

Chapter 4

Federal Commissioner for Data Protection and Freedom of Information

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Section 8

Establishment

- (1) The Federal Commissioner for Data Protection and Freedom of Information (Federal Commissioner) shall be a supreme federal authority. It is located in Bonn.
- (2) Civil servants of the Federal Commissioner shall be federal civil servants.
- (3) The Federal Commissioner may delegate human resources administration and management tasks to other federal bodies as long as doing so does not affect the Federal Commissioner's independence. Personal data of staff members may be transmitted to these bodies as needed for them to perform their delegated tasks.

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Section 9

Competence

- (1) The Federal Commissioner shall be competent to supervise the public bodies of the Federation, also if they take part in competition as enterprises governed by public law. The provisions of this chapter shall also apply to processors if they are private bodies in which the Federation holds the absolute majority of shares or controls the absolute majority of votes and they process data on behalf of a public body of the Federation
- (2) The Federal Commissioner shall not be competent to supervise processing operations of federal courts acting in their judicial capacity.

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Section 10

Independence

- (1) The Federal Commissioner shall act with complete independence in performing his or her tasks and exercising his or her powers. The Federal Commissioner shall remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody.
- (2) The Federal Commissioner shall be subject to audit by the Bundesrechnungshof as long as this does not affect his or her independence.

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Section 11

Appointment and term of office

(1) At the proposal of the Federal Government, the German Bundestag shall elect without debate the Federal Commissioner with more than half of the statutory number of its members. The person elected shall be appointed by the Federal President. The Federal Commissioner must be at least 35 years old at the time of election. He or she shall have the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform his or her duties and exercise his or her powers. In particular, the Federal Commissioner must have knowledge of data protection law acquired from the relevant professional experience and be qualified for judicial office or higher administrative service.

(2) The Federal Commissioner shall swear the following oath before the Federal President: “I swear to do everything in my power to further the good and the benefit of the German people, to protect them from harm and to defend the Basic Law and the laws of the Federation, to perform my duties conscientiously and to exercise justice in all my dealings, so help me God.” The reference to God may be omitted from the oath.

(3) The Federal Commissioner’s term of office shall be five years. It may be renewed once.

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Section 12

Official relationship

(1) The Federal Commissioner shall, in accordance with this Act, have official federal status under public law.

(2) The official relationship shall begin upon delivery of the certificate of appointment. It shall end upon expiry of the term of office or upon resignation. The Federal President shall remove the Federal Commissioner from office at the request of the President of the Bundestag if the Federal Commissioner has committed serious misconduct or no longer meets the requirements for performing his or her tasks. If the official relationship is ended or the Federal Commissioner is removed from office, the Federal Commissioner shall be given a document signed by the Federal President. Removal from office shall be effective upon delivery of this document. If the official relationship ends upon expiry of the term of office, at the request of the President of the Bundestag the Federal Commissioner shall be obligated to continue his or her work for no more than six months until a successor has been appointed.

(3) The senior civil servant shall exercise the rights of the Federal Commissioner if the latter is unable to perform his or her duties or if his or her term of office has expired and he or she is no longer obligated to continue his or her work. Section 10 (1) shall apply accordingly.

(4) From the start of the calendar month in which the official relationship commences until the end of the calendar month in which it ends, or, in the case of subsection 2, sixth sentence, until the end of the month in which he or she ceases his or her work, the Federal Commissioner shall be paid at the level of a federal civil servant in pay grade B 11 plus the family allowance according to Annex V of the Federal Civil Servants' Remuneration Act. The Federal Travel Expenses Act and the Federal Relocation Expenses Act shall apply accordingly. In all other respects, Section 12 (6), Sections 13 through 20 and 21a (5) of the Act on Federal Ministers shall apply, except that the four-year term of office stipulated in

Section 15 (1) of the Act on Federal Ministers shall be replaced by a five-year term. By way of derogation from the third sentence in conjunction with Sections 15 through 17 and 21a (5) of the Act on Federal Ministers, the Federal Commissioner's pension shall be calculated, counting his or her term as Federal Commissioner as a pensionable period of service, on the basis of the Federal Act Governing Civil Servants' Pensions and Allowances, if this is more favourable and if, before his or election as Federal Commissioner, he or she was a civil servant or judge in at least the last position to be held before reaching pay grade B 11.

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Section 13

Rights and obligations

(1) The Federal Commissioner shall refrain from any action incompatible with his or her duties and shall not, during his or her term of office, engage in any incompatible occupation, whether gainful or not. In particular, the Federal Commissioner shall not hold any other paid office or pursue any commercial activity or occupation in addition to his or her official duties and shall not belong to the management or supervisory board of a profit-oriented enterprise, nor to a government or legislative body of the Federation or a *Land*. The Federal Commissioner shall not deliver extra-judicial opinions in exchange for payment.

(2) The Federal Commissioner shall inform the President of the Bundestag of any gifts received in connection with his or her office. The President of the Bundestag shall decide how such gifts shall be used. He or she may issue procedural rules and regulations.

(3) The Federal Commissioner shall have the right to refuse to give testimony concerning persons who have confided in him or her in his or her capacity as Federal Commissioner and concerning the information confided. This shall also apply to the staff of the Federal Commissioner, on the condition that the Federal Commissioner decides on the exercise of this right. Within the scope of the Federal Commissioner's right of refusal to give testimony, he or she shall not be required to submit or surrender files or other documents.

(4) Even after his or her official relationship has ended, the Federal Commissioner shall be obligated to secrecy concerning matters of which he or she is aware by reason of his or her official duties. This obligation shall not apply to official communications or to matters which are common knowledge or which by their nature do not require confidentiality. The Federal Commissioner shall decide at his or her due discretion whether and to what extent he or she will testify in or outside court or make statements concerning such matters; if he or she is no longer in office, the permission of the Federal Commissioner in office shall be required. This shall not affect the legal obligation to report crimes and to uphold the free and democratic order wherever it is threatened. Sections 93, 97, 105 (1), Section 111 (5) in conjunction with Section 105 (1) and Section 116 (1) of the German Fiscal Code shall not apply to the Federal Commissioner or his or her staff. The fifth sentence shall not apply where the financial authorities require such knowledge in order to conduct legal proceedings due to a tax offence and related tax proceedings, in the prosecution of which there is compelling public interest, or where the person required to provide information or persons acting on his or her behalf have intentionally provided false information. If the Federal Commissioner determines that data protection provisions have been violated, he or she shall be authorized to report the violation and inform the data subject accordingly.

(5) The Federal Commissioner may testify as a witness unless such testimony would

1. be detrimental to the welfare of the Federation or a *Land*, in particular to the security of the Federal Republic of Germany or its relations with other countries, or
2. would violate fundamental rights.

If the testimony concerns ongoing or completed processes which are or could be considered core aspects of executive responsibility, the Federal Commissioner may testify only with the approval of the Federal Government. Section 28 of the Federal Constitutional Court Act shall remain unaffected.

(6) Subsections 3 and 4, fifth to seventh sentences, shall apply accordingly to the public bodies responsible for monitoring compliance with the data protection provisions in the *Länder*.

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Section 14

Tasks

(1) In addition to the tasks listed in Regulation (EU) 2016/679, the Federal Commissioner shall have the following tasks:

1. to monitor and enforce the application of this Act and other data protection legislation, including legislation adopted to implement Directive (EU) 2016/680;
2. to promote public awareness and understanding of the risks, rules, safeguards and rights in relation to the processing of personal data, paying special attention to measures specifically for children;
3. to advise the German Bundestag, the Bundesrat, the Federal Government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to the processing of personal data;
4. to promote the awareness of controllers and processors of their obligations under this Act and other data protection legislation, including legislation adopted to implement Directive (EU) 2016/680;
5. upon request, to provide information to any data subject concerning the exercise of their rights under this Act and other data protection legislation, including legislation adopted to implement Directive (EU) 2016/680, and if appropriate, to cooperate with the supervisory authorities in other Member States to that end;
6. to handle complaints lodged by a data subject, or by a body, organization or association in accordance with Article 55 of Directive (EU) 2016/680, and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;
7. to cooperate with, including by sharing information, and provide mutual assistance to other supervisory authorities, to ensure the consistency of application and enforcement of this Act

and other data protection legislation, including legislation adopted to implement Directive (EU) 2016/680;

8. to conduct investigations on the application of this Act and other data protection legislation, including legislation adopted to implement Directive (EU) 2016/680, also on the basis of information received from another supervisory authority or other public authority;

9. to monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies and commercial practices;

10. to provide advice on the processing operations referred to in Section 69; and

11. to contribute to the activities of the European Data Protection Board.

Within the scope of Directive (EU) 2016/680, the Federal Commissioner shall also perform the task pursuant to Section 60.

(2) To carry out the task listed in subsection 1, first sentence, no. 3, the Federal Commissioner may, on request or at its own initiative, make recommendations to the German Bundestag or one of its committees, the Bundesrat, the Federal Government, other institutions and bodies and the public concerning all matters related to the protection of personal data. At the request of the German Bundestag, one of its committees or of the Federal Government, the Federal Commissioner shall also investigate data protection matters and incidents at public bodies of the Federation.

(3) The Federal Commissioner shall facilitate the submission of complaints referred to in subsection 1, first sentence, no. 6 by measures such as providing a complaint submission form which can also be completed electronically, without excluding other means of communication.

(4) The performance of the duties of the Federal Commissioner shall be free of charge for the data subject. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the Federal Commissioner may charge a reasonable fee based on administrative costs, or refuse to act on the request. The Federal Commissioner shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

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Section 15 **Activity reports**

The Federal Commissioner shall produce an annual activity report which may contain a list of the types of violations reported and the types of measures taken, including penalties and measures taken in accordance with Article 58 (2) of Regulation (EU) 2016/679. The Federal Commissioner shall submit this report to the German Bundestag, the Bundesrat and the Federal Government and shall make it available to the public, the European Commission and the European Data Protection Board.

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Section 16 Powers

(1) The Federal Commissioner shall have, within the scope of Regulation (EU) 2016/679, the powers referred to in Article 58 of Regulation (EU) 2016/679. If the Federal Commissioner concludes that data protection legislation has been violated or that there are other problems with the processing of personal data, he or she shall inform the competent authority for legal or technical matters and, before exercising the powers referred to in Article 58 (2) (b) to (g), (i) and (j) of Regulation (EU) 2016/679, shall give this authority the opportunity to provide its opinion to the controller within a reasonable period. The opportunity to provide an opinion may be dispensed with if an immediate decision seems necessary due to imminent danger or in the public interest, or if it would conflict with compelling public interests. The opinion should also include a description of the measures taken on the basis of the information from the Federal Commissioner.

(2) If the Federal Commissioner finds that, in data processing for purposes beyond the scope of Regulation (EU) 2016/679, public bodies of the Federation have violated this Act or other data protection legislation or there are other insufficiencies with their processing or use of personal data, the Federal Commissioner shall lodge a complaint with the competent supreme federal authority and shall require this authority to respond within a period to be determined by the Federal Commissioner. The Federal Commissioner may dispense with a complaint or a response, especially if the problems involved are insignificant or have been remedied in the meantime. The response should also describe the measures taken as a result of the Federal Commissioner's complaint. The Federal Commissioner may also warn a controller that intended processing operations are likely to violate provisions of this Act and other data protection provisions which apply to the data processing in question.

(3) The powers of the Federal Commissioner shall also extend to

1. personal data obtained by public bodies of the Federation concerning the contents of and specific circumstances relating to postal communications and telecommunications, and
2. personal data subject to professional or special official secrecy, especially tax secrecy under Section 30 of the German Fiscal Code.

The fundamental right to privacy of correspondence, posts and telecommunications in Article 10 of the Basic Law shall be limited accordingly.

(4) The public bodies of the Federation shall be obligated to provide the Federal Commissioner and his or her assistants with the following:

1. access to all official premises at all times, including to any data processing equipment and means, and to all personal data and all information necessary to perform their tasks; and
2. all information necessary to perform their tasks.

(5) The Federal Commissioner shall work to cooperate with the public bodies responsible for monitoring compliance with data protection provisions in the *Länder* and with the supervisory authorities under Section 40. Section 40 (3), first sentence, second half-sentence, shall apply accordingly

