

## Comments on the draft Guidelines 01/2022 of the European Data Protection Board

*This paper exclusively reflects the views of its author.*

On 28 January 2022, the European Data Protection Board published its draft Guidelines 01/2022<sup>1</sup> “on data subject rights - Right of access” (hereinafter referred to as Draft Guidelines or Draft).

Although the Draft Guidelines are a noteworthy attempt to give guidance on this issue, the Draft itself is quite lengthy with lots of redundant text (it is, therefore, boring read), with some requirements that overcomplicate the process (e.g. the way in which access requests should be handled within the organisation of the controller), and with some questions where the Draft is, seemingly, controversial or theoretically not fully justified. Without claiming completeness, here are some issues.

### **1. The relationship between the right of access in GDPR and in other (sectoral) laws regulating access to documents**

Reading the Draft, one can feel an uncertainty with the issue of the relationship between the right of access (as per GDPR) and other (sectoral) laws regulating access to documents. It is worth mentioning that this issue has already emerged in the practice of courts as well: for example, the Berlin District Court holds that Article 15 of the GDPR does not intend to reverse the fundamental structure of German civil procedural law,<sup>2</sup> in other words (in my understanding), German civil procedural law, to some extent, prevails over the GDPR.

Looking at this issue from broader perspective, the question to be answered is whether a (sectoral) law regulating access to personal data (in a broad sense) should be interpreted as restriction of the right of access in accordance with Article 23 of the GDPR or as a *lex specialis* that prevails over the GDPR. The EDPB Guidelines 10/2020 on restrictions under Article 23 GDPR do not provide any guidance on this issue, and the Draft itself vacillates in this regard:

- a) on the one hand, for example, the Executive Summary states that “*controller must assess ... whether the request falls within the scope of Art. 15 and whether there are other, more specific, provisions that regulate access in a certain sector*”, and paragraph 47 states that “*if the data subject[s] request is based on sectoral legislation or on national legislation regulating the specific issue of access to certain categories of data, and not on the GDPR, such a request shall be exercised by the controller in accordance with such sectoral or national rules*”. This approach indicates that these sectoral laws are not considered as “restrictions” to the GDPR as per Article 23, but that they regulate the same issue in different way, i.e. sectoral laws are *lex specialis* and therefore prevail over the GDRPR;

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<sup>1</sup> See at the following link [https://edpb.europa.eu/system/files/2022-01/edpb\\_guidelines\\_012022\\_right-of-access\\_0.pdf](https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf)

<sup>2</sup> See Dr. Carlo Piltz’s post at [https://www.linkedin.com/posts/dr-carlo-piltz-631571b\\_gdpr-dsgvo-dataprotection-activity-6882314059753037824-UzFY/](https://www.linkedin.com/posts/dr-carlo-piltz-631571b_gdpr-dsgvo-dataprotection-activity-6882314059753037824-UzFY/)

- b) in contrast, other provisions—for example footnote 7, paragraphs 13 and 49—refer to different rules regulating the access to personal data in a way other than Article 15 as restrictions to the GDPR; therefore, Article 23 should apply.

These two approaches cannot be reconciled; therefore, the Draft should take a clear stance by taking also into account the unity and coherence of the legal system and the fact that (the right) approach under point a) above means that the material scope of the GDPR should be carefully reconsidered (considering, inter alia, the opinion expressed by the Berlin District Court, as cited above).

## **2. The issue of identifying the requester**

In a lengthy way, the Draft explains (cf. chapters 3.1.3, 3.2, 3.3) how the requester should be identified. Seemingly, the Draft intends to reduce the possibility of requesting additional identifying information, including formal identification (for example, identification by using ID cards and other documents and, *horribile dictu*, making copies of such IDs). One could have the feeling that the Draft pushes data controllers in the direction of choosing the risks of misidentification or incomplete identification of the data subject rather than not complying with the data subject's request. Moreover, it seeks to deter data controllers from formal means of identification (see, for example, paragraph 73).

However, it should be borne in mind that the disclosure of personal data to a misidentified (i.e. unauthorised) person may constitute unlawful data processing and may even constitute data protection breach (in the sense of the provisions of the GDPR), i.e. violation of the GDPR on multiple counts.

On the other hand, precisely for the above reasons, it is a justifiable position that, in the case of an access request, not only a clear verification of the applicant's identity may be required (e.g. by requesting presentation of official documents, or even requesting in-person appearance at the controller) but also the justification of the requester's relationship with other identifiers (e.g. username that is used for identification when using the services) may be required. Requesting and storing copies of IDs, contrary to what the Draft states (for example, in paragraph 78), is not infringement of the GDPR but complies with it, given to Article 5(2). Further, the evidentiary power of a statement such as "ID card was checked" compared to the copy of the ID card should be reconsidered (cf. paragraph 78).

## **3. Protection of internal processes of a controller**

The attitude of the Draft to the issue of handling data in internal processes is quite controversial. The Draft cites the Nowak-case (which is, honestly, an out-of-touch CJEU judgement) but also refers to Recital 63 and Article 15(4) as restriction to the right of access. Unfortunately, the Draft does not give a coherent approach nor does it conclude that—based on Recital 4 and 63, as well as on Article 15(4)—not only "trade secrets" and "intellectual property", but business secrets in a broader sense, and even the internal discussions of an organisation also deserve protection [and the *model* for this could be the provisions of the Regulation (EC) No 1049/2001 – cf. Case 386/2021/AMF of the European Ombudsman].

It is also worth mentioning that the Draft cannot give a clear guidance on how to separate the access to “personal data in the document” from the access to “document” as such. If, based on the Nowak-case, the entire document is practically “personal data”, there is no distinction between “personal data in the document” and the “document”. For example, in the case of a legal analysis (cf. paragraph 94), the legal analysis is tailored to the facts (i.e. to the personal data used), and, therefore, the legal analysis also relates to the data subject.

#### **4. How to handle data subject requests**

Instead of a casuistic approach (i.e. trying to go into the details of which group of employees may or may not be considered as competent to deal with data subject requests—cf. Chapter 3.1.2), the Draft should make it clear that, based on Article 24, it is the responsibility of the controller to establish a suitable internal process that makes sure that the data subject requests reach the “competent” person irrespective of the data recipient. By the way, establishing such an internal process and *“introduce[ing], where possible, mechanisms to improve internal communication between employees on requests”* (cf. paragraph 55) are not a “good practice” but a legal obligation resulting from Article 24 of GDPR.

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In sum, the Draft Guidelines discusses a complex problem but fails to give comprehensive and coherent solution to the issue of right of access.

Zsolt Bártfai