

To: European Data Protection Board

From: Montae & Partners

Date: March 11, 2022

Concerning: Comments on the "Guidelines 01/2022 on data subject rights - Right of access"

1. Introduction

Montae & Partners (MP) kindly welcomes the opportunity to comment on the "Guidelines 01/2022 on data subject rights - Right of access" as published by the European Data Protection Board (EDPB) on January 28, 2022.

MP is an independent company that advises pension funds, employers, work councils and entrepreneurs on a wide range of, amongst others, pension related issues. Therefore, it is imperative for MP to use this opportunity to respond to these guidelines in order to inform the EDPB about the implications of these Guidelines for our clients, based on our experiences with the GDPR up until now.

In the following, MP will address a number of questions regarding the guidelines that are of importance to MP and its clients. With this response, MP strives to enable the EDPB to provide further guidance.

2. The right of access is not always necessary to verify lawful processing

The overall aim of the right of access is to provide individuals with sufficient, transparent and easily accessible information about the processing of their personal data so that they can be aware of and verify the lawfulness of the processing and the accuracy of the processed data (para. 10 Guidelines). MP acknowledges the importance of the right of access to establish the correctness of the personal data processed by the controller. However, to establish the lawfulness of the processing of data will in a number of cases be sufficient to provide the data subject with the documents which serve as the legal basis for processing.

In The Netherlands participation in an industry wide pension funds is in most cases legally required by the Wet verplichte deelneming in een bedrijfstakpensioenfonds 2000 (Law on the obligatory participation in an industry wide pension fund 2000). Personal data is in these cases lawfully processed because both controller and data subject are legally obliged to comply (art. 6 (1) sub c GDPR). Even if there is no legal obligation, participation in a pension scheme results from the labor agreement between the data subject and its employer. Processing of the personal data is then necessary for the performance of a contract to which the data subject is party (art. 6 (1) sub b GDPR). In both cases, the legal base for lawful processing of the data subjects personal data cannot be derived from the personal data processed, but is to be found in (legal) documents. Providing the data subject with its personal data processed by the controller will therefore not contribute to the data subjects ability to establish the lawfulness of the processing.

Para. 13 of the Guidelines states that the controller is not allowed to assess the goals ('why') the data subject is trying to achieve by exercising its right to access. According to us, determining these goals can actually help to provide the data subject with the necessary information to achieve them and prevent the data

subject from receiving excessive data which, in effect, requires unnecessary additional effort of the controller. For this reason we ask the EDPB to allow controllers to ask data subjects whether they want to a) verify the lawfulness of the processing and / or b) understand how their personal data is being processed or verify the accuracy of their data. If the EDPB grants this request, we also ask to give guidance on which data to provide to the data subject if he/she only wishes to verify the lawfulness of processing. Is it sufficient in these cases to provide, or refer to, the legal documents that provide the basis for the processing or should further information be given?

3. Requesting the data subject to specify the request

Pension funds process large amounts of personal data over a long period of time. If a data subject requests access to its personal data in general terms this could mean the controller has to provide a large quantity of information that the data subject is not interested in or cannot handle. The controller may then request the data subject to specify the information or processing to which the request relates before the information is delivered (para. 35 Guidelines). However, according to the Guidelines this is only to be done in exceptional situations and the request for specification shall not aim at a limitation of the reply to the access request.

In our opinion the Guidelines contradict itself on this subject. Information should be provided in a way that is easily accessible and understandable to the data subject. A request for specification is in itself meant to help the data subject, as it enables the controller to understand the data subjects goals and thereby effectively handle the requested data. This allows the controller to help the data subject to achieve his/her goals, provided that it does not unnecessarily limit the data supplied to the data subject. Therefore, in our opinion a request for specification should be allowed in all cases.

4. Layered information

The Guidelines state that the main modality for providing access is to provide the data subject with a copy of their data. When the amount of data is very vast and it would be difficult for the data subject to comprehend the information if received in one bulk, the most appropriate measure could be a layered approach.

Pension funds process large amounts of personal data. Data subjects often participate in pension schemes for a long period of time, which results in a large number of mutations in the personal data processed. This means the data subject would receive a vast amount of information upon a general request, even if presented in two layers.

We therefore ask the EDPB to specify:

- a. in more detail which data should be provided to the data subject. We comprehend that a copy of the personal data also includes a description of the personal data on an individual level. Is this a correct interpretation?
- b. if controllers are allowed to provide the requested data in more than two layers. Considering the large amount of data processed by pension funds we strongly urge the EDPB to allow three layers of information. This would enable pension funds to provide data subjects with information on the data being processed and its legal basis (layer 1), more specific personal data tailored to the data subjects request (layer 2) and all the data processed in regard to the data subject (layer 3).

5. How to assess if a request is 'excessive'

Pension funds and employers process personal data that can change and be added to frequently, for instance due to a change in the data subjects (pensionable) salary as a result of a promotion or demotion. In the Guidelines the 'reasonable intervals' within which data subjects may again exercise their right of access are linked to, amongst others, the frequency of changes in the data set. Whether a request is excessive is to be assessed by the controller.

This poses questions on how to handle repetitive requests. If the data subject makes repetitive requests for access to data concerning his salary, is the controller allowed to provide only the data that have been changed or added since the last request? Or should all data (again) be provided? Is a monthly request considered to be excessive or is it to be answered due to the monthly changes in the dataset (due to monthly accrual of pensions)? Is it sufficient for the controller to refer to information already provided? More guidance on this topic would be highly appreciated.