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Factsheet

on FDPIC investigations of violations of data protection regulations

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(Translated from the original German text)

This factsheet summarises the FDPIC's detailed interpretations of Articles 49-53 FADP
(published separately).

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I. Introduction

As the supervisory authority, the Federal Data Protection and Information Commissioner (FDPIC) ensures that federal bodies and private persons comply with the Federal Act on Data Protection of 25 September 2020 (FADP) and other federal data protection regulations (see Art. 4 para. 1 FADP) (referred to below as 'data protection regulations'). Its supervisory activities include **investigating violations of data protection regulations** (see Art. 49 et seq. FADP) and where necessary, imposing administrative measures to enforce these regulations (see Art. 51 FADP).

This factsheet is designed to provide a brief overview of the investigation. It summarises the (separately-published) in-depth interpretations of the FDPIC on Articles 49-53 FADP (cited below as FDPIC, Application).

II. Reason and purpose of the investigation¹

Under the FADP, the FDPIC is required to open an investigation if there are sufficient indications that a data processing activity could violate data protection regulations (see Art. 49 para. 1 FADP). The investigation constitutes formal administrative proceedings. It serves to **investigate and establish the legally-relevant facts of the case** and allows a legal assessment of whether the established facts do in fact constitute a violation of data protection regulations. If the investigation concludes that a violation of data protection regulations has occurred, the FDPIC is authorised to impose administrative measures under the conditions set out in Article 51 FADP.

The investigation may be opened **ex officio** or **in response to a report**. The initial indications of a potential violation of data protection regulations may therefore come from observations made by the FDPIC in the course of its statutory supervisory or consulting activity, or they may be completely or partially based on accounts from data subjects or third parties (e.g. the media or consumer organisations).

¹ See on the following FDPIC, APPLICATION, Art. 49 N 4 f. and N 18.

The **report** to the FDPIC should ideally be made via the FDPIC's online form, but can in principle be submitted in any form. There is no deadline for the report to be submitted. The reported facts should, however, have occurred recently so that the FDPIC can take appropriate administrative measures under Article 51 FADP if a violation of data protection regulations has indeed occurred. No fees are charged for the handling of a report (see Art. 59 FADP for instances when fees are charged).

III. Addressees and subject of the investigation²

The addressees of the investigation may be federal bodies or private persons (natural or legal persons, in particular companies).

The investigation covers all matters to which the FADP or other (sector-specific) federal data protection regulations apply.

Under the FADP, the FDPIC opens an investigation if there are sufficient indications that a **data processing** activity could violate data protection regulations (see Art. 49 para. 1 FADP). The term 'data processing' should be understood in the broad sense: an investigation can always be opened if administrative measures under Article 51 FADP may be imposed. The opening of an investigation is thus also permitted if there are sufficient indications that data controllers have disregarded **regulatory provisions** or **obligations towards data subjects**, e.g. if in the event of a data loss in breach of Article 24 FADP, they have failed to inform the FDPIC or data subjects where necessary (see Art. 51 para. 3 let. f FADP).

IV. "Sufficient indications" of a violation³

While previously the FDPIC could only launch an investigation into data processing by private persons in cases where the methods of processing were capable of breaching the personality rights of larger numbers of persons (system error), this limit no longer applies under the revised Act. The conditions for opening an investigation are now the same for both a federal body and a private person. There must merely be **sufficient indications** that a data processing activity could violate data protection regulations (Art. 49 para. 1 FADP). The FDPIC may therefore open an investigation regardless of the number of potential data subjects affected.

There are "sufficient indications" when there are grounds to assume that data processing could constitute a violation. It must be possible to assume with a **certain degree of probability** that this is the case. In other words, a very vague indication of the potential breach of an obligation is not sufficient to warrant an investigation. Under the Federal Constitution, state activities must be in the public interest and must be proportionate.

V. Informal preliminary enquiries⁴

If the FDPIC has initial indications of a violation of data protection regulations, it carries out informal preliminary enquiries to check whether all the conditions for an investigation have been met. The preliminary enquiries are of an **informal nature**. This is not yet a formal administrative procedure, and the Federal Act on Administrative Procedure (APA) is therefore not applicable.

Informal preliminary enquiries may look at, for example, whether the FDPIC is the competent body, or who should be the subject of the investigation. It is conceivable that during the preliminary enquiries it

² See on the following FDPIC, APPLICATION, Art. 49 N 6 f.

³ See in detail on the following FDPIC, APPLICATION, Art. 49 N 9 et seq.

⁴ See in detail on the following FDPIC, APPLICATION, Art. 49 N 12 et seq.

becomes clear that an investigation is not needed, in particular because certain aspects of a potential breach can be rapidly resolved, or because, following an initial informal contact by the FDPIC, the private person or federal body has voluntarily put measures in place to ensure timely compliance with data protection regulations, or has requested advice on how to comply with these regulations. In addition, it may be that, despite sufficient indications of a violation of data protection regulations, an investigation is not appropriate in the specific case because the violation is of minor importance (see Art. 49 para. 2 FADP, and in detail VII.1 below).

In cases where it is foreseeable from the outset that it will not be possible to prove a potential infringement without incurring unreasonable administrative expense, and thereafter impose a lawful state of affairs, the FDPIC will have to dispense with conducting an investigation even in the case of more serious violations or will have to discontinue the investigation at an early stage after it has been opened. In the digital sphere, data processing activities and projects to be assessed (e.g. apps) can come and go very quickly. In certain scenarios, it may therefore be more effective for the FDPIC to try to quickly achieve a lawful state of affairs in an initial phase through informal contacts before initiating time-consuming administrative proceedings.

Preliminary enquiries involve obtaining more detailed information about a potential violation of data protection regulations from publicly-accessible sources, but also from the data controller itself, from data subjects or from third parties, such as consumer protection organisations. At this stage, parties answer the FDPIC's questions on a voluntary basis. Data controllers do not have a **duty to cooperate** – unlike during a formal investigation (for information on duties to cooperate in an investigation, see VIII. 3 below). However, a refusal to cooperate voluntarily may prompt the FDPIC to compel the data controller to cooperate by opening an investigation. If, during the preliminary enquiries, the data controller voluntarily produces convincing arguments that no violation of data protection regulations has occurred, an investigation will not generally be necessary. If, on the other hand, there are sufficient indications of a violation and the other conditions for an investigation are met, the FDPIC will open one.

VI. Legal status of parties reporting a violation⁵

The FDPIC is required to open an investigation in response to a report by a data subject or third party, if there are sufficient indications that a data processing activity could violate data protection regulations (see Art. 49 para. 1 FADP). Accordingly, it must investigate such reports and examine whether an investigation needs to be initiated.

Under the FADP, the person reporting a possible violation does **not have the rights of a party** in the investigation proceedings. The only party is the federal body or the private person against which or whom the investigation has been opened under Article 52 paragraph 2 FADP.

If the report is filed by a **third party** who is not a data subject affected by the potential violation, they are not entitled to have the report handled and the FDPIC is not required to inform them about the proceedings (see Art. 49 para. 4 FADP for the rights of data subjects). In cases of general interest, the FDPIC will inform the public, in accordance with Article 57 paragraph 2 FADP.

If the report is filed by a **person** who is **personally affected** by the potential violation, under Article 49 paragraph 4 FADP, the FDPIC will inform the data subject about the steps taken in response and of the outcome of any investigation.

⁵ See in detail on the following FDPIC, APPLICATION, Art. 49 N 19 f. and N 21 ff.

VII. The FDPIC's duty to investigate⁶

1. No duty to investigate violations of minor importance

The FDPIC may decide not to open an investigation if the violation of data protection regulations is of minor importance (Art. 49 para. 2 FADP), i.e. in cases where the severity of the possible infringement of the privacy or informational self-determination of the potentially affected persons is so low that an investigation is not mandatory. The vague nature of the expressions 'minor importance' or 'importance' leaves a certain amount of leeway in further interpreting this rule. On the one hand, the legislator's intention that the FDPIC's duty to investigate should comply with the requirements that are binding on Switzerland at a European level and that Switzerland should guarantee an adequate level of data protection must guide the implementation of the law in practice. On the other hand, the FDPIC will seek to exploit its investigative powers beyond the minimum required by the law in that, as long as its resources allow, it will also proceed with investigations when it is authorised but not obliged to do so.

2. Duty to investigate significant violations

Under the previous law, there was a duty to investigate violations by federal bodies (see Art. 27 former FADP) or by private persons if a larger number of persons were affected (see the wording of Art. 29 para. 1 let. a former FADP). The FDPIC will now investigate every case in which the violation is not of minor importance, i.e. significant (see Art. 49 para. 2 FADP; see also VII. 1. above). The criterion of a significant violation can therefore also be met where private persons process the data of a small number of people or indeed only one person. If the FDPIC learns of a potential violation **ex officio** or following a **report from a third party**, it may, for example, be obliged to investigate even though it only affects a small number of data subjects, provided the violation could have a highly intrusive effect on their privacy.

If a **data subject** has filed a complaint with the FDPIC and the reported violation of data protection regulations proves to be significant, the FDPIC is obliged to open an investigation and inform the data subject of its outcome (see Art. 49 para. 4 FADP). Before initiating time-consuming administrative proceedings, the FDPIC can try to quickly achieve a lawful state of affairs in an initial phase through informal contacts.

VIII. Investigation proceedings

1. Introduction

Under the previous law, the facts of the case were established and the question regarding whether a violation of data protection regulations had taken place was answered as part of a case investigation, which the FDPIC concluded, if necessary, with a non-legally binding recommendation to modify or discontinue a certain data processing activity. Under the revised Data Protection Act, the investigation into the facts of the case takes place as part of formal **administrative proceedings** in accordance with the Federal Act on Administrative Procedure (APA) (see Art. 52 para. 1 FADP).

If, as a result of the investigation proceedings, the FDPIC establishes that a violation of data protection regulations has indeed occurred, it has the power to impose an administrative measure, i.e. a legally enforceable ruling as provided for under Article 5 APA, which the data controller may contest before the Federal Administrative Court. The FDPIC may, for example, order that a data processing activity be modified, suspended or terminated, or that personal data be deleted (see more details on administrative measures in VIII. 5 below).

⁶ See details on the following FDPIC, APPLICATION, Art. 49 N 27 et seq.

2. Opening investigation proceedings⁷

The opening of an investigation constitutes an internal administrative action and is not a contestable ruling. The FDPIC informs the federal body or private person of the opening of an investigation in a formal letter and usually encloses a set of questions to request the information and documents which the federal body or private person is required to provide in accordance with Article 49 paragraph 3 FADP in order to establish the facts of the case (see VIII. 3 below).

3. Duty of the party to the proceedings to cooperate⁸

In investigation proceedings conducted in accordance with the Administrative Procedure Act (APA), the FDPIC establishes the facts of the case ex officio (see Art. 52 para. 1 FADP in conjunction with Art. 12 APA). The principle of ex officio investigation applies, whereby it is the authority's responsibility to establish the facts of the case.

However, the party to the proceedings – the federal body or private person against whom or which the investigation was opened – is required to cooperate in the establishment of the facts. They must therefore provide the FDPIC with all the information and documents that are needed for the investigation, and are therefore subject to a **duty to inform and disclose** (see Art. 49 para. 3 sentence 1 FADP). A right to refuse to provide information may apply in certain circumstances.

If the party to the proceedings fails to fulfil the duty to inform and disclose, or if the facts cannot be sufficiently established despite the information and documents being provided, the FDPIC may issue **procedural orders** under Article 50 FADP in order to obtain the necessary information (subject to professional secrecy). For example, the FDPIC may order access to premises and installations or questioning of witnesses.

4. Party rights in the investigation proceedings⁹

As the investigation proceedings are conducted in accordance with the APA, the party to the proceedings has all the party rights set out under the APA, from the opening to the conclusion of the proceedings. In particular, under the Federal Constitution, they have the right to a fair hearing (see Art. 29 APA) and the right to inspect files (see Art. 26 APA). The right to a fair hearing includes the right to introduce significant evidence, to participate in the collection of evidence, or at least to be able to comment on the results of the evidence (see Decision of the Federal Supreme Court BGE 124 I 49 E. 3a).

5. Conclusion of investigation proceedings

In the course of the investigation, the FDPIC clarifies whether certain facts exist and from a legal perspective whether a violation of data protection regulations has occurred. If this is not the case, the proceedings are terminated or abandoned as no longer relevant.

However, if a violation of data protection regulations has occurred, the FDPIC may impose the **administrative measures under Article 51 FADP**. These are issued in the form of a ruling (that can be contested before the Federal Administrative Court) (see Art. 52 para. 1 FADP), and are therefore binding.

⁷ See in detail FDPIC, APPLICATION, Art. 52 N 6 et seq.

⁸ See in detail FDPIC, APPLICATION, Art. 49 N 33 et seq. and Art. 50 N 1 et seq.

⁹ See in detail FDPIC, APPLICATION, Art. 52 N 12 f. and N 19.

The law provides for two categories of administrative measures:

- The first category concerns measures for cases where **data processing** violates the data protection regulations: if a violation of data protection regulations has occurred, the FDPIC may order that the data processing be modified, suspended or terminated, wholly or in part, and that the personal data be deleted or destroyed, wholly or in part (see Art. 51 para. 1 FADP). In the case of cross-border data transmission, it may delay or prohibit disclosure of the data abroad if this violates the requirements of Articles 16 and 17 FADP or provisions relating to the cross-border disclosure of personal data in other federal acts (see Art. 51 para. 2 FADP).
- The second category of measures concerns cases in which **regulatory provisions** or **rights of data subjects** are not respected (see Art. 51 para. 3 and 4 FADP): In such cases, the FDPIC may, for example, order the federal body or private person to conduct a data protection impact assessment in accordance with Article 22 FADP (see Art. 51 para. 3 let. d). It may also order that the data subject be given the information required under Article 25 FADP if the private person or federal body refuses to provide this information (Art. 51 para. 3 let. g FADP).

If the federal body or private person has taken the required measures during the investigation to restore compliance with the data protection regulations, the FDPIC may simply issue an official **warning** (see Art. 51 para. 5 FADP).

Under the revised Federal Act on Data Protection, the FDPIC still does not have the power to impose administrative sanctions in the event of violations of data protection regulations. The FADP merely introduces a set of criminal provisions (see Art. 60 et seq. FADP). The prosecution and the adjudication of criminal acts is a matter for the cantons (see Art. 65 para. 1 FADP).