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«Dead End» of an Employee's Information Request Concerning their Personnel File:

exercising the right to information under Article 8 DPA with (obviously) improper motives is an abuse of rights. In such cases, the employer may refuse to satisfy the employee's information request and deny access to the personnel file.

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In a recent decision, the Swiss Federal Supreme Court confirmed and clarified its case law on information requests under Article 8 DPA. It came to the following conclusion: if the sole purpose of an individual's information request is to obtain evidence in preparation for a court case, the individual is exercising their right to information in breach of data protection law and is therefore abusing the law. Although this decision was not ruled in the context of labour law, it has considerable practical relevance to employment relationships.

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Personnel File as an Object of Data Protection Law

After dismissal of an employee by an employer one of the first precautions is that the employee (and possibly their lawyer) regularly requests the employer to hand over the personnel file. This is usually done prior to or during ongoing labour law disputes. For instance, the employee is dissatisfied with the content or the wording of the reference letter. If the employee were in possession of the annual performance appraisals, the employee could, at most, dispute a better qualification in court. Performance appraisals are personal data under the Swiss Data Protection Act (**DPA**) and form part of the personnel file about which the employee may request information from the employer at any time in accordance with Article 8 DPA.

If an employee requests to be provided with a copy of their personnel file according to Article 8 DPA, this dœs not only concern the personnel file that is kept in the human resources department. Article 8 DPA rather applies to all data processed about an employee regardless of whether they are available in a physical file or are scattered and possibly stored electronically in various systems and web applications. This so-called «*material personnel dossier*» includes in particular:

- Job application documents,
- references,
- employment contract and related amendments,
- bonus agreements,
- further education agreements,
- performance appraisals,
- interim letters and reference letters,
- wage and insurance data,
- absences (vacation, sickness/accident, military service, etc.),
- disciplinary measures (warnings, reprimands, fines, etc.),
- other correspondence between employer and employee,
- notes on special occurrences, and
- potential documentation on internal investigations.

Information Request under Data Protection Law in Employment Relationships

Pursuant to Article 1 DPA, the Data Protection Act aims to protect the privacy and the fundamental rights of persons when their data is processed. Based on Article 8 DPA, any person may request information from the controller of a data file as to whether and which data concerning them is being processed. The purpose of this provision is to create transparency and to enable the data subject to control compliance of this processing with the law (in line with the principles of data protection law).

Article 8 DPA ultimately serves the enforcement of the protection of personality. The employer – as the controller of a data file – is, in principle, obliged to provide information on collected data, even if the data is processed by third parties on its behalf. Under certain conditions, the employer may refuse, restrict or defer the provision of information. This is the case, for example, where overriding interests of third parties (Article 9(1)(b) DPA; e.g. names of uninvolved third parties) or the employer's overriding interests (Article 9(4) DPA; e.g. business secrets) conflict with the provision of the requested information or where it is required by law (Article 9(1)(a) DPA; for instance, correspondence between a lawyer and their client). The same applies to personal data that is processed by a natural person exclusively for personal use (Article 2(2)(a) DPA; e.g. handwritten notes).

Unless there is a legal limitation of the right to information, the employer is obliged to provide information on all data in the personnel file. The scope of the duty to provide information is set out in Article 8(2) DPA. The information must generally be provided in writing within 30 days, although this period may be extended unilaterally by the employer (Article 1(4) Ordinance to the Data Protection Act). The employer may be sanctioned with a fine if it wilfully provides the employee with false or incomplete information (Article 34(1)(a) DPA). In contrast, the complete refusal to provide information is, according to the wording of the Data Protection Act, not subject to prosecution. This is not going to change under the revised Data Protection Act (Article 60(1)(a) revDPA[1]). It is not the employer as a legal entity that is liable to prosecution, but rather, according to the attribution rule of Article 29 of the Swiss Criminal Code, the natural person who acts on behalf of the legal entity (e.g. employees with independent decision-making authority) and who personally commits the offence under Article 34(1)(a) DPA.

Impact of the Federal Supreme Court's Recent Decision on Employment Relationships

The Federal Supreme Court's decision of 18 November 2020 (case number 4A_277/2020) dealt with four investors who demanded that the company in which they had invested hand over all personal data processed about them, in particular, but not limited to, e-mails, correspondence, telephone and conversation notes. The Federal Supreme Court qualified the information request as an abuse of rights and thus overruled the decision of the High Court of Berne. The ruling is remarkable because, as far as apparent, it was the first time that the Federal Supreme Court ruled that an information request constituted an abuse of rights as it solely served to clarify the prospects of litigation. In other cases, the Federal Supreme Court considered it established that the person requesting information could at least remotely assert a recognisable interest in their personal data under data protection law and, therefore, approved the information request. In this new decision, however, the information request undisputedly served the sole purpose of preparing civil proceedings and thus clarifying the risks and chances of litigation (so-called «*fishing expedition*»).

Although the Federal Supreme Court's decision was not issued in an employment law context, it has general validity. It is very pertinent, in particular, to information requests by employees at the end of their employment relationship for the following reasons:

- **Importance of interest in the information requested:** the Federal Supreme Court confirms its case law according to which the right to information under Article 8 DPA can, in principle, be claimed without any proof of interest. As a rule, an employee may therefore request information about their personnel file without having to disclose their motives behind the request. However, as soon as an employer refuses, restricts or defers to provide the information requested because of its overriding own or a third party's interests, a balancing of interests must be carried out. However, if the employee does not assert any interests under data protection law at all, their request fails for this reason alone.

- **Information requests that constitute an abuse of law:** if the disclosed motives of the employee indicate that their information request is made to enforce interests that are not protected under Article 8 DPA, the exercise of the right to information constitutes an abuse of rights. Examples of this include purely harassing information requests, for example to cause damage to the employer, or information requests to save costs for the creation of a data subject's own data collection. The above-mentioned decision of the Federal Supreme Court concerned an information request which was intended solely to make possible evidence available for conducting a potential lawsuit against the employer. Employers are often confronted with such information requests. Usually, this happens after the employer has dismissed the employee and a dispute about potential abusiveness of dismissal, the reference letter, bonus claims, etc. has already arisen. Prior to the decision discussed here, the Federal Supreme Court had already ruled several times that the right to information under Article 8 DPA must neither serve to facilitate the collection of documentary evidence nor otherwise interfere with civil proceedings. Civil procedural law provides its own measures for this purpose (e.g. request for document production or precautionary taking of evidence).

- **Comprehensive information request as an indication of abuse of the right to information:** the Federal Supreme Court states that the (real) motive of an information request can also be drawn from its scope: the more comprehensive the information request (e.g. all documents, correspondence concerning the employee), the higher the risk that the information request is considered an abuse of rights. However, it is precisely the case that such comprehensive information requests are typical for labour law disputes and, thus, are particularly exposed to the allegation of abuse of rights.

Conclusion and Recommendations

To summarise, we note that the right to information (Article 8 DPA) serves to exercise the rights granted to individuals by the Data Protection Act. This crucial purpose will also be emphasised in the future by the right to information stipulated in the revised Data Protection Act (Article 25(2) revDPA[2]). Any information request or request to access the personnel file must therefore be complied with by the employer if the employee intends to verify whether their data is being processed in compliance with the Data Protection Act. On the other hand, the employer dœs not have to comply with information requests that are solely motivated by the purpose to obtain evidence prior to proceedings. Indications of a pre-trial «*fishing expedition*» may be seen, for example, in the fact that the personnel file is requested immediately after dismissal, possibly in the same letter in which an objection to the dismissal and maybe even further allegations are raised.

Employers that are confronted with extensive information requests in the context of dismissals or potential disputes with employees without any apparent interest in verifying data processing should consider whether access to the data file should be granted at all. Depending on the circumstances of the individual case, it may be advisable for the employer to simply refuse to grant access to the personal data for the time being, pointing out that the information request is an abuse of rights, at least as long as the employee dœs not demonstrate that their interests are protected by data protection law. As explained above, according to the Data Protection Act, the complete refusal to provide information is not subject to prosecution. It is only the provision of false or incomplete information that is punishable by law.

However, even if the Federal Supreme Court has for once ruled that an information request is an abuse of rights, it should not be forgotten that the Federal Supreme Court has so far protected a majority of information requests even in the context of labour law disputes. We therefore advise employers to carefully determine how to proceed in the event of an information request that raises the suspicion of a «*fishing expedition*», ideally with the involvement of experts.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Endnotes

1 The draft of the revised DPA, which is expected to enter into force in 2022, is available at: <https://www.admin.ch/opc/de/federal-gazette/2020/7639.pdf>.

2 Art. 25(2) revDSG states: «The data subject receives such information as is necessary to enable him/her to assert his/her rights under this Act and to ensure transparent data processing».

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