



WINTERHAWK

Helping you prepare for GDPR
One step at a time



THE ‘RIGHT TO BE FORGOTTEN’

GDPR legislation introduced a fascinating new concept in to Data Protection laws: the so-called “right to be forgotten”. People latched onto it as one of the biggest and most interesting parts of the new legislation – not only because it is big and interesting, but also because it was misinterpreted from the start. People ranging from criminals to anyone who ever regretted an embarrassing social media post believed they could simply contact the entity in question and have all traces of their past actions immediately and permanently erased.

Of course, that’s not at all what the “right to be forgotten” is about. GDPR legislation goes a long way in protecting the rights and data of EU citizens, but the regulations must be seen as fundamental rights, not as absolute ones. This is an extremely important and key principle of Data Protection rules in general; while it sets a healthy baseline for how to govern personal data, Data Protection must always be weighed against other competing legislation and fundamental rights. Often, there are legal requirements to keep or archive data: in accordance with document retention requirements for financial transactions, or for employee payroll and/or pension records. An individual does not have the right to request the erasure of all traces of themselves in such scenarios, because other laws for retaining



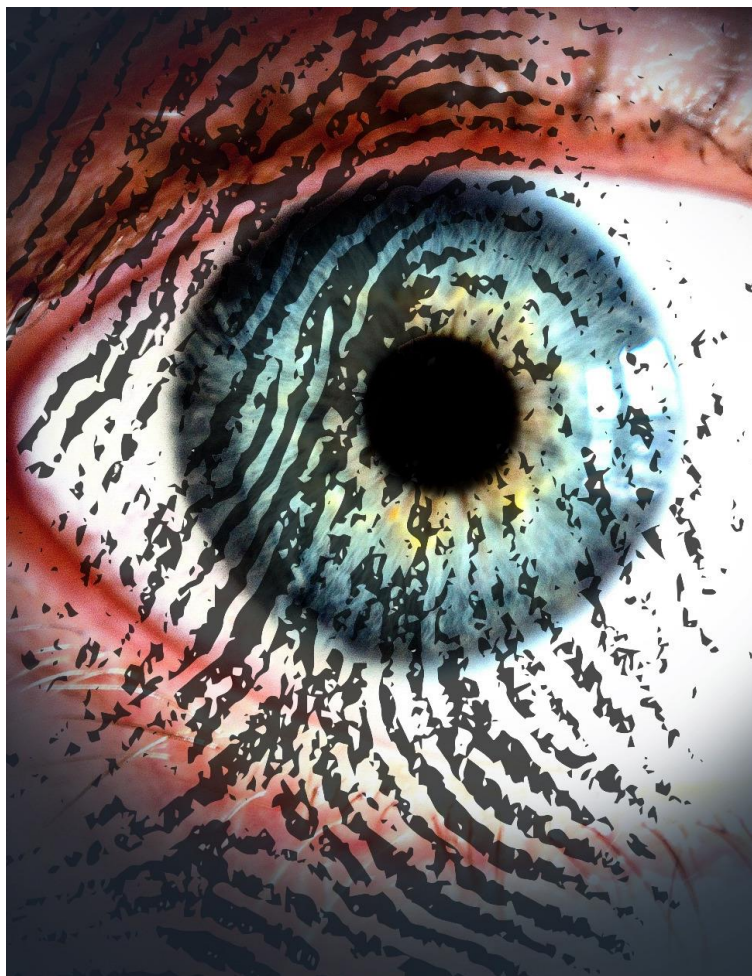
those records will take priority over GDPR, nor can someone who has acted in a formal capacity as an officer or representative of a company have their personal data removed from the official record. An organisation may have an obligation to protect that data or possibly supply it (upon a Subject Access Request), however they do not necessarily have an obligation to remove it. To the contrary, they will likely be compelled to keep it in some cases, in accordance with document retention requirements.

Similarly, information that is in the public’s interest or a matter of public record will often not be fully protected by the “right to be forgotten”. Crimes committed, for example, are both a matter of public interest and official record, and an individual’s right to privacy will not always outweigh or overrule those facts. In the infamous Google case (*Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014)), the Advocate General

pronounced that the “right to be forgotten” was secondary to the Rights of Freedom of Information and Expression (i.e. the media and/or public interest), and that the plaintiff had no right to erasure of the data in question. This does not mean that irrelevant or unnecessary data can simply be published in the general interest of the public, but rather that these things would have to be considered on a case-by-case basis. Ultimately, the final ruling declared that these competing rights should be weighed against each other.

The legislation does not exist to erase a criminal past or to minimise the public profile of well-known persons or celebrities. Nor does it exist to erase all evidence of ordinary individuals in all scenarios simply because they ask for it. The question remains then, what is the purpose of the “right to be forgotten” if not to force the erasure of data upon request? It still has an important role to play in the new legislation, as long as we understand its intent.

It is about making companies understand how to handle personal data once it no longer serves its lawful purpose and there is no longer a legal reason to store it.



Some examples:

- Criminals might not have a right to request Google to remove all traces of their existence, but they can at least request that the information be dealt with in a fair context and that unnecessary data is not presented as a first “hit” from the search engine.

- You probably cannot require a former employer to remove your name from all financial transactions with your name on them, but via a Subject Access Request they may provide you with all of the personal data they have on you. You can then request that they eliminate anything no longer relevant for legal or document retention purposes.

- You will not be able to remove yourself from the transaction history of an online retailer you have made purchases from, but you can withdraw your consent to be contacted regarding marketing campaigns.

- Celebrities and public figures will likely never be able to remove all traces of their personal data from media or other search engine sources, but they can insist that personal information (home addresses, national ID numbers, phone numbers, etc.) be protected and/or removed from records wherever possible, as that likely pushes past the boundaries of Freedom of Expression and the public interest.

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