



Open Science and Data Protection – What do I need to keep in mind?

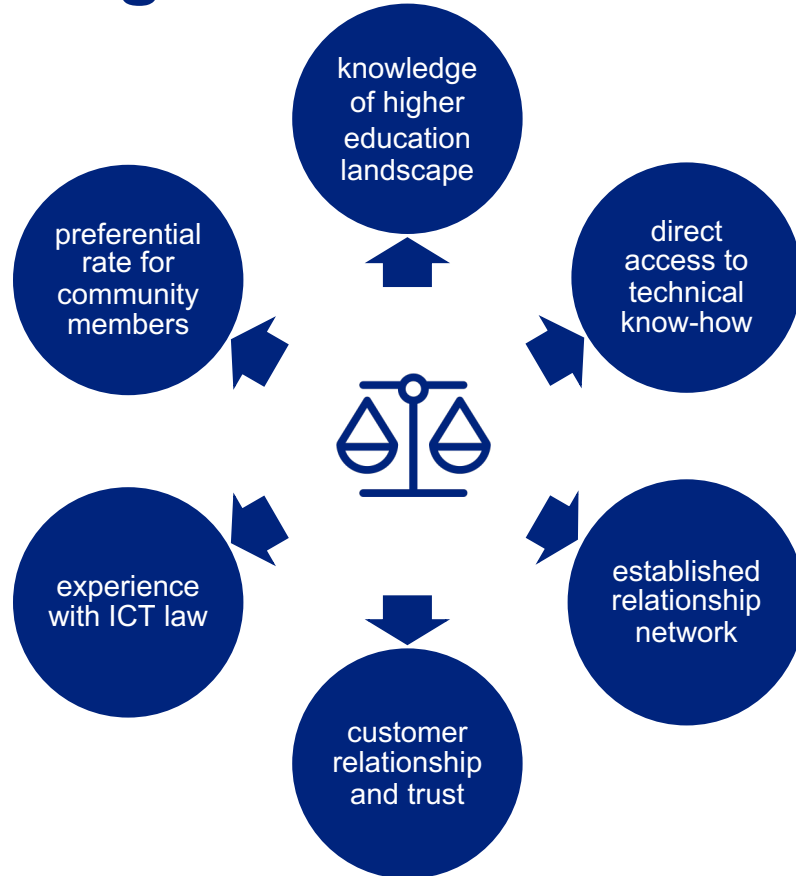
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Agenda

- SWITCHlegal
- Open Science and Data Protection
- Take aways
- Questions & answers



Why SWITCHlegal?



SWITCHlegal – who is who?



Anna Kuhn
Data Protection Officer



Nora Zinsli
General Counsel



Angelo Marchetta
Legal Counsel



Benedikt Saner
Legal Counsel

SWITCHlegal – what do we offer?

We offer legal consulting in ICT law to our community!



Licensing Law



Data
Protection Law



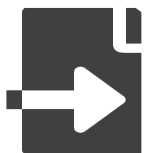
Telecommuni-
cations Law



Intellectual
Property Law



Procurement
Law



Drafting legal
documents



Legal opinion
on legal issues



Negotiation
of contracts



Presentations,
trainings,
workshops

... and much more!

SWITCHlegal – what does our community say?



"In my opinion, the collaboration with SWITCHlegal was straightforward, pragmatic yet clearly structured. We were able to get into the subject very quickly because SWITCH is familiar with the regulatory environment and the technical aspects of the universities".

— Oliver De Boni, Head of Strategic IT Management



Due to SWITCHlegal's university-specific expertise, we received professional advice in revising our basic legal documents. The collaboration was uncomplicated and the work was completed efficiently. Many thanks for the helpful collaboration.

— Dr Silvia Deplazes, Head of the Further Education Division



"The report enables us to introduce the LoRaWAN technology on a clean legal basis. I would therefore like to work again with SWITCHlegal in the future".

— Armin Wittmann, Head of ID ICT Networks



SWITCHlegal – how to get in contact?



Check out our website www.switch.ch/legal



Write us at legalteam@switch.ch



Give us a call +41 43 268 15 15



Subscribe to our SWITCHlegal Radar: <https://www.switch.ch/legal/newsletter/>



We would be happy to collaborate with you!

Open Science and Data Protection

Are the two domains compatible?



Open Science goals



Privacy goals

Open Science and Data Protection

What laws are applicable?

- Federal Act on Data Protection (FADP) and Ordinance to the Federal Act on Data Protection (DPO)
- Cantonal Data Protection laws (e.g. IDG in the Canton of Zurich)
- International Data Protection laws (e.g. EU GDPR)
- Other regulation or internal compliance requirements?
- Remember: Entry into force of revised FADP and DPO in September 2023 and different Cantonal Data Protection Laws currently under revision

Open Science and Data Protection

Relevant links

- FADP and DPO: https://www.fedlex.admin.ch/eli/cc/1993/1945_1945_1945/de,
https://www.fedlex.admin.ch/eli/cc/1993/1962_1962_1962/de
- Revision of FADP and DPO:
<https://www.bj.admin.ch/bj/de/home/staat/gesetzgebung/datenschutzstaerkung.html>
- Cantonal Data Protection laws: See the collections of law of the Cantons.
- Status of the revisions in the Cantons: <https://www.privatim.ch/de/stand-der-revisionen-der-datenschutzgesetze-in-den-kantonen-20-april-2021/>
- EU General Data Protection Regulation: <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

Open Science and Data Protection

Is personal data being processed?

- **Personal data:** all information relating to an identified or identifiable person
- **Sensitive personal data** includes amongst others data on:
 - religious, ideological, political or trade union-related views or activities
 - health, the intimate sphere or the racial origin
 - social security measures
 - administrative or criminal proceedings and sanctions
- **Processing:** any operation with personal data, irrespective of the means applied and the procedure; in particular the collection, storage, use, revision, remote access, disclosure, archiving or destruction of data

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What about anonymization? (1)

- Data protection rules don't apply to anonymized data (\neq pseudonymized data)
- Rule of thumb: Data is enough anonymized if for an average person the effort to identify the subject is too big.
- Indications are:
 - Specific techniques or knowledge is needed
 - Required costs and time
 - Interest of third party
- The threshold for sufficiently anonymized data is high!

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What about anonymization? (2)

- Judgment of the Federal Supreme Court on Google Street View (BGE 138 II 346)
- Main findings:
 - Raw images of persons and pictures in which a person remains recognizable even after processing must be regarded as personal data. This is also the case for vehicle number plates and pictures of houses, gardens and other private spaces, as in such cases a **personal connection can be established without difficulty**.
 - It takes little effort to attribute the images to specific persons and it must be assumed that third parties will **take an interest in the data** and therefore might identify the persons concerned.
 - No necessity of complete obscuring of data, an **error rate of 1%** is deemed acceptable with duty to constant improvement of the blurring technology.
 - In case of **high sensitivity** of the pictured facilities (schools, courts etc.), there is however no error rate tolerated and a more extensive blurring is required.

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What principles need to be kept in mind? (1)

- Principle of **legality** (legal basis needed for public sector, e.g. RIPA)
- Principle of **transparency**
- Principle of **proportionality** (data minimization)
- Principle of **purpose limitation**
- Conditions for **consent**

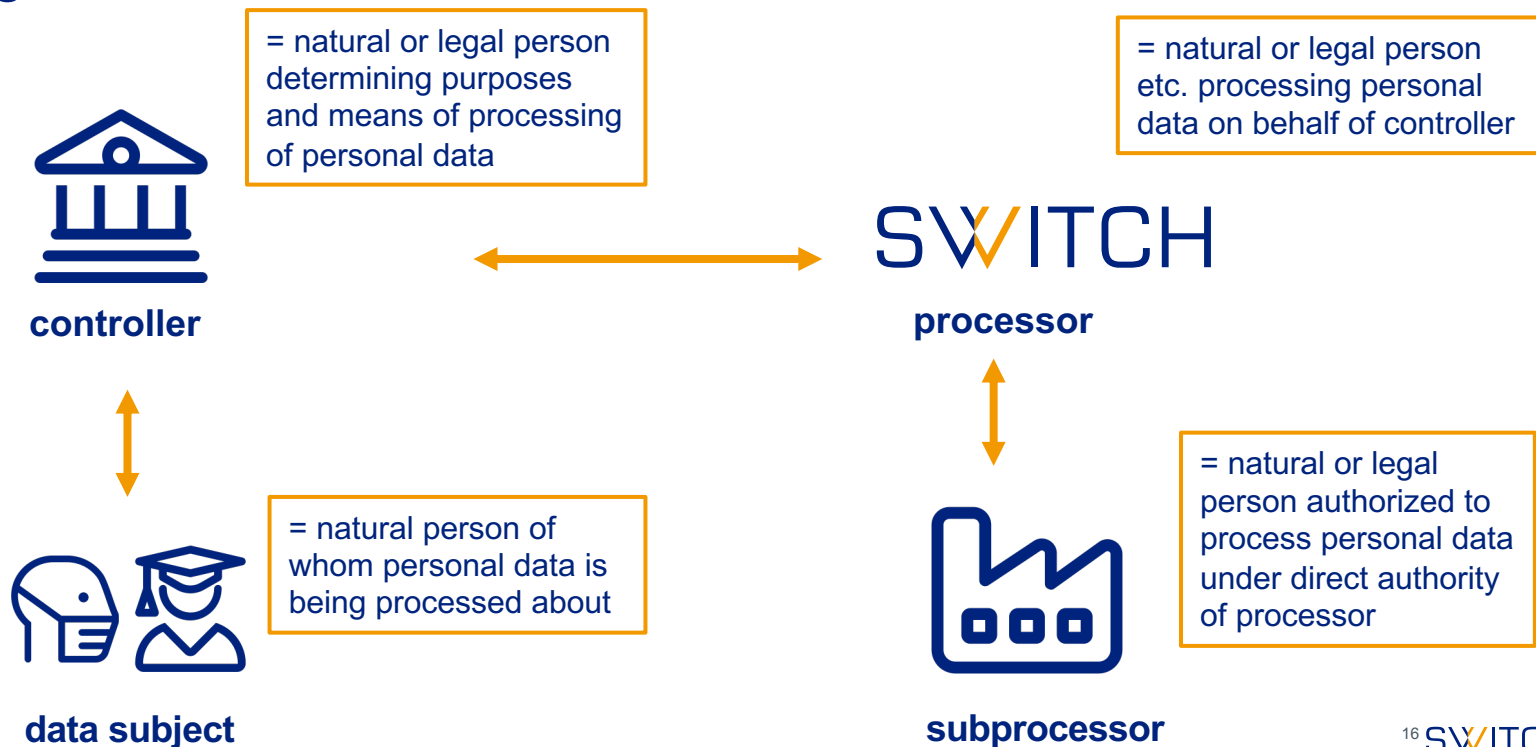
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What principles need to be kept in mind? (2)

- **Data security** (technical and organisational measures, “CIA”)
- Assignment of the roles **controller** and **processor**
- **Rights of the data subject** (information, access, rectification, erasure)
- **Cross-border transfer** of personal data

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Key roles



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Is there a research privilege?

- Provision applicable for **federal bodies** (article 39 FADP)

^ Art. 39 Data processing for non-personal purposes





1 Federal bodies may process personal data for non-personal purposes, in particular for research, planning or statistics, if:

- a. the data will be anonymized as soon as the purpose of processing permits;
- b. the federal body discloses personal data requiring special protection to private persons only in such a way that the persons concerned cannot be identified;
- c. the recipient discloses the data to third parties only with the consent of the federal body that disclosed the data; and
- d. the results are published only in such a way that the persons concerned cannot be identified.

2 Articles 6(3), 34(2) and paragraph 1 shall not apply.

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Takeaways (1)

-  **Applicable law:** For each institution and processing activity the applicable data protection provisions need to be assessed.
-  **Processing personal data:** Assess if in a project “personal data” is actually being processed; remember that the definitions are very broad.
-  **Anonymized data** is no longer personal data. However, the threshold for anonymization is high.
-  **Data Protection principles:** If personal data is being processed make sure to comply with all the applicable data protection principles (minimization, data security, sufficient consent if needed etc.)

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Takeaways (2)

- 👍 **Research privilege:** In research projects, the processing of personal data can be privileged if certain criteria are met.
- 👍 **Other legal fields:** Regarding Open Science also other legal fields are targeted (e.g. copy right law, criminal law)
- 👍 If you need **legal assistance**, get your legal team involved or get in contact with SWITCHlegal. We are here to help!



Questions & answers



- Does an IP address qualify as personal data? Is the situation different with a public WIFI?
- Is the data “37.9° Celcius” (body temperature) personal data?
- A privacy policy states “The data is being processed for research purposes”. What data protection principles are at stake and are they fulfilled?
- A research team at the UNIL conducts an Open Data project with personal data involved. They use the online repository SWITCHconnectome to process data.
 - What data protection laws are applicable?
 - What roles according to data protection law are involved?
 - Is it lawful to store personal data in the online repository?

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