



# Data Breach Incident Plan: Legal Counsel's Role

**Name:** Maria Raphael  
President, European Association of Data Protection Professionals (EADPP), Cyprus Branch  
Board member of EADPP

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## SUMMARY

- European Association of Data Protection Professionals (EADPP)
- Incident Response Plan and Team
- Legal Professional Privilege
- In-house legal Counsel's role
- Outside Legal Counsel's role
- Practical advice for Legal Professional Privilege
- Data Protection Officer's Role

# 1. EADPP General Information

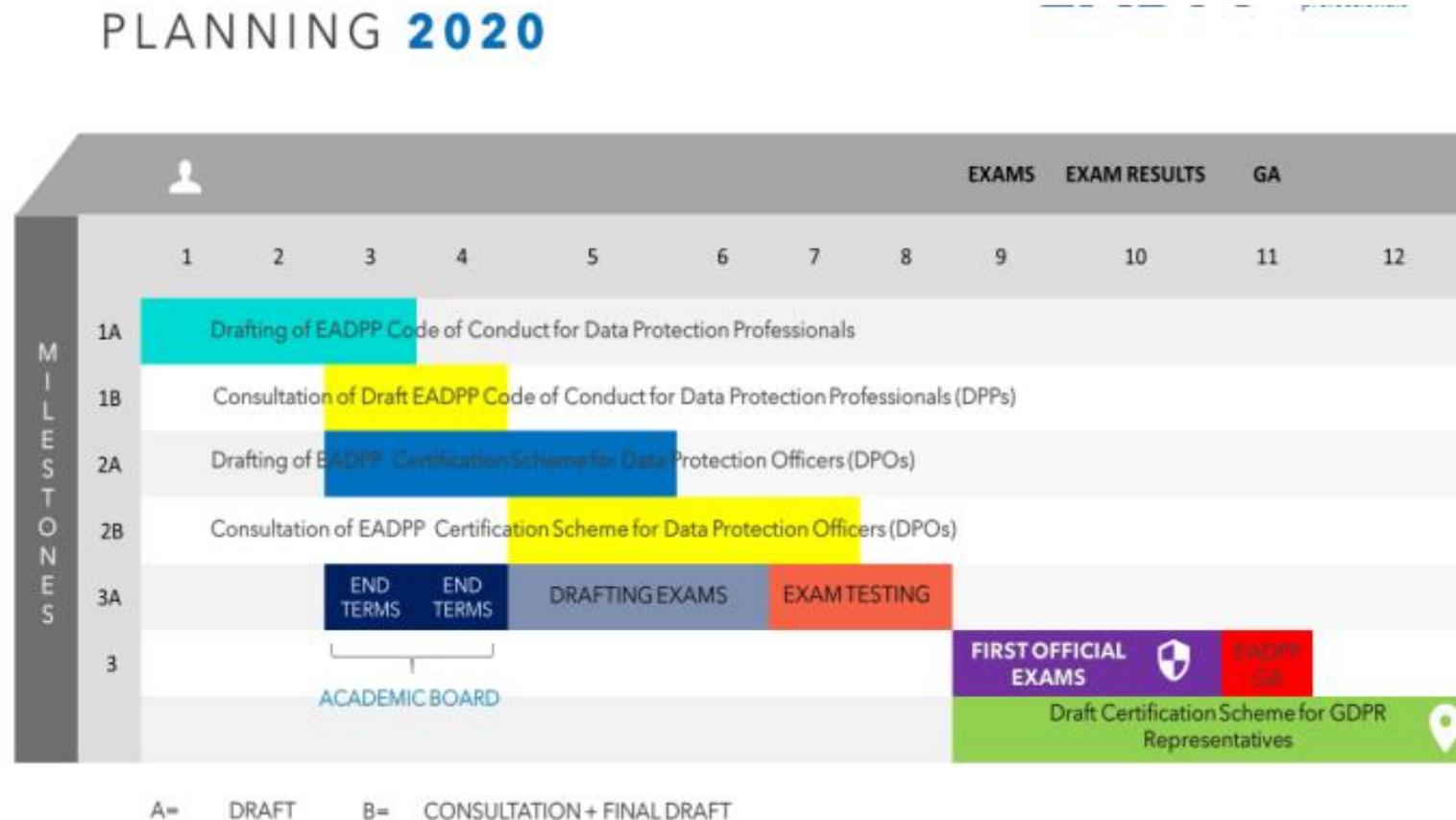
- **November 28, 2018:** Foundation of the European Association of Data Protection Professionals (EADPP) in Maastricht, The Netherlands
- **Primary Aims:**
  1. Facilitating, organizing, structuring, and representing Data Protection Professionals (DPP) who implement the European Privacy Law in and outside the EEA
  2. Representing the DPP at the European Institutions engaged in the field of personal data protection (e.g. European Data Protection Board)
  3. Creating a European code of conduct
  4. Creating a European and independent EADPP certificate for data protection professionals practicing in and outside EEA.

## 2. Representation

- the EADPP consists of approximately 1,100 members, spread across all EEA Countries
- **November 15, 2019 (1<sup>st</sup> General Assembly):** Elections of the Board Members and 25 members of the 4 Committees
- Representation of the EADPP in 18 Member States via national branches

# 3. Certification

The EADPP has planned to realize the first certifications of DPOs in the third quarter of 2020 according to the schedule below.



## 4. Become a member

Join in: <https://www.eadpp.eu/sign-up/>

Annual subscription fee € 60

For further information:

- <https://www.eadpp.eu>
- <https://www.linkedin.com/company/european-association-of-data-protection-professionals/>
- EADPP Greek Branch: [greece@eadpp.eu](mailto:greece@eadpp.eu)
- EADPP Cyprus Branch: [cyprus@eadpp.eu](mailto:cyprus@eadpp.eu)

## 5. Types of personal data breaches

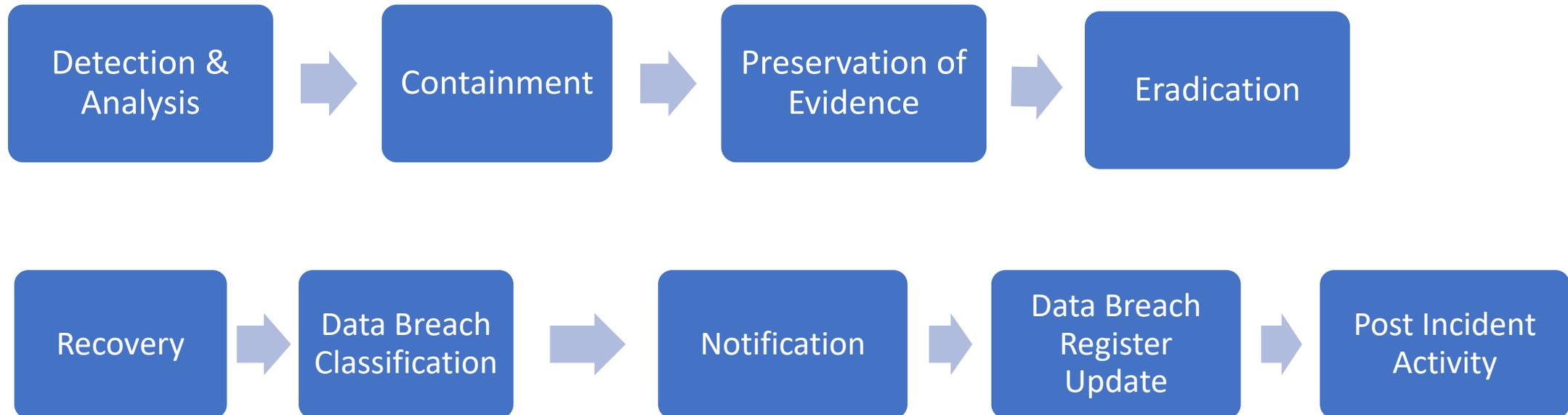
1. Confidentiality breach
2. Integrity breach
3. Availability Breach

## 6. Adverse Consequences

- Inability to access data
- Litigation exposure
- Reputational Liability
- Regulatory scrutiny
- Underlying cost when addressing an incident
- Potential loss of Revenue (Fines/Loss of existing and potential business/Damages paid to Affected Individuals/ Increase of insurance premiums)

## 7. PERSONAL DATA BREACH INCIDENT RESPONSE PLAN

*What will the company do, when prevention fails?*



## 8. INCIDENT RESPONSE TEAM (IRT)

1. Information Technology
2. Information Security
3. In-house Legal Counsel
4. Outside Legal Counsel
5. Marketing
6. Business Development
7. Human Resources
8. Communications and Public Relations
9. Union Leadership
10. Finance
11. Insurance
12. Management
13. Customer Care

## 9. Legal Counsel's Involvement in IRT

### Goals:

- Safeguarding and enhancing the confidentiality of information during incident response and investigations
- Retaining the choice to waive the right for privilege
- Focus on dealing with the incident
- Achieving strategic goals and safeguarding the company's best interest

## 10. Legal Privilege in Greece

- Article 8 of the ECHR
- Article 19 of the Constitution (confidentiality of letters, correspondence & communication)
- Article 38 of the Greek Lawyers' code: **“Confidentiality and Confidence”**
  - “The lawyer should keep in confidence anything entrusted to him by their clients at the time of their engagement as well as in the course of the execution of their client’s mandate or whatever comes to their knowledge while dealing with their client’s cases.”
- Articles 261, 263 of the Penal Procedure Code: **“Confidentiality and non-seizure of written communications”**
- Legal Privilege’s implementation in the communications with in-house Counsel (with exceptions)

**“Once privileged, always privileged”**

# 11. When in doubt, instruct an outside Legal Counsel

## **Cyprus**

- Professional secrecy obligation
- Applicable to in-house counsel

## **Germany:**

- Professional secrecy obligation
- Non-applicable to in-house counsel

## **Italy:**

- Legal Professional Privilege
- Non-applicable to in-house counsel

## **Spain:**

- Professional secrecy obligation
- No distinction between in-house and external counsel

## **United Kingdom**

- Legal Advice Privilege/Litigation Privilege
- Applicability to in-house counsel for legal and not commercial advice

## **United States**

- Attorney-client legal professional Privilege /Work product doctrine
- Applicability to in-house counsel: Control group test, subject matter test

## 12. In-house Counsel's role in Incident Planning

- Assessing disclosures of prior incidents and material risks;
- Drafting and testing the company's incident response plan;
- Facilitating employee training and tabletop exercises;
- Drafting or reviewing vendor contracts with external incident response consultants;
- Ensuring the adequacy of insurance coverage;

## In-house Counsel's role in Incident Response

- Swift participation from the moments of incident's initial identification to post-breach activity
- Master of all communications: Monitors and approves internal and external lines of communication to regulatory bodies, subjects, data subjects, media, law enforcement and ensures consistency and accuracy)
- Making sure that post-breach response is on track and that all key decisions are made in a timely manner
- Advising on how arrangements and communications can be structured in order to protect attorney/client privilege throughout the investigation
- Providing on-going legal advisory support

- Assessing potential litigation and regulatory implications
- Advising on whether the incident classifies as a breach
- Advising on notification requirements (are you required to notify, who must be notified, when must affected parties be notified, what must you tell them)
- Assisting in drafting or reviewing any required notifications before they are released
- Ensuring appropriate evidence preservation;
- Conducting witness interviews;

## 13. Outside Legal Counsel's Role

- Provision of advice for need to notify Supervisory Authority and Data Subjects
- Taking over the company's representation before the Supervisory Authority or the Court or on communication with data subjects
- Safeguarding the confidentiality of information, communication and documents
- Orchestration and direction of internal and external communication in order to safeguard the attorney-client-privilege
- Retainment and direction of third -party experts, such as forensic experts in order to protect attorney-client privilege of communication to or by the experts
- Receiving all incident reports (initial, draft and final )

## 14. Practical Advice to Safeguard the Legal Privilege

- Immediate communication with outside Legal Counsel
- Recording the reasons for contemplating legal proceedings
- Internal and External communication orchestrated and directed by Legal Counsel
- Defining individuals responsible for managing instructions and receiving advice
- Three-party agreements between company, outside Legal Counsel and external consultants by which Legal Counsel will retain external consultants

- Labeling the communications and documentation: “Directed by Counsel”, “Legally Privileged and Confidential” , “Prepared at the Direction of Counsel”, “Attorney Work Product”.
- Restricting the dissemination of privileged documents to circumstances in which it is strictly necessary
- Restricting the written communications
- Separation of Legal and Commercial Advice
- Legal Context
- Drafting reports to be Directed and Received by Legal Counsel or Drafted by Legal Counsel

## 16. Data Protection Officer

### **Prevention of breach and preparation for the Breach**

- Providing data protection advice and information
- Monitoring compliance with the GDPR

### **During a breach and any subsequent investigation by the Supervisory Authority**

- Cooperation with the supervisory authority
- Contact point for the supervisory authorities and for data subject
- Opinion as to the structure, the setting up and the administration of the documentation of breaches
- Maintaining records of documentation



Maria Raphael is the co-founder of Privacy Minders ([www.privacyminders.com](http://www.privacyminders.com)), based in Larnaca, Cyprus and a director and shareholder in the law firm, I. Frangos & Associates LLC ([www.frangoslaw.com](http://www.frangoslaw.com)).

Maria is a Certified Information Privacy Professional /Europe (CIPP/E). As of November 2019, she is the Chair of the Cyprus Branch of the European Association of Data Protection Professionals (EADPP). She is also a Board member of EADPP and the Chair of its EADPP Strategy & Policy Committee.

Maria has been certified by the Human Resource Development Authority as a trainer of Vocational Training.

Maria graduated in Law from the Aristotle University of Thessaloniki and holds a Master's degree (LL.M.) in Criminology and Criminal Justice from the University of London, as well as a Postgraduate Diploma in Common Law and a Postgraduate Certificate in International Criminal Justice.



**[www.frangoslaw.com](http://www.frangoslaw.com)**

**[maria@frangoslaw.com](mailto:maria@frangoslaw.com)**

**Tel: +357 24 81 25 81**

**[www.privacyminders.com](http://www.privacyminders.com)**

**[maria@privacyminders.com](mailto:maria@privacyminders.com)**