⁶ nonetheless the Law on Personal Data Protection²⁷ states that personal data undergoing processing shall be:

- processed fairly and lawfully;
- collected for specific, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- accurate and, where necessary, kept up to date;
- kept in a form that permits the identification of subjects for no longer than is necessary for the purposes for which the data were collected and/or further processed.

Particularly, national authorities consider/interpret²⁸ that in the context of the Law on Personal Data Protection, the controller shall, prior to disclosing personal data, analyze the request for information in order to identify:

24 Article 5 (5) of the Law on Personal Data Protection

25 Article 10 (2) of the Law on Freedom of Expression

26 Article 10 (3) of the Law on Access to Official Information

27 Article 4 of the Law on Personal Data Protection

28 Reply of the National Center for Personal Data Protection to Chisinau Court of 20 March 2017 with reference to the "Lawyers for Human Rights" Public Association's request for being provided the names of persons put on the national and international wanted lists during 2009–2016.

- the concrete purpose for which the data are to be disclosed and whether or not such purpose is connected to the purpose for which the data were collected;
- the reasons for the need for such official information with limited access;
- the conditions in which personal data will be kept and the period for which they are needed;
- the legal framework underlying the applicant's request for access to the data;
- the presence of the grounds provided for in Article 5 of the Law on Personal Data Protection that justify third-party access to confidential information in the absence of the subject's consent;
- guarantees for ensuring the secure and confidential processing of the personal data requested in accordance with articles 29 and 30 of the Law on Personal Data Protection.

This restrictive interpretation by national authorities of the provisions of the Law on Personal Data Protection as it relates to journalists is contrary to the spirit of democracy. Given this, the media cannot fulfill their task to inform the public about problems of public interest in an efficient manner.

SECTION II: Processing Personal Data and Freedom of Expression and Information

The right to personal data protection is not an absolute right and should be reconciled with other rights such as the freedom of expression.

In its case law, the ECHR noted the following:

(...) in case of a conflict between two rights enjoying equal protection under the Convention, the Court shall assess the importance of conflicting interests. The result of proceedings should not, in fact, vary depending on whether the application was filed with the Court under Article 8 of the Convention (...) or under Article 10 of the Convention (...), as these two rights deserve, in fact, to be observed in an equal manner (see *Hachette Filipacchi Associés (ICI PARIS) vs. France*, case No 12268/03, § 41, 23 July 2009; *Timciuc vs. Romania (dec.)*, case No 28999/03, § 144, 12 October 2010; *Mosley vs. UK*, case No 48009/08, § 111, 10 May 2011; and *Couderc and Hachette Filipacchi Associés vs. France [MC]*, case No 40454/07, § 91, 10 November 2015).

Thus, the Court concluded that, “The margin of appreciation should, in theory, be the same in both cases (see *Von Hannover (case No 2) vs. Germany*, 17 February 2012, § 106; *Axel Springer AG vs. Germany*, 17 February 2012, § 87; and *Couderc and Hachette Filipacchi Associés vs. France*, § 91).”²⁹

At the national level, freedom of expression is protected by Article 32 of the Constitution³⁰ and by the Law on Freedom of Expression which aims to guarantee the exercise of the right to free expression and to create a balance between guaranteeing the freedom of expression and protecting a person’s honor, dignity, professional reputation and private and family life.

Under articles 3 and 4 of the law, the exercise of freedom of expression may be subject to certain legal restrictions necessary in a democratic society for ensuring national security; territorial integrity; public order and crime prevention; protecting health and morality, reputations or the rights of others; preventing the disclosure of confidential information or guaranteeing the authority and impartiality of judicial power. Freedom of expression may be restricted solely for the protection of a

A comentat [J2]: The footnote implies this was a conclusion of the Constitutional Court of Moldova, but it seems more like an ECHR conclusion.

²⁹ Decision of the Constitutional Court of the Republic of Moldova on control of constitutionality, Article 10 (4) 2 of the Law on Government Agent (Access to Information) No 151 of 30 July 2015, § 80, 18 May 2016

³⁰ (1) Every citizen shall be guaranteed the freedom of thought and opinion, as well as the freedom of expression in public by way of word, image or any other means possible. (2) The freedom of expression may not harm the honor, dignity or the rights of other people to their own vision. (3) The law shall forbid and prosecute all actions that challenge and defame the State and people; instigate war of aggression, national, racial or religious hatred; incite discrimination, territorial separatism, public violence, or other manifestations encroaching upon the constitutional order.

legitimate interest, namely when the restriction is proportional to the situation it was determined by, and there should be a fair balance between the interest protected and the freedom of expression as well as the people's right to be informed.

Consequently, any limits that can be legally imposed on the freedom of expression shall not exceed the abovementioned limits; that is, they should be provided by law and represent, in a democratic society, a measure necessary "for protecting ... the reputations or rights of others." This concept refers to the right to personal data protection.

At the national level, the relationship between personal data protection and freedom of expression is regulated by Article 10 of the Law on Personal Data Protection as follows:

"Provisions of articles 5, 6 and 8 shall not apply if processing personal data is carried out exclusively for journalistic, artistic or literary purposes, if processing relates to personal data that have been voluntarily and manifestly made public by the data subject or that are closely related to the subject's quality of public person or to the public nature of the facts that this person is involved in, under the Law on Freedom of Expression".

The provisions referred to above are the following.

Moldovan Law on Personal Data Protection
<p>Article 5. Processing of personal data</p> <p>(1) Personal data shall be processed with the consent of the subject.</p> <p>(2) The consent given for processing personal data may be withdrawn at any time by the subject. The withdrawal of consent cannot be retroactive.</p> <p>(3) In the case of incapacity or limited capacity of the subject, the consent for processing personal data shall be given in writing by his/her legal representative.</p> <p>(4) In the case of the death of the subject, the consent for processing his/her personal data shall be given in writing by the successors of the latter where such consent has not been given by the subject during life.</p> <p>(5) The subject's consent is not required if processing is necessary for:</p> <ul style="list-style-type: none">a) the performance of a contract to which the subject is a party or for taking actions prior to entering into a contract at the request of the subject;b) the carrying out of an obligation of the controller under the law;c) the protection of the life, physical integrity or health of the subject;d) the performance of tasks carried out in the public interest or in the exercise of public authority prerogatives vested in the controller or in a third party to whom the personal data are to be disclosed;e) the realization of a legitimate interest of the controller or of a third party to whom personal data are to be disclosed, provided that such interest does not prejudice the interests or fundamental rights and freedoms of the

subject;

f) purposes of statistical, historical or scientific research provided that personal data remain anonymous for the entire duration of processing.

Article 6. Processing of special categories of personal data

(1) The processing of special categories of personal data shall be prohibited except for cases in which:

a) the subject has given his/her consent. In cases of incapacity or limited capacity of the subject, the processing of special categories of personal data shall be carried out only with the written consent of his/her legal representative;

b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment by law providing safeguards set by law as well as taking into account that the personal data processed for this purpose may be disclosed to a third party only if there is an appropriate legal obligation of the controller;

c) processing is necessary to protect the life, physical integrity or health of the subject or of another person, if the subject is physically or legally incapable of giving his/her consent;

d) processing is carried out in the course of legitimate activities by public associations, parties or other social-political organizations, by trade unions, employers' organizations, philosophical or religious organizations or non-profit cooperative organizations provided that processing relates solely to their members or to persons who have regular contact with them in connection with their purposes and that the data are not disclosed to a third party without the consent of the subject;

e) processing relates to data that are voluntarily and manifestly made public by the subject;

f) processing is necessary to establish, exercise or defend a legal right of the subject;

g) processing is necessary for the purpose of ensuring national security, provided that it is done in observance of the rights of the subject and of other appropriate safeguards provided for in this law.

(2) The National Centre for Personal Data Protection may with grounds order the prohibition of the processing of special categories of personal data even if the subject has given his/her consent and the consent has not been withdrawn provided that the prohibition is not removed in one of the cases referred to in paragraph (1), b) – g).

Article 8. Processing of personal data relating to criminal convictions, coercive procedural measures or administrative sanctions

(1) Processing of personal data relating to criminal convictions, coercive procedural measures or administrative sanctions may be carried out only by or under the control of public authorities within the limits of their competences and in the conditions set by the laws regulating these areas.

(2) The Registry of Criminal and Criminological Data is kept by the Ministry of Internal Affairs.

The main criteria for reconciling the right to personal data protection with the freedom of expression shall be examined in terms of whether or not the disclosure of personal data by journalists contributes to a debate in the general public interest.

A. Processing of Personal Data for Journalistic Purposes

National law does not define the term *journalistic purpose*; however, the definition can be deduced from the Journalists' Code of Ethics and the Law on Freedom of Expression. A journalist is a person who earns a living by collecting, editing and publishing information on facts and events of public interest for the purpose of public dissemination. Journalists exercise their profession to serve public interests in accordance with their own consciences and the principles provided in the Code of Ethics.³¹ Furthermore, according to Article 4 (2) of the Law on Freedom of Expression, the media is responsible for informing the public on matters of public interest and for performing, within the scope of its responsibilities, journalistic investigations on issues of public interest.

Thus, journalistic purpose is the objective of a journalist/the media to:

- collect, edit and/or publish information on facts and events of public interest;
- inform the public on issues of public interest;
- perform, in accordance with the Code of Ethics, journalistic investigations on issues of public interest. A journalistic investigation is a reasonable research of facts by the media to produce journalistic material.³²

Recommendation CM/Rec (2011)7 of the Committee of Ministers to member states on a new notion of media³³ declares the need for a broader notion of media that would encompass everyone involved in the production and dissemination of content including information, analyses, comments and opinions to potentially large numbers of people. The Committee of Ministers also recognized that in some cases certain privileges naturally available to journalists can be expanded to include others as well—bloggers for instance—to the extent that they can be considered a part of the media ecosystem and help the media perform their functions and roles in a democratic society.

31 Clauses 1.1 and 1.2 of the Journalist Code of Ethics of the Republic of Moldova

32 Article 2 of the Law on Freedom of Expression

33 adopted on 21 September 2011

Given the provisions of Article 10 of the Law on Personal Data Protection, if personal data are processed solely for journalistic purposes the following apply.

1. The subject's consent for the collection, storage, extraction, disclosure through transmission or public dissemination of personal data shall not be required.
2. It is permissible to process special categories of personal data (data revealing a person's racial or ethnic origin; political, religious or philosophical beliefs; social status; health or sex life or criminal convictions, administrative sanctions or coercive procedural measures).
3. It is permissible to process personal data related to criminal convictions, coercive procedural measures or administrative sanctions.

Finally, personal data processed for journalistic purposes shall be:

- processed fairly and lawfully;
- collected for specific, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- accurate and, where necessary, kept up to date;
- kept in a form that permits the identification of subjects for no longer than is necessary for the purposes for which the data were collected and/or further processed.

The current Law on Personal Data Protection does not contain any exclusions or derogations from the principles of personal data processing for journalistic purposes. The enforcement of these principles without any exclusions or derogations for journalistic purposes discourages media from fulfilling their constitutional task in an efficient manner.

B. Information of Public Interest vs. Personal Data Protection

Under the Law on Freedom of Expression, information providers may disclose personal data if such data are closely connected with the public quality of the subject or the public nature of facts in which the person is involved.

According to Article 2 of the Law on Freedom of Expression:

- **Public interest** is society's interest (not merely the curiosity of individuals) in the events related to the exercising of public power in a democratic society or in other issues that normally arouse the interest of society or a part of it.

The manner of exercising public power is always a matter of public interest. On the other hand, some situations that are not normally of interest to the public might, due to certain events, arouse public interest. Thus, certain information about private lives, such as a person's income, could become of interest to the public when the person decides to run for a public office even if there was no previous public interest in such information. The greater the public interest, the more justified the interference in the right to respect for private and family life. The expression "public interest" requires a broad interpretation. This interest can come from the whole of society or from a part of it. Still, public interest is never simply the curiosity of individuals. According to Article 25 (2) of the law, any reasonable doubt about whether to grant the status of public interest or curiosity shall be construed in favor of granting the status of public interest.³⁴

- **A public person** is a person who exercises public functions or a person who because of status, social position or other circumstances, arouses public interest.

A public person is a person who exercises public functions or a person who, because of status, social position or other circumstances, arouses public interest. A public person should show higher tolerance towards media's interest in his/her activities and private life. The element arousing public interest can be the person's status (position held), social position (affiliation with a notorious family or the person's own notoriety) or any other circumstances. Depending on the element that arouses public interest, public persons can be "perfect" when public interest in them persists, and "imperfect" when public interest disappears once the person's status or social position changes. Examples of "perfect" public persons are members of royal families. Public officials or celebrities are examples of "imperfect" public persons.³⁵

- **A person exercising public functions** is an individual vested with public power (executive, legislative or judicial), or a legal entity that provides public utility services or an individual who is authorized to manage the legal entity providing public utility services or subdivisions thereof.

³⁴ Independent Journalism Center Comment on the Moldovan Law on Freedom of Expression, page 9

³⁵ Ibidem, page 10

Although the goal declared by the Law on Personal Data Protection is to guarantee and protect the fundamental rights and freedoms of individuals, particularly the right to intimate family and private life, the Law on Freedom of Expression expressly stipulates in Article 11 (2) that information about the private and family lives (including personal data) of public persons and individuals exercising public functions can be disclosed if it is of public interest. The simultaneous interpretation of these two regulations causes difficulties.

People have high expectations for persons in elective offices, not only from the viewpoint of their professional conduct but also in terms of the way they behave outside of their jobs. Thus, a country's president should be a standard of integrity both in professional and private life. Public persons should accept interference in their private lives to a greater extent than ordinary citizens; the degree of attention is proportional to the importance of the public person and the private information disclosed. The lack of the person's consent to publish information about his/her private life does not automatically allow for litigation. The law's provisions comply with European recommendations. Item VII of the Declaration on Freedom of Political Debate in the media adopted by the Committee of Ministers of the Council of Europe on 12 December 2004 stipulates: "The private lives and family lives of political figures and public officials should be protected against media reporting under Article 8 of the Convention. Nevertheless, information about their private lives may be disseminated where it is of direct public concern to the way in which they have carried out or carry out their functions while taking into account the need to avoid unnecessary harm to third parties. Where political figures and public officials draw public attention to parts of their private lives, the media have the right to subject those parts to scrutiny." Public interest is a key factor in this case as well.³⁶

Clearly, these provisions can cause confusion or arbitrary interpretation on the part of information providers and personal data users. It can be presumed that at the moment the Law on Personal Data Protection was adopted, its compatibility with the Law on Access to Information and the Law on Freedom of Expression had not been studied which makes it difficult to determine the relationship between information of public interest and personal data.

In the situation in which certain personal data show that a persons' ability to exercise the public function held has been affected, access to such data should be allowed as it presents direct public interest. The provisions of Article 11 of the Law on

36 Ibidem, page 23

Freedom of Expression are fair as they protect the right to private life and at the same time allow public opinion to control the ability of public officials and of any other persons paid from the state budget to exercise their public functions.

The Law on Personal Data Protection does not define personal data in relation to the category of information of public interest or to personal data that can become information of public interest. Such provisions should be introduced for the purpose of legislative correlation. Although the principle of transparency should prevail all the more so for public officials, in reality the Law on Personal Data Protection prevails.

Constant oversight of the activities of public officials and state institutions on the part of every citizen by virtue of their rights arising from taxpaying duties should have priority at the legislative level in the current situation. Public interest ensured through maximum transparency in agreement with fundamental human rights and freedoms is the concept that should govern the activities of public officials.³⁷

37 "Information of public interest is a fundamental right and a proportional responsibility," developed by the Institute for Public Policy jointly with the Independent Journalism Center of Romania, page 14

SECTION III: Harmonization of the National Legislation on Personal Data Protection with European Legislation from the Perspective of the Right to Freedom of Expression and Information

Parliamentary Decision No 483-XIV of 2 July 1999 ratified Convention for protection personal data about automat procesing personal data, signed at Strasbourg, in January, 28th, 1981 (Convention 108), the first international legal instrument adopted in the data protection area. At the European level, Directive 95/46/EC of the European Parliament and of the Council was designed to clarify and expand upon the principles of the right to personal data protection already contained in Convention 108.

This formalized Moldova's commitments to ensure the protection of an individual's rights and freedoms with regard to the processing of personal data, including the protection of the inviolability of private life, personal and family secrets and the processing of personal data in compliance with national and international regulations.

Today the relationship between personal data protection and freedom of expression at the European level is regulated by Article 9 of Directive 95/46/EC titled "Processing of personal data and freedom of expression." According to this express provision, member states envisage derogations from and restrictions within this section as well as in sections IV and VI for the processing of personal data solely for journalistic, artistic and literary purposes to the extent they are proven necessary for bringing the right to private life into agreement with regulations on the freedom of expression. These provisions have been fully transposed in national law, specifically in the Law on Personal Data Protection.

On 27 April 2016, however, the General Data Protection Regulation that shall come into force on 25 May 2018 was approved; it will repeal Directive 95/46/EC. It updates the principles set in the directive, which will cease to be effective, and prescribes a unique set of rules directly applicable in all EU member states to ensure the more efficient protection of the private lives of individuals on EU territory. Regarding the processing of personal data from the viewpoint of freedom of expression and information, the regulation expands the rules for member states as follows.

Concerning the processing of personal data from the perspective of freedom of expression and information, the Regulation extends the new rules to Member States as follows:

**Regulation (EU) 2016/679 of the European Parliament and of the Council
(General Data Protection Regulation)**

Article 85: Processing and freedom of expression and information

(1) Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

(2) For processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organizations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

Article 86: Processing and public access to official documents

Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation.

Harmonizing Moldovan law with EU legal requirements is a decisive factor in successfully integrating the Republic of Moldova into the EU. After the signing of the European Union Association Agreement, this harmonization has inevitably become more important.

In line with priorities determined under applicable bilateral instruments that govern the relationships between the EU and Moldova with a view to harmonizing

national law with community law, Moldovan national authorities should adopt legislative measures that meet the requirements of the General Data Protection Regulation.

Thus, as concerns the processing of personal data for journalistic purposes, authorities need to adjust the existing regulatory framework in order to determine with sufficient clarity all exonerations and derogations from:

- the general principles of personal data protection;
- the rights of persons concerned;
- the controller and the person authorized by the controller;
- the transfer of personal data to third countries or to international organizations;
- independent supervisory authorities;
- cooperation and coherence;
- specific cases of personal data processing.

Under such circumstances, the Law on Personal Data Protection needs to undergo revision and to be amended in a way that would ensure proportionality between the right to respect for private life and the freedom of expression and information.

CONCLUSIONS AND RECOMMENDATIONS

The EU's current acquis in the area of personal data protection as viewed from the perspective of freedom of expression and information has been transposed into national law; however, given the new General Data Protection Regulation (Regulation (EU) 2016/679) that will come into force on 25 May 2018 and will introduce new rules for personal data processing for journalistic purposes or for public interest, we believe it necessary to proceed to transpose the said EU regulations into the national legal system. Before the launch of the harmonization process, we recommend that research be conducted on the compatibility of national personal data protection rules and practices with Regulation (EU) 2016/679 and relevant European and international standards.

We find that national authorities tend toward a restrictive interpretation of the provisions of the Law on Personal Data Protection in relation to journalists who have the constitutional task to inform the public about issues of public interest. Information providers often disregard essential criteria of balance between the right to personal data protection and the freedom of expression and information. We recommend that journalists be relieved of the duty to specify the purpose of personal data processing when requesting personal information.

The Law on Personal Data Protection does not define personal data in relation to the category of information of public interest and personal data that can become information of public interest. Such provisions should be introduced for the purpose of legislative correlation. In a situation in which certain personal data show that a persons' ability to exercise a public function held has been affected, access to such data should be allowed as it presents direct public interest. The provisions of Article 11 of the Law on Freedom of Expression are fair as they protect the right to private life and at the same time allow public opinion to control the ability of public officials and of any other persons paid from the state budget to exercise their public functions.

It is recommended that more accurate provisions on the circumstances that make personal data processing legal be introduced into the law: It should determine (i) the characteristics of entities (processing personal data for journalistic purposes) to which personal data can be disclosed, (ii) restrictions depending on the purpose and period of storage and (iii) other actions to guarantee the legal and fair processing of data. At the same time, personal data storage by journalists should be legal when it is necessary for exercising the right to freedom of expression and information and for fulfilling a task that serves public interest or results from the exercise of public power by the controller.