

## Decision

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# Deputy Data Protection Ombudsman's decision on informing data subjects of recording telephone calls and the data subject's right of access to data

## Matter

Informing data subjects of recording customer telephone calls and the data subject's right of access to data

## The applicant's claims with grounds

The applicant requested the Office of the Data Protection Ombudsman to take measures for issuing an order concerning the rights of the data subject on 28 September 2017. The applicant had asked an electricity company ("controller") where it had learned which electricity company's customer the applicant was. The applicant also asked what other data the controller had about the applicant. According to the applicant, the controller has not supplied the requested information.

## Information from the applicant

The applicant reported having received an electricity sales call from a salesperson in the employ of the controller. According to the applicant, the salesperson had implied that they were representing the electricity company whose customer the applicant was. During the telephone call, the applicant realised that the call was not being made on behalf of the electricity company whose customer the applicant was. Rather, the caller was a salesperson employed by another electricity company, i.e. the controller referred to in the complaint.

The applicant then sent a request to the controller after the sales call, asking for information on how the controller knew which company supplied electricity to the applicant and what other data the controller had on the applicant. A sales manager in the employ of the controller then contacted the applicant by telephone. During this call, the manager played a recording of the sales call between the salesperson and applicant. In their complaint, the applicant states that they were not aware of the sales call being recorded. According to the applicant, the controller also did not inform the applicant of where it had obtained the information on which electricity supplier's customer the applicant was. In the applicant's words, the sales manager that contacted the applicant said that it was a generally known fact that the applicant's electricity supplier supplied the electricity for the applicant's postal code area.

According to the applicant, they agreed with the sales manager that the recording of the sales call between the salesperson and applicant would be delivered to the applicant, along with all other data that the controller had on the applicant. However, the applicant stated that the sales manager later asked the applicant to file an official request for the recording and data requested by the applicant. The controller sent the

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description of its data file to the applicant and informed the applicant that they could come to the company's premises to listen to the recording after submitting an official request. The applicant did not file the official request for obtaining the data as suggested by the sales manager.

The applicant feels that the controller does not treat the obligations of the Personal Data Act with the required gravity, since the controller did not have the right to record the telephone call between the applicant and controller without informing the applicant of the fact. Furthermore, the applicant is of the opinion that they have not received the requested information from the controller.

### 1. Judicial question

#### Right of access

The matter has been instituted at the Office of the Data Protection Ombudsman while the Personal Data Act was still in force. Therefore, the matter requires the assessment provided for in section 38, subsection 3 of the Data Protection Act on whether Articles 12 and 15 of the General Data Protection Regulation can be applied to the decision.

It must then be determined whether the controller has implemented the applicant's request to gain access to the data (right of access) in accordance with the applied legislation.

#### Choice of applicable law

The General Data Protection Regulation has been applied since 25 May 2018. As an EU Regulation, the GDPR is legislation directly applicable in the Member States. The General Data Protection Regulation is specified by the national Data Protection Act (1050/2018) that entered into force on 1 January 2019. The Data Protection Act repealed the Personal Data Act (523/1999).

The repealed Personal Data Act was in force when the applicant requested access to their data from the controller. The matter was instituted at the Office of the Data Protection Ombudsman before the application of the GDPR. The applicant's request was based on the rights provided for in sections 26 and 28 of the Personal Data Act.

As the matter being assessed is the implementation of the data subject's right of access to data (right of access), the transitional provision of section 38, subsection 3 of the Data Protection Act is relevant with regard to the choice of law applied to the decision. According to section 38, subsection 3 of the Data Protection Act, where the provisions of Articles 12 and 15–18 of the Data Protection Regulation that impose broader obligations on the controller than the provisions in force upon the entry into force of the Data Protection Act, those provisions do not apply to such cases of exercise of the right of access that are pending when the Data Protection Act enters into force, if the application of the said provisions of the Data Protection Regulation would be unreasonable for the controller.

*Application of Articles 12 and 15 of the General Data Protection Regulation*



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According to section 26, subsection 1 of the Personal Data Act, regardless of secrecy provisions, everyone has the right of access, after having supplied sufficient search criteria, to the data on him/her in a personal data file, or to a notice that the file contains no such data. The controller must at the same time provide the data subject with information of the regular sources of data in the file, on the uses for the data in the file and the regular destinations of disclosed data.

According to Article 15(1) of the General Data Protection Regulation, the data subject has the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: a) the purposes of the processing; b) the categories of personal data concerned; c) the recipients or categories of recipient; d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing; f) the right to lodge a complaint with a supervisory authority; g) where the personal data are not collected from the data subject, any available information as to their source; and h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

The right of access to data is subject to the provisions of section 26, subsection 1 of the Personal Data Act, and the provisions of points (a) to (h) of Article 15(1) are nearly identical in substance. However, the Deputy Data Protection Ombudsman notes that points (a) to (h) of Article 15(1) of the GDPR provide for *more extensive* data than section 26, subsection 1 of the Personal Data Act, since the subsection in question does not grant data subjects the right to receive information corresponding to that referred to in points (b), (d), (e) and (f) of Article 15(1) of the GDPR.

Since the provision applied to the matter at hand imposes broader obligations on the controller than the provisions of the Personal Data Act, the matter requires an assessment of whether their application would be *unreasonable* for the controller. Regarding the assessment of the reasonableness of applying points (a) to (h) of Article 15(1) of the GDPR, the Deputy Data Protection Ombudsman notes that, with regard to the collection and processing of personal data, the applicant would have had the right to receive the information corresponding to points (b) and (e) of Article 15(1) of the GDPR from the controller also by virtue of the Personal Data Act. The data subject had the right to obtain the information corresponding to the above-mentioned points (b) and (e) from the controller by virtue of the Personal Data Act (Personal Data Act, section 10, subsection 1, paragraph 3), i.e. the information needed for exercising the rights of the data subject in respect to the processing operation in question (Personal Data Act, section 24, subsection 1).

In accordance with the above, the Deputy Data Protection Ombudsman finds that, if the Personal Data Act were to be applied to the matter, the applicant would have the right to obtain information corresponding to points (a), (b), (c), (e), (g) and (h) of Article 15(1) of the GDPR. Therefore, only the information referred to in points (d) (storage period) and (f) (right to lodge a complaint with a supervisory authority) would be



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information that the applicant would not have been entitled to obtain from the controller if the Personal Data Act was applied.

The provisions concerning the storage period and right to lodge a complaint have no bearing on the resolution of the matter. The Deputy Data Protection Ombudsman does note, however, that the obligations of the controller pertaining to the information provided for in points (d) and (f) of Article 15(1) of the GDPR are also provided for in the Personal Data Act. During the application of the Personal Data Act, the controller had the obligation to comply with the general rules on the processing of personal data provided for in chapter 2 of the Personal Data Act, such as the defined purpose of processing and the necessity requirement (Personal Data Act, sections 6 and 9). The Personal Data Act also gave the data subject the right to refer the matter to a supervisory authority (Personal Data Act, section 28, subsection 2). The Deputy Data Protection Ombudsman thus finds that applying points (a) to (h) of Article 15(1) of the GDPR is not unreasonable in the matter at hand, taking into account the obligations of the controller under the Personal Data Act.

According to section 28, subsection 1 of the Personal Data Act, anyone who wishes to have access to the data on himself/herself, as referred to in section 26, must make a request to this effect to the controller by a personally signed or otherwise comparably verified document or by appearing personally in the premises of the controller.

According to Article 12(2) of the GDPR, the controller must facilitate the exercise of data subject rights under Articles 15 to 22. In cases referred to in Article 11(2) of the Regulation, the controller may not refuse to act on the data subject's request to exercise the rights referred to in Articles 15 to 22 unless the controller is able to demonstrate that it is not in a position to identify the data subject. According to Article 12(6) of the GDPR, without prejudice to Article 11, where the controller has reasonable doubts concerning the identity of the natural person making the request referred to in Articles 15 to 21, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

The General Data Protection Regulation thus does not set any specific formal requirements for the request to obtain access to data. The Personal Data Act required the request to be made to the controller by a personally signed or otherwise comparably verified document or by appearing personally in the premises of the controller. This could be interpreted to constitute broader obligations for the controller as provided for in section 38, subsection 3 of the *Data Protection Act*. The matter thus requires an assessment of whether the application of the provisions of the GDPR would be *reasonable* for the controller.

It would be unreasonable for the controller to reprimand the controller for not implementing the rights of the data subject if the request was not made in the way referred to in section 28, subsection 1 of the Personal Data Act. The purpose of the provision in question was to permit the controller to make sure that the person submitting the request is the data subject. According to the information received on the matter now being decided on, the controller has not doubted the applicant's role as data subject. The controller also replied to the data subject's request verbally over the telephone according to the information received. The result will be the same for the controller regardless of whether the Deputy Data Protection Ombudsman orders the information to be delivered to the data subject or the applicant makes a new request to



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receive the information from the controller. Therefore, also with regard to the applicant's legal protection, the Deputy Data Protection Ombudsman finds that it would not be unreasonable for the controller to apply the GDPR's currently valid provisions concerning the form of the request.

With regard to the format in which the personal data must be delivered, section 28, subsection 2 of the Personal Data Act states that the controller must without undue delay reserve the data subject an opportunity to inspect the data referred to in section 26 or, upon request, provide a hard copy of the data. The data must be given in an intelligible form.

According to Article 12(1) of the GDPR, the controller must take appropriate measures to provide any information referred to Article 15 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language. The information must be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means. Article 15(3) of the GDPR requires the controller to provide a copy of the personal data undergoing processing.

According to Article 12 of the GDPR, the personal data may be provided to the data subject by electronic means where appropriate. Providing the data orally or by electronic means is not specifically mentioned in the corresponding provision of section 28, section 2 of the Personal Data Act. The provision of Article 12(1) can be interpreted to impose *broader* obligations on the controller. It must thus be assessed whether applying the provision would be reasonable for the controller. As the General Data Protection Regulation increases the controller's options with regard to the appropriate format of delivering the personal data subject to certain conditions, this cannot be considered *unreasonable* for the controller.

Based on the above, the Deputy Data Protection Ombudsman finds that Articles 12 and 15 must be applied in the matter.

### Decision of the Deputy Data Protection Ombudsman and its grounds

#### Decision

The controller has not implemented the applicant's right of access to data provided for in Article 15 of the General Data Protection Regulation.

By virtue of point (c) of Article 58(2) of the General Data Protection Regulation, the Deputy Data Protection Ombudsman orders the controller to comply with the data subject's request concerning the right of access to data under points (a) to (h) of Article 15(1) and to provide the information relating to the applicant as provided for in Article 12(1) and Article 15(3) of the General Data Protection Regulation.

Since the applicant did not make the request in the manner provided for in section 28, subsection 1 of the Personal Data Act that was in force at the time, the Deputy Data Protection Ombudsman finds an order to provide the information to be a sufficient measure.





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### Grounds

Based on the report and response received in the matter, the controller did not provide the applicant with the personal data requested by the applicant.

The Deputy Data Protection Ombudsman draws attention to the following matters especially with regard to providing a recording of the telephone call.

According to Article 12(1) of the GDPR, the controller must take appropriate measures to provide any information referred to Article 15 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language. The information must be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means. According to Article 12(2) of the GDPR, the controller must facilitate the exercise of rights under Articles 15 to 22. Article 15(3) of the GDPR requires the controller to provide a copy of the personal data undergoing processing.

The applicant has said that they agreed with the controller on the telephone that the applicant would be provided with the data requested by and relating to the applicant, along with the recording of the telephone call. The controller nevertheless did not deliver the recording of the call to the applicant, instead later informing the applicant of the opportunity to listen to the recording on the controller's premises after making an official request for exercising the right of access. The controller later justified this practice to the Office of the Data Protection Ombudsman by referring to Article 15(4) of the General Data Protection Regulation.

The right of access to personal data and the format in which data must be provided was provided for at the national level in the Personal Data Act that was repealed on 1 January 2019, section 28, subsection 2 of which states that the controller must reserve the data subject an opportunity to inspect the data referred to in section 26 or, upon request, provide a copy of the data. In the Data Protection Ombudsmans decision practice (10 May 2011, record no. 2680/41/2010 and 12 September 2013, record no. 2240/523/2013), the Data Protection Ombudsman has interpreted the data subject's right to obtain recordings of customer calls by virtue of section 28 of the Personal Data Act. The Data Protection Ombudsman has found that the right provided for in section 26 of the Personal Data Act can be implemented either by affording the data subject the opportunity to listen to the recording (2680/41/2010) or by delivering the recording to the data subject in writing, such as in the form of a transcript, upon request (2240/523/2013). Controllers have nevertheless been required to provide the information in writing if so requested by the data subject (12 September 2013, record no. 2240/523/2013). Correspondingly, the General Data Protection Regulation provides for the format in which the information must be provided. According to Article 12(1) of the General Data Protection Regulation, the information referred to in Article 15 must be provided in writing, or by other means, including, where appropriate, by electronic means. Furthermore, with regard to the right of access to data, Article 15(3) of the General Data Protection Regulation provides for the controller's obligation to provide a copy of the personal data undergoing processing to the data subject.



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The Deputy Data Protection Ombudsman thus finds that the controller has not implemented the applicants right of access to data.

### 2. Judicial question

#### **The application of Articles 12 and 15 (right of access to data) of the General Data Protection Regulation to telephone call recordings**

The information provided by the controller in the matter indicates that the controller has not changed its practices for implementing the right of access to data (right of access) with regard to telephone call recordings since the application of the General Data Protection Regulation began.

#### **Decision**

By virtue of point (d) of Article 58(2) of the General Data Protection Regulation, the Deputy Data Protection Ombudsman orders the controller to bring its processing procedures into compliance with the provisions of Article 12(1) and Article 15(3) with regard to implementing the right of access to data concerning telephone call recordings.

The Deputy Data Protection Ombudsman leaves the appropriate measures to the discretion of the controller, within the limits provided in the grounds for the decision, but orders the controller to submit a report on the measures taken to the Office of the Data Protection Ombudsman by 30 March 2020.

#### **Grounds**

It is an undisputed fact that telephone call recordings contain personal data as referred to in Article 4(1) of the General Data Protection Regulation. In its decision issued on 30 July 2010 (2094/1/09), the Supreme Administrative Court considered speech recorded on tape to constitute personal data and thus be subject to the right of access provided for in section 26 of the Personal Data Act. Correspondingly, the Court of First Instance of the European Communities found in matter T-166/05 on 11 March 2009 that individuals can be identified by their voice (paragraph 39). The GDPR has not changed the definition of personal data from that provided in the Personal Data Act. Data subjects thus still have the right of access to personal data with regard to telephone call recordings.

In its report delivered on 7 October 2019, the controller states that it affords data subjects the opportunity to listen to the recording on the controller's premises or, alternatively, by telephone. In its report, the controller suggested that Article 15(4) of the GDPR prohibited it from providing the actual telephone call recording to the data subject.

According to Article 12(1) of the GDPR, the controller must take appropriate measures to provide any information referred to Article 15 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language. The information must be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the



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data subject is proven. According to Article 12(2) of the GDPR, the controller must facilitate the exercise of rights under Articles 15 to 22. Furthermore, with regard to the right of access to data, Article 15(3) of the General Data Protection Regulation provides for the controller's obligation to provide a copy of the personal data undergoing processing to the data subject.

Providing the information provided for in Article 15(1) of the GDPR to a data subject can, in principle, be refused by virtue of Article 15(4), according to which the right to obtain a copy may not adversely affect the rights and freedoms of others, which include trade secrets and intellectual property and in particular the copyright protecting software according to paragraph 63 of the recitals of the GDPR. However, Article 15(4) does not restrict the controller from implementing the data subject's right of access in a situation such as the one in the matter at hand.

In a prior decision (12 September 2013, record no. 2240/523/2013), the Data Protection Ombudsman has found that, in practice, telephone call recordings always contain personal data relating to another individual, and this cannot be considered to constitute an obstacle to implementing the right of access. According to the decision, the Personal Data Act thus does not prevent disclosing the personal data of the controller's representative to a data subject exercising their right of access. The controller stated that it records sales and customer service telephone calls in order to safeguard the rights of the parties and for training purposes. The calls are thus recorded for purposes defined by the controller, and the salesperson's personal data constitutes a part of the recording.

In addition to Article 15(4) of the GDPR, a data subject's right of access to data can be restricted on grounds provided for in section 34 of the Data Protection Act. According to the above-mentioned section, a data subject does not have the right of access to data if, for example providing access to the data could seriously endanger the health or treatment of the data subject or the rights of some other person (section 34, subsection 1, paragraph 2). The right of the data subject cannot be restricted by virtue of the above-mentioned legal provision in a case such as this one.

The Deputy Data Protection Ombudsman finds that the way of implementing the data subject's right provided for in Article 15 of the GDPR with respect to providing access to the telephone call recording does not conform to the requirements of the GDPR, as Article 15(3) of the GDPR requires the controller to provide a copy of the personal data to the data subject. In this regard, the Deputy Data Protection Ombudsman draws particular attention to the fact that limitations of the right of access to data provided for in Article 8(2) of the Charter of Fundamental Rights of the European Union (2012/C 326/02) is to be interpreted narrowly.

Based on the above, the Deputy Data Protection Ombudsman finds that the controller's current practice for implementing the right provided for in Article 15 with regard to telephone call recordings does not conform to the requirements of the GDPR.

As described above, the Personal Data Act would have obligated the controller to provide the information requested by the data subject, for example as a transcript. Since the controller can provide the information in electronic form by virtue of the General Data Protection Regulation currently in force, the controller can also deliver a copy of the data in another format of its choice, such as a telephone recording.





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### 3. Judicial question

#### Providing information on recording telephone calls

Due to the information that came to light during the processing of the matter, the Deputy Data Protection Ombudsman must assess whether the controller's practices for providing information on the recording of telephone calls are compliant with point (a) of Article 5(1), Article 12(1) and Article 13 of the General Data Protection Regulation.

#### Decision of the Deputy Data Protection Ombudsman and its grounds

##### Decision

The controller's current practices for providing information are not sufficiently transparent according to point (a) of Article 5(1) of the General Data Protection Regulation, nor are they thus compliant with the requirements of Article 12(1) and Article 13 of the GDPR.

##### Order

By virtue of point (d) of Article 58(2) of the General Data Protection Regulation, the Deputy Data Protection Ombudsman orders the controller to bring its processing procedures into compliance with the provisions of point (a) of Article 5(1), Article 12(1) and Article 13 with regard to informing data subjects of the recording of telephone calls.

The Deputy Data Protection Ombudsman leaves appropriate measures to the discretion of the controller, but orders the controller to submit a report on the measures taken to the Office of the Data Protection Ombudsman by 30 March 2020.

##### Reprimands

The Deputy Data Protection Ombudsman additionally issues a reprimand under point (b) of Article 58(2) of the General Data Protection Regulation to the controller regarding deficiencies in informing data subjects of the recording of telephone calls.

##### Grounds

According to Article 13 of the General Data Protection Regulation, the controller must provide the data subject with the information referred to in Article 13 at the time the personal data is obtained. Among other things, point (c) of Article 13(1) requires the data subject to be informed of the purposes of the processing of the personal data as well as the legal basis for the processing.

According to point (a) of Article 5(1) of the GDPR, the controller must process the personal data lawfully, fairly and in a transparent manner in relation to the data subject. In paragraph 39 of the recitals to the GDPR, it is stated that it should be transparent to natural persons how personal data concerning them is collected and used.

Article 12(1) of the GDPR provides for the controller's obligation to take the appropriate measures to provide any information referred to in Article 13 to the data subject in, e.g. a transparent and intelligible form.



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In its report delivered on 20 August 2018, the controller stated that it records a separate audio receipt of sales telephone calls if the consumer makes an electricity supply agreement. According to the controller, the applicant had not been informed of the start of recording because the applicant had not made an electricity supply agreement with the controller.

On the basis of the information received on the matter, the Deputy Data Protection Ombudsman finds that the controller did not inform the applicant of recording the telephone call. In the Deputy Data Protection Ombudsman's overall assessment of the matter, the Deputy Ombudsman draws attention to the fact that the controller has made changes to the information provided on its website on the recording of telephone calls after receiving the request for information from the Office of the Data Protection Ombudsman.

In its supplementary report dated 7 October 2019, the controller provided further clarifications on its current practices and said that it does not record sales telephone calls if the call does not lead to an agreement. The recording of such calls is stopped and the recorded conversation is automatically erased. The controller thus only informs the data subject of recording the sales telephone call if it leads to an agreement. The Deputy Data Protection Ombudsman points out that recording a telephone call constitutes processing of personal data as referred to in the GDPR (as well as in the repealed Personal Data Act). The controller is thus required to inform the data subject of the collection of personal data.

Since the controller does not inform the data subject at the start of recording the telephone call, its practices are not compliant with the requirements of point (a) of Article 5(1), Article 12(1) and Article 13 of the GDPR. The Deputy Data Protection Ombudsman thus finds that the controller's current practices for providing information are not sufficiently transparent according to point (a) of Article 5(1) of the General Data Protection Regulation, nor are they thus compliant with the requirements of Article 12(1) and Article 13 of the GDPR. Taking into consideration that the controller has already taken certain measures in order to bring its operations into compliance with the GDPR, the Deputy Data Protection Ombudsman considers a reprimand to be a sufficient sanction in this matter in addition to the order regarding the processing of personal data.

### Applicable legal provisions

EU General Data Protection Regulation (2016/679), point (a) of Article 5(1), Article 12(1), (2) and (6), Article 13, points (a) to (h) of Article 15(1), Article 15(3) and (4), points (c) and (d) of Article 58(2)

Data Protection Act (1050/2018), section 34, subsection 1, paragraph 2; section 38, subsection 3

Personal Data Act (523/1999), sections 6 and 9; section 10, subsection 1, paragraph 3; section 24, subsection 1; section 26, subsection 1; section 28

Administrative Procedure Act (434/2003), section 34, subsection 2, paragraph 5

Charter of Fundamental Rights of the European Union (2012/C 326/02), Article 8(2)

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