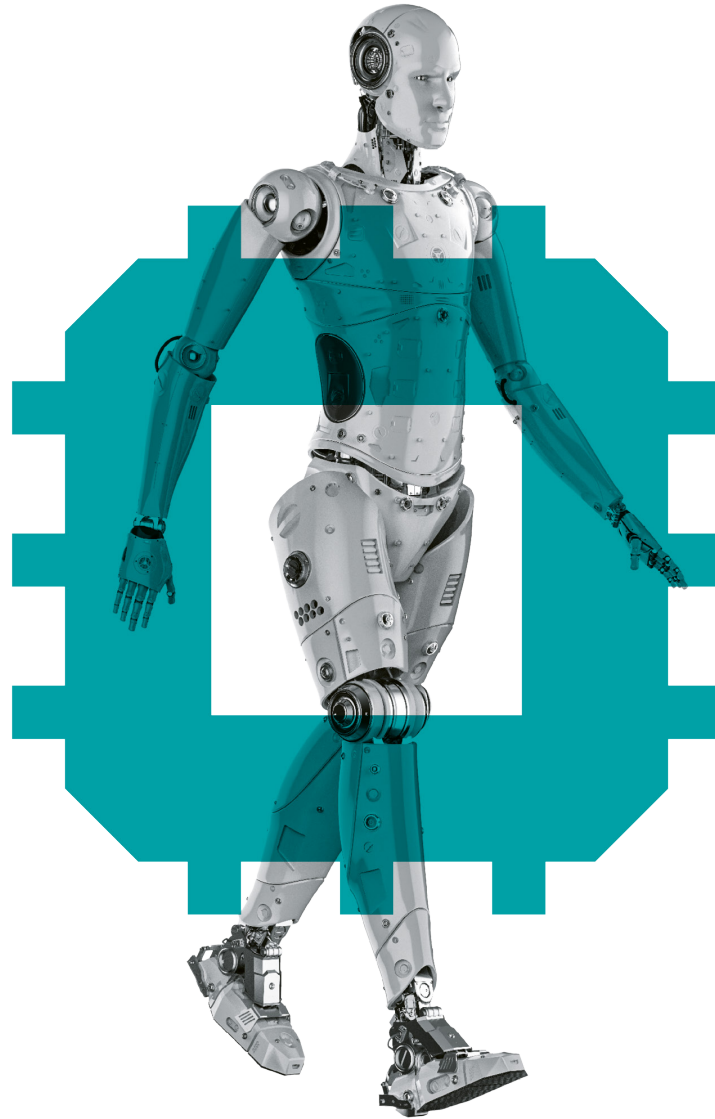


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# Data Subject Access Requests before, during, and after Employment

Roland Mathys, Jacqueline Brunner

## Key Take-aways

- 1.** Employers are particularly frequently affected by data subject access requests in connection with unsuccessful job applications or following the termination of the employment relationship.
- 2.** Employers should not respond to access requests in a formulaic manner, but should always assess on a case-by-case basis whether and to what extent there is an obligation to provide information.
- 3.** Clear processes, professional documentation, and a structured approach to the handling of personal data are essential to addressing access requests efficiently and in a legally sound manner.

# 1 Introduction

The Federal Act on Data Protection (**FADP**) governs the data subject's right to information to personal data processed about them. The specifics of the right to information are set forth in the Data Protection Ordinance (**DPO**).

In the context of employment relationships and recruitment processes, **access requests** are **regularly** made – typically in connection with unsuccessful job applications, workplace conflicts, or following the termination of the employment relationship.

In order to handle access requests efficiently, in a controlled manner, and in compliance with the law, employers should **be aware of their respective rights and obligations and ensure that appropriate processes are in place**. This is all the more important given that intentionally providing false or incomplete information in response to an access request may result in criminal penalties.

The present overview pertains to private data controllers under Swiss law and **does not aim to provide a comprehensive description of the right to information**. Rather, the focus is on selected practical questions arising in the context of employment and recruitment relationships.

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## Access requests must be assessed on a case-by-case basis.

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## 2 Modalities and Limits of the Right to Information

It must always be **assessed on a case-by-case basis** whether and to what extent a right to information exists.

Employers should first examine whether the FADP applies to the particular case at hand. For example, the FADP does not apply in court proceedings and in proceedings governed by federal procedural regulations, subject to first-instance administrative proceedings; in such cases, the respective procedural law applies exclusively.

If the FADP applies, there is generally a right to obtain information **about all existing personal data relating to the employee or job applicant concerned**. This may therefore also include internal records, provided they are not intended exclusively for personal use – an example of this would be personal notes prepared for an employee appraisal or job interview. In this context, the right to information must not be circumvented by a failure to maintain documentation in breach of applicable obligations. Employers are required,

in particular, to provide information regarding the data processed, the purpose of processing, the origin of the data, any recipients, and the retention period. The information must generally be provided free of charge and within 30 days of receipt of the access request. Personal data of third parties that does not relate to the data subject concerned is not covered by the right to information.

Access requests frequently also seek the production of documents, copies of documents, or extracts from documents. According to the FADP, the personal data processed must be provided as such – either in writing or in the form in which the data is available. The information may, for example, be provided in the form of a structured and comprehensible overview; a list lacking context or coherence, however, is unlikely to suffice. Where personal data is available in the form of image or audio recordings, these may generally also be provided in this form (i.e., without transcription). In our view, there is **no entitlement to the production of documents or corresponding copies or extracts as such**. However, depending on the specific case, such production – possibly with redactions – may nevertheless be more appropriate, efficient, or even necessary.

The right to information is not absolute. **Under certain circumstances, access may be refused, restricted, or deferred**, in particular on the following grounds:

- statutory provisions (e.g., professional secrecy);
- overriding interests of third parties;
- overriding interests of the employer, provided that the personal data is not disclosed to third parties;
- obvious lack of merit (e.g., purposes unrelated or contrary to data protection, in particular the collection of evidence for civil proceedings, or obviously vexatious requests).

In principle, **no specific interest** needs to be demonstrated to exercise the right to information. However, the assessment of whether the conditions for a restriction are met may require the employee or job applicant to set out their interests nonetheless. Any restrictions must be disclosed and reasoned by the employer.

## 3 Right to Information in the Recruitment Process

In the context of access requests following unsuccessful job applications, applicants typically wish to learn why they had been rejected and/or what personal data was processed about them. The focus is particularly on:

- assessments;
- reference and background checks;
- internal evaluations;
- documentation generated by recruiting tools.

As a general rule, information regarding the personal data contained therein must be provided. Employers should therefore be mindful that **internal assessments** may also be subject to the right to information. Accordingly, it is advisable to maintain **professional and objective documentation**. Polemical or unnecessarily judgmental language creates avoidable risks – especially if the content must eventually be disclosed.

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## Clear processes significantly reduce risks associated with access requests.

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Prior to providing information, it must be examined whether any **restriction on the information to be provided is necessary**. Experience shows that access requests made by unsuccessful job applications rarely constitute an obvious abuse of the request. Rather, the primary considerations are overriding interests of third parties (e.g., where disclosure threatens to infringe on the privacy of third parties, such as in the case of an assessment or the provision of a reference) and, possibly, the employer's own overriding interests (e.g. confidentiality). Accordingly, it must be assessed on a case-by-case basis whether restrictions – such as redactions – are necessary and permissive.

**Clear internal processes** are likewise crucial:

- What data is collected?
- For how long are application documents retained?
- Who has access to application documents, both internally and externally?
- How are access requests handled?

**Retention and deletion processes** are of particular importance in this context. Application documents of rejected job applicants may only be retained for as long as the purpose of the processing requires. Given the possibility of complaints under the Federal Act on Gender Equality (**FAGE**), it is advisable to retain application documents until the three-month complaint period has expired without being used, and to delete them thereafter, unless the job applicant's consent or another ground justifies longer retention. Employers must ensure that appropriate deletion processes are in place and are also implemented in digital recruiting tools. The practice of maintaining lists of rejected job applicants (to facilitate recognition in the event of a new application), which is common in practice, is not permissible under both data protection and employment law and should therefore be discontinued.

## 4 Right to Information during the Employment Relationship

In ongoing employment relationships, access requests are **relatively rare**. At the same time, they are often less sensitive (e.g., with regard to the employer's potential confidentiality interests), as employees are subject to the duty of loyalty under employment law (pursuant to the Swiss Code of Obligations (**CO**)) and thus also to a duty of confidentiality. If an access request is nevertheless made, it is often connected to conflict situations, internal investigations, or performance evaluations.

Here again, information must generally be provided, whereas employers should assess the existence and scope of the duty to provide information on a case-by-case basis: For example, personal data contained in **documents relating to pending or ongoing investigations** may be withheld on the basis of the employer's overriding confidentiality interests. If the employee making the request is not themselves the subject of the ongoing investigation, but is merely involved in another capacity (e.g., as a witness), overriding interests of third parties may also preclude the provision of (unrestricted) information.

During the employment relationship, the following applies: Anything documented may be the subject of an access request. Personnel files should therefore be **maintained in a professional and objective manner**.

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## After leaving the company, access requests are often used strategically.

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## 5 Right to Information after Termination of the Employment Relationship

Following the termination of an employment relationship, the **number of access requests typically increases significantly**. In principle, information must be provided in these cases as well. However, such access requests often serve to prepare for eventual employment law disputes, such as those related to termination or salary and bonus claims.

When assessing the obligation to provide information, attention should be paid to whether the request may be considered **abusive**. Indications

thereof may include, for example, the access request being made in connection with the assertion of claims or an allegedly wrongful dismissal (such as occurring shortly thereafter or even in the same or a parallel communication). Abuse may further be indicated where the access request is formulated in very broad terms, lacks a discernible connection to data protection law, or relates to a period or event considerably in the past – which may constitute an impermissible “fishing expedition”. In such cases, depending on the specific circumstances, the access request may be refused on the grounds that it serves purposes foreign to data protection. If legal proceedings have already been initiated, the FADP does not apply (see above) and the access request need usually not be complied with.

If information is to be provided, it should be considered that former employees **are no longer subject to the duties of loyalty and confidentiality under employment law** with respect to information disclosed to them after termination of their employment

relationship. Where sensitive information or internal documents are disclosed, redactions or **additional protective measures** – such as confidentiality agreements – may therefore be appropriate prior disclosure.

## 6 Conclusion

Data subject access requests are becoming an increasingly common part of daily HR practice. This makes a structured and legally compliant approach all the more important. Clear HR and data protection processes, professional documentation, controlled communication, and an early legal assessment of access requests on a case-by-case basis are particularly crucial. This often allows access requests to be handled in a targeted, efficient manner without unnecessary escalation.



**Roland Mathys, LL.M. (LSE)**  
Partner  
[roland.mathys@swlegal.ch](mailto:roland.mathys@swlegal.ch)



**Jacqueline Brunner**  
Associate  
[jacqueline.brunner@swlegal.ch](mailto:jacqueline.brunner@swlegal.ch)



**Dr. Stéphanie Chuffart-Finsterwald, LL.M.**  
Partner  
[stephanie.chuffart@swlegal.ch](mailto:stephanie.chuffart@swlegal.ch)



**Vincent Carron, LL.M.**  
Partner, Certified Specialist  
SBA Labour Law  
[vincent.carron@swlegal.ch](mailto:vincent.carron@swlegal.ch)

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**Schellenberg Wittmer Ltd**  
Attorneys at Law

**Zurich**  
Löwenstrasse 19  
P.O. Box 2201  
8021 Zurich / Switzerland  
T +41 44 215 5252  
[www.swlegal.com](http://www.swlegal.com)

**Geneva**  
15bis, rue des Alpes  
P.O. Box 2088  
1211 Geneva 1 / Switzerland  
T +41 22 707 8000  
[www.swlegal.com](http://www.swlegal.com)

**Singapore**  
Schellenberg Wittmer Pte Ltd  
50 Raffles Place, #40-05  
Singapore Land Tower  
Singapore 048623  
[www.swlegal.sg](http://www.swlegal.sg)