

Challenges in the Processing of Children's Personal Data

The protection of children's personal data is a topical and problematic issue. The urgency of this issue is determined by the status of children as data subjects, their rights, and the peculiarities of legislative regulations regarding the expression of these rights. Particularly noteworthy is the impact of digital technologies on children's daily lives and their ability to exercise these rights. This article reviews national and international standards for the processing of children's personal data to identify the expected risks and challenges.

Keywords: *Personal Data Protection Service of Georgia, Protection of personal data of Children, processing of personal data of Children.*

1. Introduction

The purpose of the Law of Georgia “On Personal Data Protection” is to safeguard fundamental human rights and freedoms, including the rights to privacy in personal and family life, personal space, and communication, in the context of personal data processing. In this regard, special consideration must be given to the status of children as data subjects, their rights, and the exercise of these rights independently or through a representative, and the evaluation of key risks. This includes oversight of data controllers, such as schools, the healthcare sector, and other institutions, along with identifying violations, prevention, raising awareness, and fostering a culture of personal data protection.

It is important to assess the legal framework governing the processing of children's personal data and to identify the expected risks. Additionally, it is crucial to determine how well the new Law of Georgia “On Personal Data Protection” addresses existing challenges and what considerations data controllers should take into account when handling children's data.

2. A Specific Regulation on the Processing of Children's Data

In June 2023, the Parliament of Georgia adopted the Law “On Personal Data Protection,” which introduces unique innovations and serves as a fundamental legal document for the protection of personal data in Georgia.

* PhD Student at Ivane Javakishvili State University, Faculty of law; Inviting Lecturer; International Relations and Legal Matters Coordinator of International Relations, Analytics and Strategic Development Department of Personal Data Protection Service of Georgia.

The novelty of the regulation is based on the need to harmonize with international legal standards, (Council of Europe Convention 108 for the Protection of Individuals with Automatic Processing of Personal Data, Protocol amending Convention 108, Modernized Convention 108, General Data Protection Regulation etc.)¹ To introduce protective measures and mechanisms into Georgian legislation, and enhance the effectiveness, institutional independence, and impartiality of the Personal Data Protection Service, while implementing relevant recommendations. The importance of this law lies in its sectoral, functional, and fundamental nature.²

Article 7 of the law outlines the procedures and conditions for obtaining consent to process personal data of children. It specifies that if a child commits an administrative offense, it is considered as mitigating circumstance³. Conversely, processing data of children in violation of this law is regarded as an aggravating circumstance for administrative offenses under this law.⁴

Processing of data about a child is permitted based on the child's consent if they are 16 years old or older. For children under the age of 16, data processing requires the consent of a parent or legal guardian, unless otherwise specified by law. This includes cases where data processing is necessary for children aged 16 to 18, where the consent of a parent or legal guardian may also be required.⁵

Data controller is required to take all reasonable and appropriate measures to verify the consent of a parent or legal guardian for a child under the age of 16. Processing of special category data about a child is permitted only with the written consent of a parent or legal guardian, unless otherwise explicitly provided by law.

An overview of international standard-setting acts highlights the significance of the 1989 UN Convention on the Rights of the Child, adopted by the United Nations General Assembly. This document was the first international legal instrument to formally acknowledge the need for special care and protection for children.

The Global Privacy Assembly (“GPA”) Resolution 2021 on the Digital Rights of the Child underscores that children require special protection and are entitled to the rights recognized by the Convention. It emphasizes that children should be able to enjoy these rights in all areas, including the online environment. The resolution explains that the digital environment significantly affects a child's development, daily life, future prospects, and opportunities.

The 2021 Declaration by the Committee of Ministers on the need to protect the privacy of children in the digital environment outlines the importance of safeguarding children's privacy online. It also highlights the risks that minors encounter when using modern technologies.

According to Article 38 of the General Data Protection Regulation (“GDPR”), children are granted special rights regarding the protection of their personal data, as they may be less aware of the risks, consequences, and available remedies involved in its processing.

¹ See: Council of Europe, Guide to European Data Protection Law, Luxembourg, Publishing House of the European Union, 2018, 20-21.

² Comp.: *Goshadze K.*, Constitutional-legal guarantees of personal data protection and processing, University of Georgia, Tbilisi, 2017, 43.

³ Law of Georgia “On Personal Data Protection”, 3144-Xlms-Xmp, 14/06/2023, Article 61, paragraph 1, Sub-paragraph “B”.

⁴ *Ibid.*, paragraph “c” of Article 62.

⁵ see *Shudra T.*, Protecting the Personal Data of Minors in the Digital Environment with Different Expectations of Parents and Children, *Personal Data Protection Law Journal*, 1/2023, 112-115.

The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) and the Modernized Convention 108 both address the issue of data protection. Article 5(2) of the Modernized Convention 108 refers to the data subject's consent. In EU law, consent as a lawful basis for data processing is strictly defined in Article 6 of the GDPR. Article 8 of the Charter of Fundamental Rights also clearly emphasizes this principle. The specific characteristics of valid consent are outlined in Article 4 of the Regulation, while the conditions for obtaining such consent are detailed in Article 7. Special rules for obtaining consent from children in relation to information society services are established in Article 8 of the Regulation.

3. A Child as a Data Subject

Being informed is an integral part of a person's free development, based on the ability to grow according to one's own will, decisions, and choices. A thorough understanding of information regarding personal data processing enables individuals, including children, to protect and control their personal sphere. Under EU and Council of Europe legislation, "personal data" is defined as any information that identifies or can identify a natural person, either directly or through additional information.⁶ The German Constitutional Court stated in 1983 that "in the case of automatic data processing, there is no longer any insignificant information."⁷ Any information relating to an individual, no matter how seemingly innocuous, may fall into a special category."⁸ Therefore, personal data includes any information, whether it relates to a person's personal life, work, economic or social environment, or individual capabilities.⁹ According to "GDPR", an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.¹⁰ According to the Universal Declaration of Human Rights:¹¹ Data protection is a universal right and extends beyond the citizens of individual countries¹².

According to the recital of the General Data Protection Regulation (GDPR), children have a special right to the protection of their personal data, as they may be less aware of the risks, consequences, protection mechanisms, and rights associated with data processing.¹³ Special right to protection should apply to:

- The use of personal data of children for marketing purposes;
- The creation of personal profiles or accounts for children;

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4/5/2016, 1–88 art. 4 (1); Council of Europe, Modernized Convention for the Protection of Individuals with Regard to the Processing of Personal Data (Convention 108+; CM/Inf (2018) 15-final), 18/05/2018, article 2 (a).

⁷ German Federal Constitutional Court, 1 BvR 209/83, 269/83, 362/83, 420/83, 440/83, 484/83, 15 December 1983, margin number 150.

⁸ Commission of the European Communities, COM (90) 314, final, 13 September 1990, 19.

⁹ see.: WP29, Opinion 4/2007 on the concept of personal data, 20 June 2007, 6.

¹⁰ General Data Protection Regulation, GDPR, Recital 14 sentence 1.

¹¹ Convention on the Rights of the Child, International Treaty and Agreement, 1948, Article 8.

¹² General Data Protection Regulation, GDPR, Recital 14.

¹³ General Data Protection Regulation, GDPR, Recital 38.

- The collection of personal data related to children when they use services directed specifically at them.¹⁴

Children assume the status of data subjects in various situations, particularly in the digital age, where their personal data is collected, processed, and stored for multiple purposes. For example, several scenarios may be considered:

Online Services and Social Media: Today, children are not restricted from using various online platforms, social networks, applications, or websites that collect their personal data, including personal information, photos, videos, or other identifying details.

Educational Institutions: Schools and other educational institutions collect and store data about their students for administrative, educational, or security purposes. This data includes attendance records, grades, behavior reports, and health information, making children data subjects within the educational environment.

Health Care Services: When a child receives medical care or treatment, health care providers collect and process information about the child's health. This includes medical records, diagnoses, treatment plans, and prescriptions.

Games and Entertainment: Online games, applications, and entertainment platforms often collect data from children as they interact with virtual environments and characters. This data is typically used to enhance the user experience and tailor content to individual preferences.

Research and Surveys: Children's data may be processed for research or survey purposes, particularly in educational or psychological studies. In such cases, it is crucial to respect their privacy and ensure their data is handled appropriately.

4. Key Considerations for Processing Children's Personal Data

The new law of Georgia "On Personal Data Protection" stipulates that the processing of children's personal data must be carried out in accordance with the best interests of the child. However, the list of personal data processing principles does not include any specific modifications for processing children's data. This suggests that the general principles of data processing apply equally. Consequently, the data controller is responsible for identifying the individuals whose personal data is being processed, ensuring compliance with these principles.

The Code on the Rights of the Child does not prohibit the processing of a child's personal data for various purposes, such as in health care, education, and social protection. However, such processing must be conducted in the best interests of the child and in full compliance with Georgian legislation.¹⁵

The Supreme Court of Georgia has emphasized in one of its decisions that Article 71 of the Code on the Rights of the Child strictly protects a child's personal data. According to the first part of this article, it is prohibited to publicly disclose any personal data of a child involved in administrative or court proceedings, including through media. This includes information that could reveal or indirectly indicate the child's identity, such as images, detailed descriptions of the child or their family members, names, addresses, and audio or video recordings. The second part of the article prohibits the public disclosure of any document or record containing the child's personal data related to disciplinary measures, cases of violence

¹⁴ General Data Protection Regulation, GDPR, Recital 38.

¹⁵ Kiladze S., Turava P., commentaries on the Code of Children's Rights, Tbilisi, 2021, 278.

involving or committed by the child, the child's health condition, or participation in social assistance or charity programs, among other similar information. Third part of the article stipulates that processing a child's personal data is permitted only in accordance with Georgian legislation. Therefore, the processing of personal data, including the publication of photographs, is allowed only with the consent of the data subject, except in legally defined circumstances.¹⁶

The court emphasizes that when taking any action involving a child, personal data must be protected to a much higher standard, and the child's best interests must be paramount. The court explained that, in the case under consideration, given the context, the topic, and the information conveyed, publishing the image of the minor in the story did not serve the child's best interests, did not protect the child's rights, and could cause negative feelings for the child.

The court notes that, in any action taken against a child or in any decision affecting them, there must be a primary focus on evaluating and safeguarding the child's best interests in both public and private contexts.¹⁷

The court points out that while the first and second parts of Article 71 of the Code on the Rights of the Child outline specific cases where publishing a minor's image is prohibited, these should not be considered an exhaustive list. Each case involving a minor must be evaluated individually, considering the unique circumstances to best serve the child's interests. Similarly, the Charter of Journalistic Ethics mandates the protection of children's rights as a distinct principle, requiring journalists to prioritize the child's interests in their professional activities and to avoid creating or publishing content that could be harmful to children.¹⁸ Therefore, in each case, journalists should assess the potential negative risks and consequences that may arise from identifying a minor. If there is a risk that identifying the minor in a particular story could negatively affect their rights and best interests, the child's image should be presented in a way that does not reveal their identity.¹⁹

5. Risks and Challenges in Processing Children's Data

Data processing refers to any action or set of actions performed on personal data or data sets, whether through automated or other means. This includes, for example, collecting, recording, organizing, structuring, storing, adapting or modifying, retrieving, disclosing, using, transmitting, distributing, or otherwise making the data available, as well as grouping, combining, restricting, deleting, or destroying the data.

a. Internet Use and the Processing of Children's Data on Social Networks

The issue of internet use by children requires significant attention. Children may use online resources more frequently than their parents realize, and as a result, parents might not perceive this as a threat, especially since online tools simplify communication in daily life. However, when accessing online resources, there are risks²⁰ of personal data disclosure, privacy violations, and potential criminal actions such as coercion, fraud, and other threats,

¹⁶ Decision No. As-488-2023 of the Supreme Court of Georgia of September 21, 2023.

¹⁷ Decision No. A-1351-SH-33-2023 of the Supreme Court of Georgia of December 25, 2023.

¹⁸ Comp.: *Firtskhalashvili A., Kardava E., Turava P.*, Handbook of Social Law, Tbilisi, 2023, 347-348.

¹⁹ Decision No. As-488-2023 of the Supreme Court of Georgia of September 21, 2023.

²⁰ *Gurgenidze M.*, Protection of child's personal data in the Internet space, East European University, Tbilisi, 2020, 31-32.

which are particularly concerning. It is important to consider whether the online platform has a personal data protection policy and how its scope of use impacts the daily lives of children. Additionally, it should be assessed whether parents or children themselves are familiar with the privacy and security settings of the platforms they frequently use. Publicly disclosing a child's data online, in a way accessible to everyone, can have negative consequences, such as making the child a target of bullying or other unwanted treatment.²¹

b. Monitoring the Behavior of Children at School and the Processing of Student Data

Schools are authorized to conduct video surveillance on school premises, but only for purposes such as ensuring personal safety, protecting property, safeguarding children from harmful influences, and securing confidential information. Video recording is permitted only at entry points and the external perimeter. Surveillance is strictly prohibited in changing rooms and hygiene areas. Schools also have the right to monitor student entry and exit from the building and to record the name, surname, identification document details, address, dates and times of entry and exit, as well as the reasons for the visit. The retention period for this data must not exceed the limit defined by law.²² Schools may take photos or videos and make the learning process public, but only with the consent of the data subject.²³ The best interests of the student must be prioritized when obtaining consent. Throughout the student's time on school grounds, whether during classes or breaks, the purposes for which the school may process the student's personal data must be clearly defined. For instance, video monitoring may be used to ensure that lessons proceed smoothly and that students remain in the classroom during instruction. Additionally, surveillance can be employed to prevent students from leaving the school premises during lessons or to ensure that unauthorized individuals do not enter the school grounds.²⁴ Educational institutions, their employees, as well as parents and family members of children, must take more responsibility for the disclosure of children's data and act in the best interests of the child.²⁵

c. Processing of Children's Data in Medical Institutions

When disclosing data related to the health of minors, special attention must be given to assessing the risks associated with further use of this information. Children's data requires heightened protection, and each data processor must act primarily in the best interest of the child. Regardless of parental consent, disclosing health-related data or other sensitive information to third parties as public information is not permitted and is considered disproportionate and inappropriate for data processing purposes.²⁶ When assessing risks, it is crucial to determine the legal basis for processing a minor's personal data.²⁷

²¹ European Union, Children's Online Privacy and Data Protection in European Countries, 2021, No. 2021-020137, The Law Library of Congress, Global Legal Research Directorate, 18-19.

²² European Data Protection Supervisor, Study on the Essence of the Fundamental Rights to Privacy and to the Protection of Personal Data, EDPS 2021/0932, December 2022.

²³ Guide to the General Data Protection Regulation, Bird & Bird, 2020, 6-7.

²⁴ See: *Sukhashvili N.*, Personal data protection of school students during distance education, collection of articles: current problems and challenges of personal data protection, Tbilisi, 2021, 9-10.

²⁵ *Gorgiladze A.*, Protection of personal data of abused children, Peculiarities of personal data protection (collection of articles), 2020, 55.

²⁶ Decisions of the State Inspector's Service, processing of health data, 2020.

²⁷ See: *Archuadze T.*, Depersonalization of personal data as a guarantee of data subject protection, Journal of Constitutional Law, 5/2020, 117.

In the context of personal data processing, the following issues should be considered according to the Code on the Rights of the Child:

- The right to life and personal development of the child implies that the child has a fundamental right to life and to develop personally. The state is required to take all necessary measures to protect the child's life and to create conditions conducive to their harmonious development. This is in accordance with the Code on the Rights of the Child, the Constitution of Georgia, the Convention on the Rights of the Child and its additional protocols, other international agreements to which Georgia is a party, and other relevant legal acts;
- The child's right to education means that every child is entitled to quality and inclusive education, with equal access. The state ensures that all children have equal access to an inclusive education system.
- The child's right to private and family life means that the child has the right to a private space and to conduct personal correspondence. Any illegal restriction of this right, including unjustified and unlawful interference with the child's personal space, family life, or personal correspondence, is not permitted.

The child's rights to freedom of opinion, information, media, and the internet mean that the child has the right to express their opinions freely. The child also has the right to be heard in decisions affecting them, with their views considered in accordance with their age, mental, and physical development. Additionally, the child has the right to seek, receive, and disseminate information through various means and forms. The child is entitled to access mass media and the internet and to use the internet freely.

In response to these challenges, the provisions introduced by the new law of Georgia "On Personal Data Protection" should be broadly interpreted. Article 7 of this law outlines the procedure and conditions for obtaining consent to process data about a minor. It specifies that the data controller must consider and protect the best interests of the minor. Consent from the minor, their parent, or other legal representative is not valid if the data processing threatens or harms the minor's best interests.

In 2022, the Personal Data Protection Service examined 39 cases involving the processing of minors' personal data. Of these, 27 cases were initiated by the Service, while 12 were based on citizen complaints or notifications. The reported issues primarily concerned the illegal disclosure of minors' personal data by medical institutions, breaches of video surveillance regulations, violations related to data processing for direct marketing purposes, and other instances where the processing of minors' data did not comply with legal requirements.

6. Conclusion

The scope of challenges related to processing minors' personal data is broad and complex. Uncertainty remains among data controllers regarding the appropriate forms and extent of processing for minors' data..

Given that one of the main objectives of the Personal Data Protection Service is to inform the public about data protection status and significant related events, it is crucial not only to raise awareness about the processing of children's personal data but also to develop strategies, inspection protocols, and flexible models with relevant standards for implementing Article 7 of the new law.

Alongside the implementation of Georgia's new "On Personal Data Protection" law, it is important to ensure that controllers of minors' personal data adhere to the law's requirements. Increasing minors' awareness of their rights is crucial for the timely identification of data protection challenges and will aid in taking appropriate countermeasures.

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