Data Management and ethical challenges for open schools: Legal & GDPR issues with examples

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Part II (legal)

Open Classroom conference 2021

Saturday 23/10/2021

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Introduction to the legal part (I)

- Legal aspects of data management for open schools: GDPR.
- GDPR applies to any information that relates to the students, not only name, address etc. Anything that can be linked is personal data and needs to be treated with care!
- In particular, the GDPR requires extra attention and care for data relating to children/minors, so of extra importance for schools (and by extension teachers).

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Introduction to the legal part (II)

- In addition, use of cameras and video, posting pictures etc. is a hot topic. This will be discussed as well.
- The information is aimed at school leaders (school as organization controlling the data processing under the GDPR) but also at teachers. Both need to be aware of the sensitivities. School management should provide guidelines.

- APPROACH: first some basic principles explained (part I), then some use cases to illustrate the importance and how to implement (part II).

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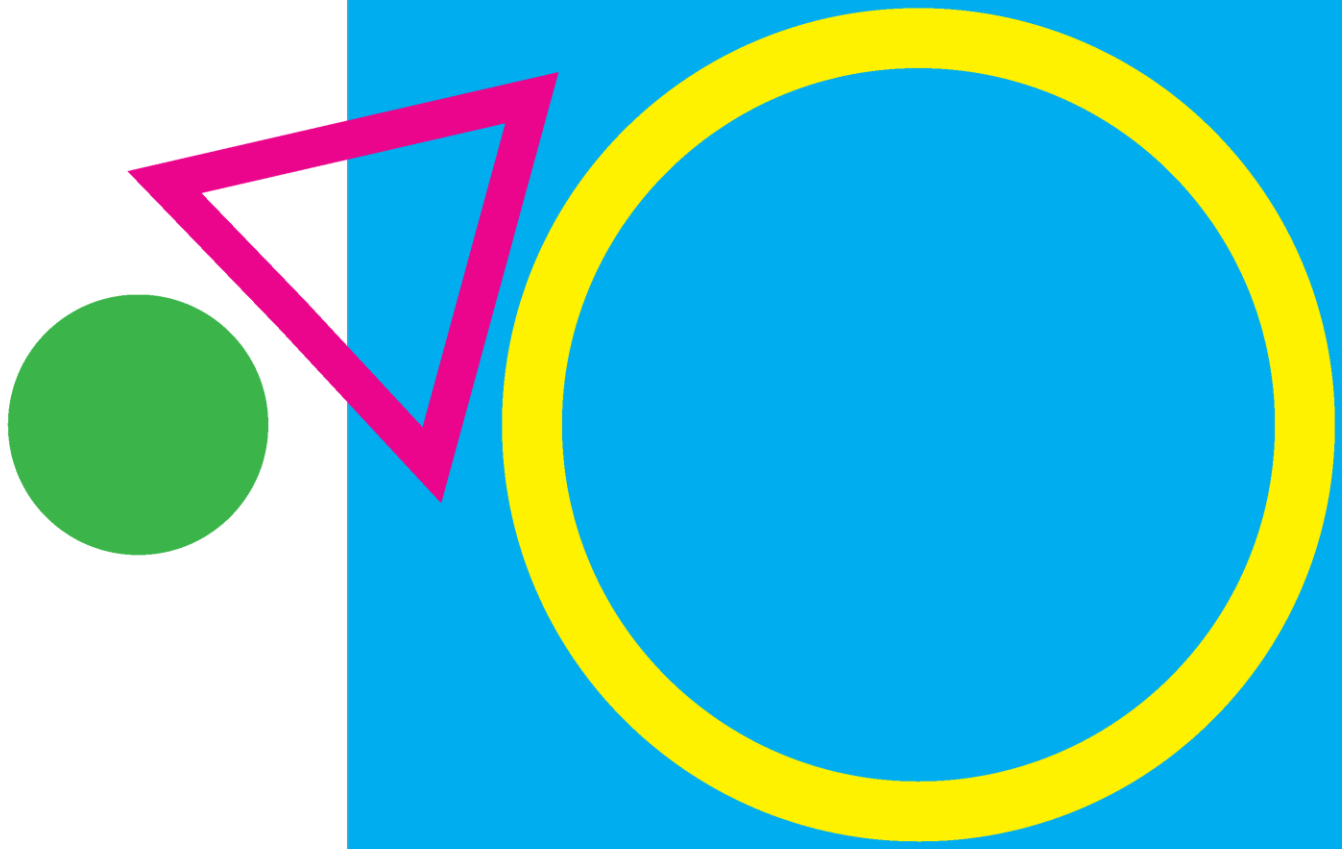
PART I: principles



Personal data: what is it?

- Any information that relates to a person that is identified or can theoretically be identified.
  - Examples of data that can directly identify a person: name, contact details, address.
  - Examples of data that cannot directly identify, but are still personal data: IP address used, an opinion expressed (even if name is not mentioned), an answer to a questionnaire (even without name), the answers of a child to a test (even without name).
- Why is a questionnaire taken in class without a name still personal data? Is this not simply anonymous?
  - Child may be recognizable by means of the answers given. Or the teacher may know who filled out which questionnaire, even if not written down.
  - The fact that someone could identify the person (even if they do not), make this personal data. Not only for the teacher or parent, but for everyone who receives, sees or uses that information!
  - Extremely broad concept. Not an issue, GDPR does not limit that you can use this. Just have to play by the rules.
  - But: GDPR does not apply to just asking the class their opinion if not recorded/written down!

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Principles of data management under the GDPR

- Lawfulness, transparency and fairness:
  - Respects the law and all applicable rules and guidance (lawful).
  - There is clear information (to parents, but ALWAYS also to children, about what data is used and why).
  - Fairness: the use of information can be expected by the children and their parents.
- Purpose limitation:
  - When information is gathered, it is clarified for what this will be used. The information is then not used for other reasons. Children and parents must be informed about what information will be used for when it is gathered (transparency).
  - Exception: compatible use. If there is a linked purpose to use information anyway it may be re-used (e.g. parents give email address for information about school trip. Same email can be used to provide updates or to inform that the trip is cancelled). If not sure: ask consent.
- Data minimization: only use the data that you really need. Do not gather information that “may be useful”.

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Principles of data management under the GDPR (2)

- Accuracy:
  - try to keep data accurate and respond to requests for corrections, but always check. Changing data without checking can be a breach of GDPR (e.g. someone with malicious intent pretends to be parent, sending information to this person is a data breach).
- Storage limitation:
  - Only keep information for as long as you have a good reason to do so. Use objective factors (legal obligation, operational need) to justify this.
  - Keep an overview of the data you have and delete old data when no longer relevant.

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Principles of data management under the GDPR (3)

- Integrity and confidentiality:
  - Keep data secure, make reasonable efforts (good passwords, regular changes in passwords, no sharing passwords, 2FA with phone, don't keep passwords in the open on paper, lock files cabinets, lock offices, etc.
  - Make sure that within the school only people who NEED to know have access to certain information, especially when sensitive. Pay special attention to access rights in online folders.
- Accountability:
  - You need to be compliant AND be able to prove it!
  - Keep documents, paper trails, proof of your compliance (e.g. parental consent not orally, but written; if you give information to children make a note that this happened, etc.)

- Principles are ALWAYS applicable.

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Some other GDPR basics

- Legal grounds: when using personal data, you need a legal ground ("permission") to do so.
  - For schools:
    - Often consent, for activities that are not obligatory/not necessary strictly speaking to provide education.
      - E.g., participation in a project.
      - Answering a questionnaire.
    - For essential things to teach and run the school: public task.
  - Other legal grounds exist such as:
    - Legal obligation.
    - Contract.
    - Legitimate interests of the controller.
  - So, no need to ask consent when another ground exists, e.g. for:
    - Administration (public task, legal obligations, contract).
    - Reporting to governmental agencies (public task, legal obligations).
    - Taking obligatory tests (public task, legal obligations).

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Some other GDPR basics (2)

- Special categories of data:
  - Sexual orientation or preference, racial or ethnic origin, political opinion, religious or other beliefs, health data, biometric data.
  - In principle forbidden, only when explicit consent exists, manifestly made public and is needed (data minimization) or legal obligation (example in Greece of law that was not in compliance with GDPR).
  - Be very careful with this, try to avoid it!
  - However: there is an exception for research, so there is a possibility for students to reveal such information in the course of participating in a research project (e.g. RAYUELA).

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Some other GDPR basics (3)

- Consent of children depends on the situation (online services or not, different age limits apply usually) and the age of the child.
- If the child cannot give consent, then parents need to do this. If asking for parental consent, assent by the child is a good idea, depending on the age.
- Consent needs to be freely given (so not for obligatory things), specific and granular (not vague and broad), informed, and given by a clear affirmative action.
- When relying on consent, the data subject is still the child, and the child has a right to information. ALWAYS. Both when the child is asked to consent itself or when parental consent is used.
    - Use information methods appropriate to the age of the child.
    - Do not just inform the parents and neglect the child.

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GDPR + : camera use, video, pictures

- What about the use of camera, video, pictures (sharing on the website, social media, etc.)
- This is GDPR related: typically consent will be needed here (parental and assent or consent of the child).
- In addition: right of image. There is no EU harmonized law on this, but best practices can be identified.
  - Using images should always be optional (based on consent (parental + assent or the minor's, depending on age).
  - There should be consent for the taking of the image, and specific consent (with information) for every use. This means that: putting a picture on the website, sharing on social media, using it in the school paper, etc. each require specific mention and consent.

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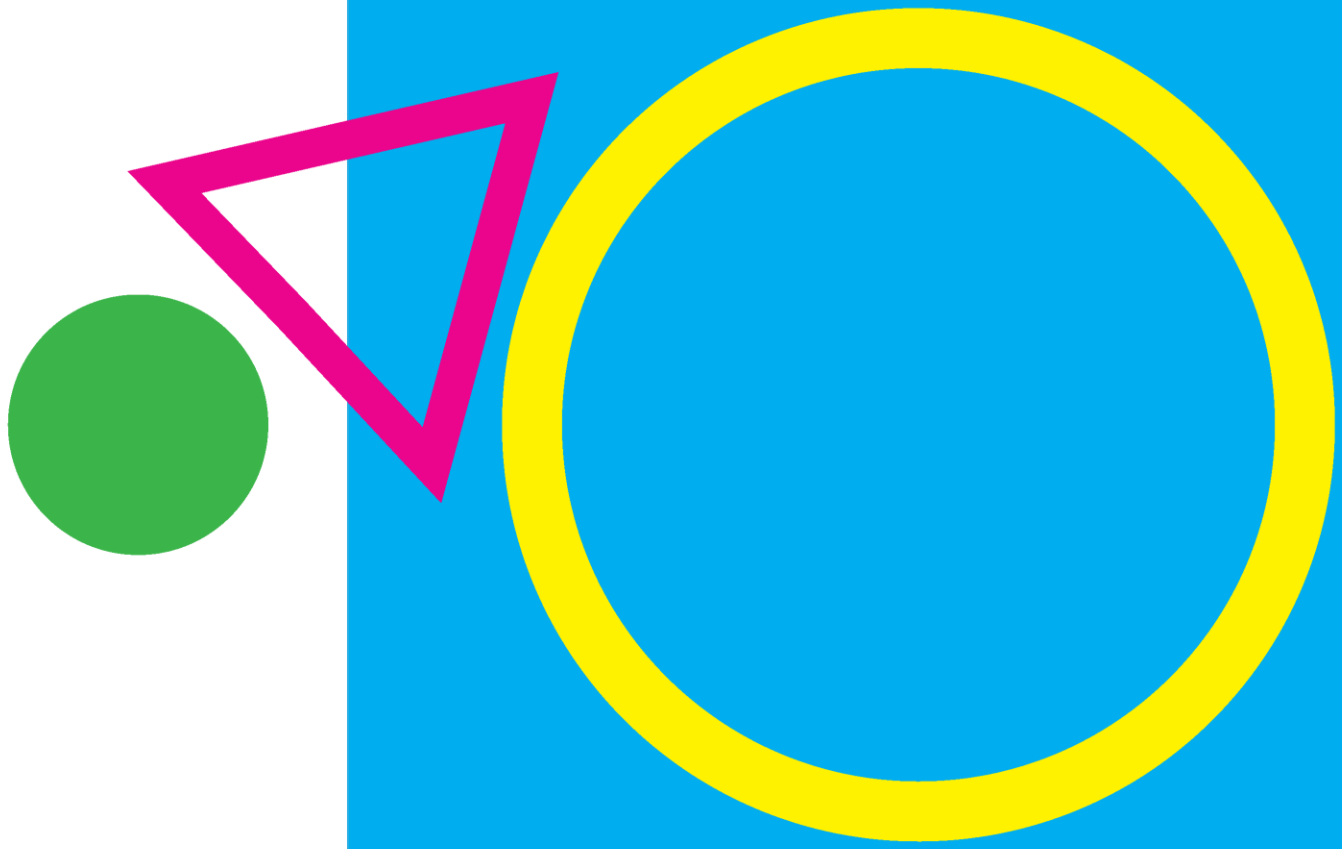
PART II: examples



Example 1

- Q: Teacher creates content in the classroom. He/she wants to share this with other teachers. The data involves some photos and personal data. He/she also wants to share some pictures of the classroom activity on social media. What can be shared?

- Best practice is that for sharing photos and information, there is consent. This means that the children and parents have been informed. If this is not the case, try to remove personal data and photos before sharing.
- Better to share only non personal data. Findings, methodology, fictious examples etc.

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Example 2

- Q: Teacher wants to conduct a small survey in the classroom to have better information about the interests of students, and the issues etc. What does he/she need to consider?

- This should be based on consent and not be obligatory (parental + assent or consent based on age). Information must be given about what the surveys will contain and what the information will be used for.
- If this is regular, one consent at the beginning of the year could suffice.
- Only ask for information that is needed. Don't keep it longer than needed. Don't reuse this information for other purposes that what you said initially. If you want to do this anyway, you have to ask consent again!
- Make sure this information is confidential (rather than "anonymous"). Consider how to do this securely (on paper, vs. the use of online tools).
- But: what about simple oral questions to students?

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Example 3

- Q: A school wants to cooperate in a project (e.g., in RAYUELA) with its students, which involves a classroom activity and testing of tools. What aspects does the school need to consider?

- Again, the involvement of students needs to be voluntary and based on consent. This is a good starting point. Opt-out must be possible.
- The school also needs to check:
  - That the project will indeed ask for consent, and in an appropriate manner. This includes proper information.
  - What data will be involved (not more than needed, if sensitive is this justified?) and what it will be used for (purposes), with whom it will be shared, how long it will be kept etc. In particular, whether this is fair, acceptable and foreseeable for the children involved.
  - How the project will guarantee confidentiality and security of the information.
  - Whether the project can guarantee data subject rights (e.g. child wants to withdraw consent, is there a procedure?).

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Example 4

- Q: teachers want to use online tools for teaching. Or given the corona situation, online tools are the only option. Same for virtual/online visits etc. Can this be made obligatory and what to think about?
- Distinction to be made between:
  - Situation where the use of online tools is necessary for the school to fulfil its public task of teaching and running the school (e.g., Corona situation, needed to be able to provide education at all). No consent needed in this case.
  - Situation where an online tool is used for optional activities (e.g., virtual school visit), consent is the best option in this case, so opt-out should be possible.

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Example 4 (continued)

- In both cases:
  - Schools must make sure to pick reliable, safe and secure solutions.
  - Using online tools should not lead to excessive additional data gathering (data minimization applies, only gather what you need), or to keeping data longer, or to using it for new and other purposes (if this is intended, consent should always be asked).
  - If extra data is gathered and used by the school, this should be made clear (transparency) and should be fair.
  - Schools should also make sure to do their due diligence on what information the platform may use for its own purposes and make sure to inform about this as well. The children and parents should not be demanded to do this for themselves.
  - Video options should as best practice be based on consent, not forced (so child is free to use this or not).
  - Sharing of video and images (e.g., “group photo” with everyone’s cameras on, to share on social media) should be based on consent as well, just as in real life.

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Example 5

- Q: Teacher wants to keep records on their students and apply a holistic approach to their development. Out of good intentions, the teacher makes some notes that contain gender identity, some health data, etc. and shares this with other teachers.

- Keeping a performance record and gathering related information on students may be needed to carry out the public task of teaching. In most countries, procedures for recording and reporting are in place, that define the fields of data that need to be gathered. There is no reason to ask for consent for this, this has another legal ground (public task). Keeping additional records may not be as easily justified under this public task reason and should be avoided.
- Keeping additional records becomes particularly worrisome when sensitive elements are involved, especially special categories of data. Such data should as a rule not be processed, unless specific legal obligations apply.
- However: the GDPR applies to structured processing of data only. It does not prevent teachers from speaking to students and knowing certain relevant elements, or orally sharing information with colleagues in confidence. It should however not be mentioned in reports, or overviews of sensitive elements should not be kept and shared.

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Presentation by **Pieter Gryffroy**, **Timelex** (www.timelex.eu) in the context of the RAYUELA project (https://www.rayuela-h2020.eu/).

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