



# ICLG

The International Comparative Legal Guide to:

## **Data Protection 2016**

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# Switzerland

Clara-Ann Gordon



Pestalozzi

Phillip Schmidt



## 1 Relevant Legislation and Competent Authorities

### 1.1 What is the principal data protection legislation?

The principal data protection legislation is the Federal Act on Data Protection of 19 June 1992 (Data Protection Act; hereinafter, “DPA”). Since Switzerland is not a member of the EU, it does not have to comply with the EU Data Protection Directive or any other directives applicable in this field.

### 1.2 Is there any other general legislation that impacts data protection?

Every Swiss canton has its own data protection statutes with respect to data processing of cantonal public authorities.

### 1.3 Is there any sector specific legislation that impacts data protection?

The Swiss banking secrecy and guidelines thereto impact data protection when bank customer data are processed. Furthermore, secrecy obligations, such as patient secrecy regarding health data as set out in article 321 of the Swiss Criminal Code, have an impact when respective data is processed.

### 1.4 What is the relevant data protection regulatory authority(ies)?

The Federal Data Protection and Information Commissioner (“FDPIC”) is the relevant authority if personal data are processed by federal authorities, individuals and legal entities. The respective Cantonal Data Protection and Information Officer in each canton is the relevant authority if personal data are processed by public authorities of the respective canton.

## 2 Definitions

### 2.1 Please provide the key definitions used in the relevant legislation:

#### ■ “Personal Data”

All information relating to an identified or identifiable natural or legal person (see articles 3 lit. a and b DPA).

#### ■ “Sensitive Personal Data”

Data on: 1) religious, ideological, political or trade union-related views or activities; 2) health, the intimate sphere or racial origin; 3) social security measures; and 4) administrative or criminal proceedings and sanctions (see article 3 lit. c DPA).

#### ■ “Processing”

Any operation with personal data, irrespective of the means applied and the procedure, and in particular the collection, storage, use, revision, disclosure, archiving or destruction of data (see article 3 lit. e DPA).

#### ■ “Data Controller”

There is no statutory definition as the term is not explicitly used in the DPA. The FDPIC defines “Data Controller” or “Data Exporter” in its template outsourcing agreement as the natural or legal person, public authority, agency or any other body established in Switzerland which alone or jointly with others determines the purposes and means of the processing of personal data and which transfers such data (to another country) for the purposes of its processing on his behalf.

#### ■ “Data Processor”

There is no statutory definition as the term is not explicitly used in the DPA. The FDPIC defines “Data Processor” or “Data Importer” in its template outsourcing agreement as the natural or legal person, public authority, agency or any other body (established in another country) which agrees to receive personal data from the Data Exporter for the purposes of processing such data on behalf of the latter after the transfer in accordance with his instructions.

#### ■ “Data Subject”

Natural or legal persons whose data is processed (see article 3 lit. b DPA). It is important to emphasise that the DPA does not only protect personal data of natural persons as most other data protection laws, but also personal data of legal persons.

#### ■ *Other key definitions – please specify (e.g., “Pseudonymous Data”, “Direct Personal Data”, “Indirect Personal Data”)*

##### ■ “Data Owner”

The term used in the DPA is “Controller of the Data File”, which is any private person or federal body that decides on the purpose and content of a data file (see article 3 lit. i DPA).

##### ■ “Pseudonymous Data”

There is no statutory definition. Pseudonymous data are data for which the relation to a natural or legal person is not entirely removed, but rather replaced by a code, which can be attributed based on a specific rule to the respective natural or legal person. Anonymous data are data for which the relation to a natural or legal person is entirely removed.

- **“Personality Profile”**

A collection of data that permits an assessment of essential characteristics of the personality of a natural person (see article 3 lit. d DPA).

- **“Data Files”**

Any set of personal data that is structured in such a way that the data is accessible by the data subject (see article 3 lit. g DPA).

### 3 Key Principles

#### 3.1 What are the key principles that apply to the processing of personal data?

- **Transparency**

The collection of personal data and in particular the purpose of its processing must be evident to the data subject (see article 4 para. 4 DPA).

- **Lawful basis for processing**

Personal data may only be processed lawfully (see article 4 para. 1 DPA).

- **Purpose limitation**

Personal data may only be processed for the purpose indicated at the time of collection that is evident from the circumstances, or that is provided for by law (see article 4 para. 3 DPA).

- **Data minimisation**

There is no such principle set out in the DPA.

- **Proportionality**

Data processing must be carried out in good faith and must be proportionate (see article 4 para. 2 DPA).

- **Retention**

This is not a key principle set out in the DPA. However, the principle of proportionality requires that personal data are only retained as long as it is necessary with respect to the purpose of the data processing. General data retention requirements are not set forth in the DPA, but rather in the Swiss Code of Obligations or sector specific regulations.

- *Other key principles – please specify*

There are no other key principles.

### 4 Individual Rights

#### 4.1 What are the key rights that individuals have in relation to the processing of their personal data?

- **Access to data**

Any person may request information from the controller of a data file as to whether data concerning them is being processed (see article 8 para. 1 DPA; exceptions are mentioned in article 9 DPA).

- **Correction and deletion**

Any data subject may request that incorrect data be corrected or deleted (see article 5 para. 2 DPA).

- **Objection to processing**

Data subjects may request (in a civil litigation) that data processing be stopped, that no data be disclosed to third parties, or that the personal data be corrected or destroyed (see article 15 para. 1 DPA). It is important to note that data processing may be blocked by preliminary injunctions.

- **Objection to marketing**

In addition to the objection to data processing for marketing purposes as set out above, there is a special regulation regarding mass emails (i.e., marketing newsletters) in article 3 lit. o of the Unfair Competition Act.

- **Complaint to relevant data protection authority(ies)**

The Commissioner may investigate cases in more detail on his own initiative or at the request of a third party (see article 29 para. 1 DPA).

- *Other key rights – please specify*

There are no other key rights.

### 5 Registration Formalities and Prior Approval

#### 5.1 In what circumstances is registration or notification required to the relevant data protection regulatory authority(ies)? (E.g., general notification requirement, notification required for specific processing activities.)

Cross-Border Data Transfer: if personal data is transferred to a country that has no adequate data protection laws in force, additional safeguards are necessary. Safeguards are, for example, data transfer agreements or group-wide data protection policies (for transfers within a group of companies). The FDPIC must be informed about these safeguards (see article 6 para. 3 DPA). If the standard contractual clauses of the EU or the FDPIC are used, it is sufficient to inform the FDPIC about this use in a general way.

Registration of Data Files with the FDPIC: federal bodies must register their data files with the FDPIC (see article 11a para. 2 DPA). Private persons must register their data files with the FDPIC only if: 1) they regularly process sensitive personal data or personality profiles; or 2) they regularly disclose personal data to third parties (see article 11a para. 3 DPA). Exceptions from the registration duty are set out in article 11a para. 5 DPA (for example, if the respective legal person has appointed an internal data protection officer who monitors compliance with data protection laws).

#### 5.2 On what basis are registrations/notifications made? (E.g., per legal entity, per processing purpose, per data category, per system or database.)

See answer to question 5.1 above. The registration of data files is made per data file.

#### 5.3 Who must register with/notify the relevant data protection authority(ies)? (E.g., local legal entities, foreign legal entities subject to the relevant data protection legislation, representative or branch offices of foreign legal entities subject to the relevant data protection legislation.)

Generally, the local legal entity is the data controller who transfers personal data pursuant to the DPA abroad (see definition in answer to question 2.1 above) and/or is the controller of the data files (see definition in answer to question 2.1 above).

Foreign entities domiciled outside of Switzerland may be qualified as controllers of data files in the sense of the DPA. However, the FDPIC is not able and does not enforce the DPA in the case of a foreign legal entity domiciled outside of Switzerland because of the principle of territoriality. In cases where a foreign legal entity is the

controller of a data file with personal data of Swiss data subjects, the FDPIC may investigate whether a legal entity in Switzerland is co-controller of the respective data file. The representative or branch office of a foreign controller of the data file is not automatically subject to the registration obligation. The representative or branch office of a foreign entity is usually not to be qualified as controller of the data file, since often they do not have the power to decide on the content or purpose of a data file.

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**5.4 What information must be included in the registration/notification? (E.g., details of the notifying entity, affected categories of individuals, affected categories of personal data, processing purposes.)**

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Cross-border transfers: no detailed information is required if the standard contractual clauses of the EU or the FDPIC are used. Otherwise, the copy of the respective contract clauses must be disclosed to the FDPIC.

Data files: information regarding the notifying entity, contact person for information requests, categories of personal data, categories of data subjects, categories of data recipients, categories of persons having access to the data files, and processing purposes must be disclosed. The FDPIC provides a template registration form on its website. The registration may also be executed electronically.

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**5.5 What are the sanctions for failure to register/notify where required?**

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Upon complaint, the respective entities or individuals may be fined if they infringe the registration obligation wilfully (see article 34 para. 2 DPA). The fine can be up to CHF 10,000.00.

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**5.6 What is the fee per registration (if applicable)?**

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There is no fee for the registration of data files.

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**5.7 How frequently must registrations/notifications be renewed (if applicable)?**

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The registration must be renewed as soon as the notified information changes. There is, however, no strict deadline.

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**5.8 For what types of processing activities is prior approval required from the data protection regulator?**

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There is no such obligation. Regarding federal and cantonal authorities, such approval obligations may arise out of specific public law.

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**5.9 Describe the procedure for obtaining prior approval, and the applicable timeframe.**

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See the answer to question 5.8 above.

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## 6 Appointment of a Data Protection Officer

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**6.1 Is the appointment of a Data Protection Officer mandatory or optional?**

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It is optional.

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**6.2 What are the sanctions for failing to appoint a mandatory Data Protection Officer where required?**

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There are no sanctions.

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**6.3 What are the advantages of voluntarily appointing a Data Protection Officer (if applicable)?**

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Data files must not be registered with the FDPIC anymore (see article 11a para. 5 DPA).

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**6.4 Please describe any specific qualifications for the Data Protection Officer required by law.**

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Independence (performs his function without instructions of the controller of the data files); sufficient resources with respect to skills and time; and sufficient personal and organisational power (as he must have access to all data files, data processing and information thereto) (see articles 12a para. 2 and 12b para. 2 of the Ordinance to the DPA).

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**6.5 What are the responsibilities of the Data Protection Officer, as required by law or typical in practice?**

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Monitoring the processing of personal data and suggesting correction measures if data protection regulations should not be complied with; and maintaining a list of all data files (see article 12b para. 1 of the Ordinance to the DPA).

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**6.6 Must the appointment of a Data Protection Officer be registered/notified to the relevant data protection authority(ies)?**

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Yes (see article 12a para. 1 lit. b of the Ordinance to the DPA).

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## 7 Marketing and Cookies

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**7.1 Please describe any legislative restrictions on the sending of marketing communications by post, telephone, email, or SMS text message. (E.g., requirement to obtain prior opt-in consent or to provide a simple and free means of opt-out.)**

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With regard to marketing communications distributed by telephone, email or fax, article 3 lit. u of the Unfair Competition Act prohibits the sending of such communication if the recipient has declared in the official telephone registry that he does not wish to receive such communication.

Regarding mass emails and text messages, article 3 lit. o of the Unfair Competition Act requires that such communication is only sent with the prior consent of the recipients and with information on a simple opt-out procedure. An exception is made if the entity received the contact information in connection with the sale of products or services and if the customer was informed at the moment of the data collection about the simple opt-out procedure. In this case, information regarding similar products or services may be sent without prior consent.

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**7.2 Is the relevant data protection authority(ies) active in enforcement of breaches of marketing restrictions?**


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No, they are not.

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**7.3 Are companies required to screen against any “do not contact” list or registry?**


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Yes. Article 3 lit. u of the Unfair Competition Act prohibits marketing communication via telephone, email and fax if the recipient has declared in the official telephone registry that he does not wish to receive such communication. In addition, there are several private “do not contact” lists which many companies respect but which are not mandatory.

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**7.4 What are the maximum penalties for sending marketing communications in breach of applicable restrictions?**


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In cases of intentional misconduct, the respective entity (respectively the responsible person) may be sanctioned, upon request, with a prison term of up to three years or a monetary penalty of up to CHF 1,080,000.00 (see article 23 of the Unfair Competition Act). The effective sanctions would, of course, be much lower than the maximum penalties. There is no penalty in the case of a negligent misconduct.

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**7.5 What types of cookies require explicit opt-in consent, as mandated by law or binding guidance issued by the relevant data protection authority(ies)?**


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Swiss law does not require an explicit opt-in regarding cookies. It is sufficient to inform the website users about cookies, the data processed by cookies, the purpose of processing, and opt-out mechanisms (see article 45c of the Swiss Telecommunication Act).

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**7.6 For what types of cookies is implied consent acceptable, under relevant national legislation or binding guidance issued by the relevant data protection authority(ies)?**


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Neither implied nor explicit consent is necessary for cookies.

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**7.7 To date, has the relevant data protection authority(ies) taken any enforcement action in relation to cookies?**


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No. The FDPIC investigates new trends regarding cookies on a regular basis but did not take any action, since cookies are not regulated in the DPA.

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**7.8 What are the maximum penalties for breaches of applicable cookie restrictions?**


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A fine not exceeding CHF 5,000.00 (see article 53 of the Telecommunication Act).

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**8 Restrictions on International Data Transfers**


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**8.1 Please describe any restrictions on the transfer of personal data abroad?**


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International or cross-border disclosure means any transfer of personal data abroad, including allowing examination (e.g., of an online database), transfer or publication (see article 3 lit. f DPA). Personal data must not be disclosed abroad if the personal integrity of the persons concerned would thereby be seriously harmed (see article 6 para. 1 DPA). A serious violation of personal integrity is assumed if there is no legislation ensuring an adequate level of protection in the country where the data are disclosed.

The conditions covering disclosure of data abroad are applicable irrespective of whether the transfer takes place within the same corporate body or to another legal entity.

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**8.2 Please describe the mechanisms companies typically utilise to transfer personal data abroad in compliance with applicable transfer restrictions.**


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The assumption that personal integrity is violated by a disclosure of personal data to a country without appropriate data protection laws can only be refuted if at least one of the minimum conditions stipulated in article 6 para. 2 lit. a to lit. g DPA is present. However, the possibility of justifying the admissibility of the international data transfer based on the general grounds for justification (according to article 13 DPA) is not available.

As a rule of thumb, all countries which have either ratified the ETS 1082 agreement or have implemented the EU directive on data protection are considered to have an adequate level of data protection according to Swiss legislation.

In addition, the FDPIC has prepared a non-binding list of those countries whose data protection legislation should ensure appropriate protection.

However, additional precautions according to article 6 para. 2 DPA may be advisable.

The transfer of data abroad within a group of companies is also permissible to countries without an adequate level of data protection, if the companies concerned are subject to group-wide data protection rules which ensure appropriate protection. This regulation privileges international data transfers within a group of companies (article 6 para. 2 lit. g DPA).

Data protection rules which ensure adequate protection must at least contain the elements recommended by the FDPIC for international data transfers, namely:

- list of purposes of use split up according to categories of personal data;
- binding agreement on disclosing data for indicated purposes only;
- protection of the rights of the persons concerned (in particular, rights to information and correction);
- ban on transfer of data to a third party;
- ensuring data security in accordance with the sensitivity of the data; and
- stipulation of compensation liability of the data recipient for violation of contract.

If there are both inadequate legislation in the recipient country as well as insufficient data protection rules within the company, international data transfers among affiliated companies in the group are still permitted, provided one of the minimum requirements of article 6 para. 2 lit. a to f DPA is satisfied:

- sufficient safeguards, in particular contractual clauses, ensure an adequate level of protection abroad;
- the data subject has consented in the specific case;
- the processing is directly connected with the conclusion or the performance of a contract and the personal data is that of a contractual party;
- disclosure is essential in the specific case in order either to safeguard an overriding public interest or for the establishment, exercise or enforcement of legal claims before the courts;
- disclosure is required in the specific case in order to protect the life or the physical integrity of the data subject; or
- the data subject has made the data generally accessible and has not expressly prohibited its processing.

Most legal entities use the EU standard contractual clauses as sufficient safeguards in the sense of article 6 para. 2 lit. a DPA. The use of the EU standard contractual clauses also facilitates the notification of the cross-border transfer to the FDPIC (see the answer to question 8.3 below).

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**8.3 Do transfers of personal data abroad require registration/notification or prior approval from the relevant data protection authority(ies)? Describe which mechanisms require approval or notification, what those steps involve, and how long they take.**

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There is no general requirement to register or notify or apply for approval. The FDPIC has to be notified only in two instances:

The FDPIC has to be informed of the fact that adequate contractual guarantees (article 6 para. 2 lit. a DPA) have been concluded or that data protection rules within the group of companies (article 6 para. 2 lit. g DPA) have been implemented. As long as the contractual guarantees are in line with the provisions in the EU standard contractual clauses, the respective data protection agreement does not have to be submitted. Also, the group internal rules do not need to be submitted. In both instances, it suffices to inform the FDPIC of the existence of such rules and guarantees.

## 9 Whistle-blower Hotlines

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**9.1 What is the permitted scope of corporate whistle-blower hotlines under applicable law or binding guidance issued by the relevant data protection authority(ies)? (E.g., restrictions on the scope of issues that may be reported, the persons who may submit a report, the persons whom a report may concern.)**

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There are no specific legislation or provisions under Swiss law on whistle-blowing as such. Any whistle-blower hotlines must, however, comply with the general requirements of the DPA. There are ongoing attempts to regulate whistle-blowing and to provide protection for whistle-blowers (see the answer to question 16.2 below). Currently, the protection of the employee (whistle-blower) is very weak. The employee is exposed to civil (e.g., termination of her/his job, potential damages) and criminal (e.g., offences due to false allegations, industrial espionage) sanctions. There are no restrictions as such as to what can be reported to the whistle-blower hotline.

Moreover, there is no duty to notify or register the whistle-blower hotline with the respective authorities. However, collections of sensitive personal data must be registered with the FDPIC, even if the persons concerned are aware of the processing. Excluded from this are data collections by companies which have appointed an internal Data Protection Officer (see section 6 above). Swiss doctrine is mainly of the opinion that companies with whistle-blower hotlines do not have to register the respective data collections, because there are usually no sensitive personal data or personality profiles of employees among such data and, even if there is such sensitive personal data, it is not processed on a regular basis.

Whistle-blowing is mainly discussed in Switzerland in connection with the loyalty and confidentiality duties of the employee, the provisions regarding justified termination, and the employer's duty of care towards its employees. The employer must implement all necessary measures in order to ensure that the personality rights of the whistle-blower are not infringed. Accordingly, the employee must be informed transparently and comprehensively about all aspects of the whistle-blower hotline (where it is operated, who is operating it, etc.) and of the consequences her/his whistle-blowing activities may have before using the hotline.

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**9.2 Is anonymous reporting strictly prohibited, or strongly discouraged, under applicable law or binding guidance issued by the relevant data protection authority(ies)? If so, how do companies typically address this issue?**

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There are no provisions prohibiting or discouraging anonymous reporting. In practice it is, however, often recommended not to report anonymously. The main argument in favour of non-anonymous reports is the transparency principle in article 4 para. 4 DPA (see the answer to question 3.1 above). An employee suspected of misconduct in a whistle-blowing report must be informed about the report, the whistle-blower and the alleged misconduct. It is acceptable to delay informing the suspected employee in order to facilitate investigations.

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**9.3 Do corporate whistle-blower hotlines require separate registration/notification or prior approval from the relevant data protection authority(ies)? Please explain the process, how long it typically takes, and any available exemptions.**

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See the answer to question 9.1 above. There is no requirement for registration/notification of whistle-blower hotlines unless certain types of personal data are processed.

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**9.4 Do corporate whistle-blower hotlines require a separate privacy notice?**

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Yes. The employee must be informed transparently and comprehensively about all aspects of the whistle-blower hotline (where it is operated, who is operating it, etc.) and of the consequences that her/his whistle-blowing activities may have before using the hotline.

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**9.5 To what extent do works councils/trade unions/employee representatives need to be notified or consulted?**

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The representatives of the employees in a company have a right to timely and comprehensive information by the company on all

matters that allow employees to duly perform their tasks (article 9 of the Federal Act on Information and Participation of Employees in Companies). Since a whistle-blower hotline may have an impact on employee performance, employee representatives need to be kept up to date on the whistle-blower hotline. However, there is no requirement to consult any entities.

## 10 CCTV and Employee Monitoring

### 10.1 Does the use of CCTV require separate registration/notification or prior approval from the relevant data protection authority(ies)?

No, there is no general requirement to register/notify or obtain prior approval for the use of CCTV. However, if a CCTV also records activities on public ground (e.g., it records activities on a private parking lot but also covers the nearby public walkway), cantonal or local data protection laws may require separate approval by the cantonal authorities.

### 10.2 What types of employee monitoring are permitted (if any), and in what circumstances?

The employee must be previously and transparently informed about the type and method of the electronic monitoring, the scope and period of the timeframe of the monitoring and its purpose.

Anonymous monitoring (including monitoring of search strings) of, e.g., employees' use of company-provided information technology according to email and Internet user guides or other policies, is permissible. Pseudonymous monitoring (i.e., an abbreviation for an employee known only to a very limited group of persons) is only permissible for spot checks. No continuous monitoring is permissible in this case.

In both cases, the employees must be informed of the fact that their information technology use can/will be monitored. They may be informed via monitoring policies.

Systematic and permanent monitoring of the information technology use of specific employees is not permitted, unless:

- (a) the employee has consented thereto; or
- (b) if there is no consent, then the following requirements have to be fulfilled: (i) justified suspicion of criminal offence; (ii) monitoring and reading of emails is necessary to confirm or dispel suspicion; (iii) the same is necessary to conserve evidence; and (iv) there is no overriding interest of the employee. If there is an overriding interest, then the consent of the employee must be obtained. Please note that any evidence not collected in compliance with applicable law may not be admissible in court.

Accordingly, the use of so-called spyware which clandestinely monitors the conduct of a specific employee in the workplace (e.g., computer screen movements) is not permitted and would infringe Swiss law. According to the FDPIC, this also applies to so-called content scanners (if done clandestinely). A content scanner is software which evaluates/scans sent and received emails in accordance with pre-defined keywords and reacts accordingly (cancellation or blocking of emails, etc.).

Clandestine and not pre-announced monitoring is prohibited and cannot be justified by an overriding interest of the employer.

### 10.3 Is consent or notice required? Describe how employers typically obtain consent or provide notice.

See the answer to question 10.2 above. Prior transparent information is required; however, consent is generally not necessary.

### 10.4 To what extent do works councils/trade unions/employee representatives need to be notified or consulted?

The representatives of the employees in a company have a right to timely and comprehensive information by the company on all matters that allow employees to duly perform their tasks (article 9 of the Federal Act on Information and Participation of Employees in Companies). Since CCTV and employee monitoring may have an impact on employee performance, employee representatives need to be kept up to date on these subjects. However, there is no requirement to consult any entities.

### 10.5 Does employee monitoring require separate registration/notification or prior approval from the relevant data protection authority(ies)?

No, there is no such duty.

## 11 Processing Data in the Cloud

### 11.1 Is it permitted to process personal data in the cloud? If so, what specific due diligence must be performed, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

Yes, it is permitted. However, there are no specific statutory provisions. Generally, the provisions of the DPA have to be complied with, e.g., the data subjects must be transparently informed about the fact that the data is processed in the cloud and the necessary security and organisational measures must be implemented. Furthermore, the transfer and processing of personal data in the cloud is qualified as data processing outsourcing in the sense of article 10a DPA which requires a written data processing agreement between the data controller and the data processor (cloud provider). The written agreement must include provisions on instruction and monitoring of the processor and audit rights on behalf of the data controller. The FDPIC recommends the use of either the EU standard contractual clauses for transfer of personal data from data controller to data processor, or the template agreement for outsourcing of data processing of the FDPIC.

Finally, the right to obtain information and the right to have data deleted or corrected must be respected both by the data controller and the data processor.

### 11.2 What specific contractual obligations must be imposed on a processor providing cloud-based services, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

There are no requirements which relate specifically to providers of cloud-based services. The provisions of the DPA, in particular the provisions relating to data security, are applicable. Consequently,



the controller must ensure that the processor has implemented adequate technical and organisational measures against unauthorised processing of personal data. Moreover, the controller must ensure that the processor can only process personal data in the way the controller is able to. Additional sector specific rules may be applicable, such as in the banking or health sector.

## 12 Big Data and Analytics

### 12.1 Is the utilisation of big data and analytics permitted? If so, what due diligence is required, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

Yes, the utilisation of big data and analytics is permitted and the general provisions of the DPA apply. There is no specific law or binding guidance relating to big data and analytics.

## 13 Data Security and Data Breach

### 13.1 What data security standards (e.g., encryption) are required, under applicable law or binding guidance issued by the relevant data protection authority(ies)?

Article 7 para. 1 DPA states that “personal data must be protected against unauthorised processing through adequate technical and organisational measures”.

Moreover, article 8 of the Ordinance to the DPA provides details on the level of security: anyone who, as a private individual, processes personal data or provides a data communication network shall ensure the confidentiality, availability and integrity of the data in order to ensure an appropriate level of data protection.

- (1) In particular, he shall protect the systems against the following risks:
  - a) unauthorised or accidental destruction;
  - b) accidental loss;
  - c) technical faults;
  - d) forgery, theft or unlawful use; and
  - e) unauthorised alteration, copying, access or other unauthorised processing.
- (2) The technical and organisational measures must be adequate. In particular, they must take account of the following criteria:
  - a) the purpose of the data processing;
  - b) the nature and extent of the data processing;
  - c) an assessment of the possible risks to the data subjects; and
  - d) the technological state of the art.
- (3) These measures must be reviewed periodically.

Finally, article 9 of the Ordinance to the DPA states:

- (1) The controller of the data file shall, particularly for automated processing of personal data, take the technical and organisational measures that are suitable for achieving the following goals, in particular:
  - a) entrance control: unauthorised persons must be denied access to facilities in which personal data is being processed;

- b) personal data carrier control: unauthorised persons must be prevented from reading, copying, altering or removing data carriers;
  - c) transport control: on the disclosure of personal data as well as during the transport of data carriers, the unauthorised reading, copying, alteration or deletion of data must be prevented;
  - d) disclosure control: data recipients to whom personal data is disclosed by means of devices for data transmission must be identifiable;
  - e) storage control: unauthorised storage in the memory as well as the unauthorised knowledge, alteration or deletion of stored personal data must be prevented;
  - f) usage control: the use by unauthorised persons of automated data processing systems by means of devices for data transmission must be prevented;
  - g) access control: the access by authorised persons must be limited to the personal data that they required to fulfil their task; and
  - h) input control: in automated systems, it must be possible to carry out a retrospective examination of what personal data was entered at what time and by which person.
- (2) The data files must be structured in a way that data subjects are able to assert their right of access and their right to have data corrected.

### 13.2 Is there a legal requirement to report data breaches to the relevant data protection authority(ies)? If so, describe what details must be reported, to whom, and within what timeframe. If no legal requirement exists, describe under what circumstances the relevant data protection authority(ies) expects voluntary breach reporting.

No, there is no statutory duty to do so. However, based on the general principles of the DPA, e.g., the transparency principle, it is advisable to notify the data subjects about such a breach.

### 13.3 Is there a legal requirement to report data breaches to individuals? If so, describe what details must be reported, to whom, and within what timeframe. If no legal requirement exists, describe under what circumstances the relevant data protection authority(ies) expects voluntary breach reporting.

See the answer to question 13.2 above.

### 13.4 What are the maximum penalties for security breaches?

There are no penalties for security breaches in the DPA. If the security breach also represents a breach of an obligation of secrecy, other legislation may be applicable and penalties may apply.

## 14 Enforcement and Sanctions

### 14.1 Describe the enforcement powers of the data protection authority(ies):

Investigatory Power	Civil/Administrative Sanction	Criminal Sanction
Monetary penalty notices	This is not applicable.	This is not applicable.
Recommendations	<p>The FDPIC can investigate cases and request the production of files, obtain information and arrange for processed data to be shown to him.</p> <p>If the investigation reveals that the DPA is being breached by federal bodies, the FDPIC can recommend that the federal body concerned change the method of processing or abandon the processing. The FDPIC informs the department concerned or the Federal Chancellery of his recommendation. If a recommendation is not complied with or is rejected, the FDPIC may refer the matter to the department or to the Federal Chancellery for a decision. The decision is communicated to the data subjects in the form of a ruling.</p> <p>If the FDPIC reveals in an investigation that in the private sector a natural/legal person does not comply with the DPA, it may render recommendations as well. Upon 30 days of the receipt of the recommendation, the legal person must inform the FDPIC whether it accepts and implements the recommendation or whether it rejects it. In the case of a rejection, the FDPIC may bring the case to the Swiss Federal Administrative Court.</p>	This is not applicable.
Enforcement Notices	This is not applicable.	This is not applicable.
Prosecution	This is not applicable.	This is not applicable.

### 14.2 Describe the data protection authority's approach to exercising those powers, with examples of recent cases.

The FDPIC issues his recommendations on a regular basis and publishes them on his website (see the answer to question 16.1 below regarding current cases).

## 15 E-discovery / Disclosure to Foreign Law Enforcement Agencies

### 15.1 How do companies within your jurisdiction respond to foreign e-discovery requests, or requests for disclosure from foreign law enforcement agencies?

It depends on whether these requests are made during pending proceedings or outside of such proceedings.

During pending proceedings, the companies cannot (directly) respond to such requests. The foreign law enforcement agency must contact the competent Swiss authorities within the international judicial assistance (in civil or criminal matters) system. The Swiss authority then collects and transfers the respective information by way of judicial assistance to the foreign authority. The DPA is not applicable in the case of judicial assistance proceedings (see article 2 para. 2 lit. c DPA).

If a Swiss company is directly approached by a foreign law enforcement agency, the request must be qualified as outside of a pending proceeding and the DPA must be complied with. The legal person may only disclose the information and personal data to the foreign authority if the DPA is complied with, in particular with article 6 DPA regarding cross-border data transfers.

However, the so-called Swiss blocking statutes (e.g., articles 271 and 273 of the Swiss Criminal Code) are more important than the DPA in this context. Due to the blocking statutes, companies within Switzerland cannot just simply comply with foreign e-discovery requests (even if the data transfer abroad were in compliance with the DPA). It must be decided on a case-by-case basis whether such requests can be complied with or whether a specific waiver from the competent authorities must be obtained (if applicable). If a Swiss company violates the blocking statutes, its members of the board might be sanctioned with a fine or imprisonment.

### 15.2 What guidance has the data protection authority(ies) issued?

The FDPIC has issued a guidance document regarding this subject matter. Basically, the guidance comes to the same conclusions as set out in the answer to question 15.1.

## 16 Trends and Developments

### 16.1 What enforcement trends have emerged during the previous 12 months? Describe any relevant case law.

There are several decisions of the Swiss Federal Administrative Court dealing with the access right to personal data collected and processed by federal authorities.

More relevant with regard to data processing by natural and legal persons are the following cases dealing with the disclosure of personal data to U.S. authorities in connection with the tax dispute between Swiss banks and the United States.

In April 2012, a Swiss bank transmitted to the U.S. authorities the names and other data of current and former employees who had dealt with U.S. clients. Two former employees requested to receive

copies of the documents that had been transmitted. The bank allowed them only to review the documents at its headquarter without allowing them to make copies. In its ruling of 12 January 2015, the Federal Supreme Court held that the former employees are entitled to physical or electronic copies of the documents. Moreover, the bank was obliged to disclose when and to which U.S. authorities it transmitted the documents. The Court supported the argument that the Swiss banking secrecy does not prohibit the delivery of the copies in this case because all data relating to bank clients can be redacted before disclosure. It held that the former employees have an interest to obtain physical copies in order to be able to file a lawsuit against their former employer and to be prepared for possible proceedings by the U.S. authorities. In the Court's opinion, these private interests prevailed over the bank's and third parties' interests. Additionally, the Federal Supreme Court noted that the employees will still be bound by banking and professional secrecy which prohibits them from divulging any information contained in the documents to the public.

On 28 May 2015, the Geneva Court of First Instance decided on the question whether a Swiss bank was allowed to transmit personal data of former employees to U.S. authorities outside of official international judicial assistance. The Court held as the first court in Switzerland that the bank could not rely on justifications according to article 6 para. 2 DPA. The Court denied that there are sufficient safeguards which ensure an adequate level of data protection in the United States. Additionally, it held that there are no overriding public interests which would allow the data transfer. It acknowledged the public interest of the Swiss financial sector regarding the survival of the bank as a system-relevant bank. However, the data being disclosed would expose the employee to prosecution and/or arrest and interrogation in the United States. The transfer of the personal data would therefore result in a limitation of the employee's mobility. These private interests override the public interests at stake. Consequently, the Court enjoined the bank from disclosing documents containing personal data of the employee to the USA.

## 16.2 What "hot topics" are currently a focus for the data protection regulator?

The following topics are hot:

- Invalidation of Safe Harbour Scheme.
- Revision of the DPA.
- Big Data.
- Bring your own device.
- Data tracking by apps (e.g., fitness apps).
- Data protection and personalised healthcare.
- Data protection and drones used by individuals for private purposes.

- Dashcams (small video recorders often used in cars).
- Right to be forgotten.
- Cloud computing.

After the European Court of Justice ("ECJ") held in October 2015 that the European Commission's decision to accept under the EU Safe Harbour rules the United States' protection of fundamental rights as equivalent to the rights guaranteed within the Charter of Fundamental Rights of the European Union was invalid (case C-362/14), the FDPIC considered the Swiss Safe Harbour rules as being challenged as well and recommended taking additional data protection measures. Moreover, the FDPIC recommended taking measures such as basing international data transfers on the EU Model Clauses by January 2016, since the Swiss Safe Harbour rules are no longer considered sufficient to comply with the DPA.

In April 2015, the Federal Council approved a revision of the DPA and tasked the Federal Department of Justice and Police ("FDJP") with drafting a first version of the revised DPA by the end of August 2016. In particular, the Federal Council expects the FDJP to take into account the ongoing revision projects of data protection legislation of the EU and the Council of Europe in order to strengthen the rights of data subjects.

A couple of years ago, the Swiss government proposed a revision of the Swiss Code of Obligations in connection with whistle-blower hotlines. The aim of the revision was better protection of employees when they blow the whistle. The result of the consultations with interest groups was, however, negative. As a consequence, the Swiss government decided not to introduce new protection measures for whistle-blowers in the Code of Obligations. It rather solely proposed provisions outlining the requirements for legally permitted whistleblowing. The requirements set forth that an employee must in the first instance address issues internally. The employee is permitted to notify the authorities only if the employer does not, or does not adequately, react to the notification. Notification to the authorities shall only be permitted in cases of criminal conduct or breach of public law. Only in exceptional circumstances may the employee directly notify the authorities; for example, if the employee must expect that the internal notification will be without effect, that he may be terminated, or if there is an imminent and immediate threat to his health, life, the public safety or the environment. The whistle-blower may only inform the general public if the authorities do not react within 14 days.

The Swiss parliament debated the proposed new provisions regarding whistle-blowing and in principle supported the draft proposal of the Federal Council. However, in September 2015, the parliament sent the proposal back to the Federal Council in order to simplify the text without changing its content. The Federal Council's new proposal is still work in progress.



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