Feedback on European Data Protection Board's "Guidelines 03/2026 on web scraping in the context of generative AI"

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Contents

Introduction **2**

1 General considerations **2**
1.1 Assumptions on data publication 2
1.2 Assumptions on developer control 2
1.3 Misleading language 4

2 Definition of web scraping **5**

3 Principles relating to processing of personal data **5**
3.1 Transparency 5
3.2 Data minimisation 6
3.3 Accuracy 7

4 Legal basis for the processing of personal data **8**
4.1 Consent 8
4.2 Legitimate interest 8
4.2.1 Existence of a legitimate interest 8
4.2.2 Balancing test 8

5 Special categories of personal data **10**

Conclusions **11**

References **12**

Introduction

This feedback responds to the European Data Protection Board's consultation on the *Guidelines 03/2026 on web scraping in the context of generative AI*. It introduces some general considerations, and then brings focused recommendations following the structure of the guidelines adopted for public consultation (for simplicity, hereinafter referred to as *guidelines*).

1 General considerations

The fact that the EDPB acknowledges that web scraping is significantly dangerous [9, par. 15] and that currently available techniques and mitigating measures may not be sufficient or stay appropriate in the future [9, par. 60, 74, 77] is highly welcome. However, the guidelines should be amended to fix some issues.

1.1 Assumptions on data publication

First of all, most of the document seems to consider only data published by the data subject themselves, or with knowledge and consent by the data subject. Thus, it doesn't take into account different situations which are highly relevant for the protection of data and data subjects. For example, the data may be published by a party other than the data subject, by mistake, or because it is required by law. In these cases, the data subject may not be aware of the publication of their personal data (which is acknowledged in paragraph 45 of the guidelines), and even if they do, they may not have any power to stop such processing or shield their data from scrapers. Table 1 gives some examples of such situations. It's especially important to consider that some plausible situations pose extreme threats for the fundamental rights and freedoms of the data subject, such as the publication of child sex abuse material, or of the real identity of a protected witness in a criminal trial.

With widespread crawling for AI development, especially for general use ones, these situations become more dangerous for the data subject, as AIs may disseminate the data further than intended by the publisher and further than they could reasonably expect, and also infer further information about the data subject. The guidelines acknowledge this *en passant*, [9, par. 14] but it does not really take it into account.

1.2 Assumptions on developer control

A second issue is that the guidelines seem to assume that the AI developer holds complete control over the distribution of the model and the interactions of the users with it. In particular, it seems to assume that either the model is used only "internally" by the same organisation who developed it, or users can only access it through an interface where the developer is able to filter any input and output, acting as a "man-in-the-middle". The guidelines actually *recommend* filtering the output, [9, par. 74] but this implies a general,

Table 1: examples of problematic publications of personal data

Situation	Examples
Publication by a third party in good faith	A blogger posts about a member of their family – A visitor in a hospital publishes a picture where an identifiable patient is visible in the background
Publication by a third party in bad faith	A divorced person doxes their ex spouse on a social network – A criminal publishes child sex abuse material where the victim is recognizable
Publication by mistake	An unredacted document is uploaded instead of the redacted version with a similar filename – A misconfigured web server allows anyone to access a directory intended for authenticated users only
Publication mandated by law	A municipality publishes on their website the curriculum vitae of an employee as mandated by transparency regulations – A public agency publishes on their website an expropriation order to make it legally valid under national law

continuous and automated surveillance of user interactions with the model, which brings new relevant risks for privacy, freedoms and fundamental rights of the users.

Also, the developer may not have control over distribution and interactions. They do for all the currently most used models available to the general public, but limiting the scope to them fails to address concerns related to open weights and "open source" AIs. The developer may add filters or other mitigating measures, but users of an open weights, and especially of an "open source" AI, would be able to remove them. The concept of "open source" AI itself implies that users can change them according to their needs and desires: while this is disputed, some consider them the AI equivalent of "open source" or "free-as-in-freedom" for software.[1] [21]

While not intended, the guidelines seem to prevent the development and distribution of open weights and "open source" AI. While this may be reasonable under data protection considerations, the consequences should be assessed very carefully. On the one hand, a *de facto* ban would prevent community development of AIs and grassroot experimentations and lead to an oligarchy where few commercial operators control the market of AI development and provision with their "proprietary" models. On the other hand, in the context of AI models the boundary between software and data is blurred enough that distribution of an open weights or "open source" model trained on personal data could be considered distribution of such personal data with a different encoding.

Proprietary models and open weights and "open source" AI bring very different risks for data protection: the former suffer a lack of public scrutinize and control, the latters a dangerous level of possibility to study and customize. Thus, while both of them should be analyzed under the data protection point of view, it may be better to do so separately.

By providing advice only for proprietary models, the guidelines risk introducing unjistified biases against open weights and "open source" AIs.

1.3 Misleading language

The last general issue is that several passages use a language that suggests some obligations under the GDPR are not mandatory. For example, paragraphs 21 and 22 state that "personal data *should* be processed lawfully, fairly and in a transparent matter" and "the purpose [...] *should* be lawful", whereas these are strong requirements for which the GDPR does not allow any exemption. [27, art. 5–6]

The GDPR obviosuly prevails, but for the avoidance of doubt misleading language should be fixed. Misleading language is used, among others, in paragraphs 21–24, 32–33, 61 and 75 and in example 3.

It should also be made clear that when the guidelines concede that compliance with the GDPR is challenging (such as in paragraphs 13–14 and 24) it doesn't imply that failure to comply may be excused.

[1] For the for the definitions of open source software and free software see [12; 22]. For the definitions of open weights and "open source" AI see [20; 21].

2 Definition of web scraping

The definition of web scraping [9, par. 7] is quite clear. It includes the fact that data are extracted from "*publicly available* web services", which implies that extracting data from non-public services is not covered by the guidelines. In consideration of the news of the last months about AI systems attacking protected services and accessing their data (see for example [1; 2; 14; 25]), it is very important to draw a line to exclude these cases from the legitimate interest legal basis the guidelines dedicate much attention to. Hence, it may be useful to exclude non-public services explicitly.

However, the difference is not clear. Given examples overlap significantly: "all links [...] within the domain www.edpb.europa.eu" given for targeted scraping is not conceptually different from "all URLs ending in europa.eu" given for untargeted scraping. Similarly, "URLs with content written in a specific language" can still "result in the exploration of a large portion of the internet to be searched", especially when the language is a widely used one, such as English, Chinese or Spanish.

Whether a specific crawling is targeted or not should be evaluated on a case-by-case basis, but clearer and unambiguous criteria would be very helpful. They may include:

- whether the crawlers only reaches URLs from a list determined in advance;
- the number of recursions the spider is allowed to do when expanding the list (so-called *depth*);[2]
- the size and the kind of the sources in the initial list. For example, crawling all the pages of all the blogs in a web ring, each with only a handful of posts, may be considered targeted; crawling only a few active Facebook profiles, with depth 2 and restricting the new pages to those written in the same language as the original post, would probably still involve thousands of otherwise unrelated pages and should thus be considered untargeted.

3 Principles relating to processing of personal data

3.1 Transparency

While it is true that "it is often difficult, impracticable or, even, objectively impossible to identify and inform the data subjects in an effective way" [9, par. 24], it should be made clear that the controller must make any reasonable effort to inform the data subject. In particular, with regard to paragraph 25 of the guidelines, the processor should not be allowed to design the data processing so as to not have to inform data subjects individually. Such design should be disallowed as long as an alternative way of procesing exists that allows reasonable and appropriate individual information. In

[2] A depth value of 1 means the spider must crawl all the URLs in the given list, and also follow any link it finds in those pages; a depth value of 2 means the spider must also follow the links in the pages linked from those in the initial list, and so on. If the crawler is set to not expand the initial list, this is equivalent to a depth 0.

other words, it should be made clear that the possibility to inform the data subjects must determine the choice of the processing, and not the other way around. With regard to paragraph 27 of the guidelines, it should be made clear that abovementioned transparency requirements also apply to "processing 'for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes'" as described in paragraph 27 of the guidelines. Also, since AIs are based on statistics, it may be useful to specify that AI do *not* automatically qualify as "statistical purposes" for the purpose of article 89 of the GDPR.

Where individual direct communication (e. g. via email) is impracticable or not proportionate, the data controller should be required to take into consideration other direct information measures. For example, if the controller scrapes a social network or a forum, if informing individually every user was impracticable (which may be difficult to prove, since the goal of such services is specifically to facilitate communication between people), then they should at least publish, in advance, an information post on the social network or forum itself. Another possibility is to add to the user-agent string of the crawler a comment recommending to check a web page where necessary information about the crawling is provided: [10] it requires minimal efforts and is effective to inform at least those data subject who monitor the traffic on their web server.

Also, with regard to paragraph 31 of the guidelines, it should be noted that when making the information publicly available as required by the GDPR [27, art. 15(5)(b); 5] including timestamped URLs is *de facto* mandatory, as the crawler "knows" intrinsically which URLs it visits and when, and logging such information is trivial.[3]

3.2 Data minimisation

The guidelines list measures the processor is expected to take before collecting data in order to minimise processed data, [9, par. 37] but the safeguards should be stronger.

The document recommends the exlusion of "certain categories of personal data" only when "they can be sorted out". [9, par. 37] However, the examples given for such categories are sensitive data, which means (in addition to the "special categories" defined in the GDPR) data of highly personal nature whose processing or violation involves "serious impacts in the data subject's daily life" [4, pp. 9–10] and should be subject to a data processing impact assessment under article 35 of the GDPR. In the absence of a data processing impact assessment, the guidelines should require to exclude these data from processing *even if they can* not *be sorted out*, even if this implies not using any dataset known to include any of them. This is even more important considering that scraping may easily involve personal data about tens or hundreds of thousands of subjects.

Paragraph 37 of the guidelines also consider "websites which clearly oppose the scraping of their content [...] through the use of technical measures". These measures, especially

[3] For example, they can simply be written in a plain text file as URLs followed by crawling timestamps:

```
http://europarl.europa.eu/ 20260701 20260801 20260901
https://example.com 20261017
```

This is trivial to write for software and easy to read for both humans and software.

when compliant to machine-readable standards or widely accepted conventions (for example the "robots.txt" file or the equivalent HTML tag or HTTP header) [15; 16; 18] or when their purpose is obvious (for example CAPTCHAs), should be considered objection to processing under the GDPR and thus the processor should refrain from crawling the website at hand until they demonstrate, on a case-by-case basis, "compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject". [27, art. 21]

3.3 Accuracy

The section of the guidelines about data accuracy mostly recalls the principle of accuracy of the GDPR. [9, par. 39-42; 27, art. 5(1)(d)]

It should be noted that, while the principle of accuracy is fundamental for the protection of persons and their rights, some matters related to accuracy, especially in the field of AI, can't be addressed through technical, legal or jurisdictional measures. They are social issues that require social measures. For example, understanding what is "right" or "wrong" to do (not only with personal data) is the subject of ethics, and critical evaluation and verification of any information is one of the grounds of information literacy. Providing everyone with good education and libraries, appropriately fundend and, most importantly, staffed with the best teachers and librarians, is more useful and effective than requiring AI developers to make sure their models only produce exact and up-to-date output and accept that people rely on them as a "source of truth".

In this framework, the GDPR can't be decisive, let alone the guidelines, but they can help in their field.

The guidelines should make clear that, as a general rule, the model should not output "data that constitute personal data" unless the data subject gave their consent. While some exceptions may apply (such as when the subject is a public figure, or when they freely made the data public), no legitimate interest allows this. For example, while, under very strict safeguards, it may be considered allowable for an hospital to train an AI on real medical records in order to support its doctors, under no circumstances whatsoever the AI may be allowed to output excerpts from the records it was trained on.

The guidelines may suggest that the processor should scrape periodically the same sources to make sure the data is sufficiently up to date. In principle this measure may be appropriate under data protection regulations, but repeated scraping is considered abusive behaviour by many web service providers.[4] Many of them, in addition to explicitly forbid it in their terms of use, also deployed technical measures to block unauthorized crawlers, or to serve them deliberately wrong or meaningless contents (so-called *poisoning*).[5] Hence, repeated crawling may produce outputs that are *less* up to date, or even plainly or subtly wrong.

On the recommendation to timestamp the data, [9, par. 42], see section 3.1 of this feedback.

[4] See for example the Linux kernel and Codeberg. [13; 28]

[5] See for example iocaine and nepenthes. [6; 19]

4 Legal basis for the processing of personal data

The guidelines state that legal bases other then legitimate interest "will generally be less likely to apply to web scraping in the context of development of generative AI by private bodies". [9, par. 43] This should be considered a simple observation, and not an endorsement. The fact that "legitimate interest is often relied on for scraping [...] by private bodies" [9, par. 43] does not imply that this practice is legal or appropriate. The fact that "organisations scraping data [...] are most probably not able to identify and obtain consent from each and every data subject" [9, par. 44] should not allow to overcome the limitations established by the GDPR.

4.1 Consent

While "it is often difficult to obtain the consent of individuals when personal data are collected indirectly and at large scale" and "organisations scraping data [...] from the internet [...] are most probably not able to identify and obtain consent from each and every data subject before scraping data", [9, par. 44] it should be recommended to prefer consent as a legal basis over legitimate interest.

Especially for AIs designed for a precise use, high-quality datasets where data subject gave their consent, or made of public domain contents, may be available.[6] In this case, legitimate interest for crawling personal data from the internet is probably difficult to prove. Organisations should be encouraged to use these datasets, to improve them with data about subjects who gave their consent, and to share their own datasets under permissive licenses, again only with the consent of the data subjects, so as to reduce the "necessity" of non-consensual scraping from the Internet.

4.2 Legitimate interest

4.2.1 Existence of a legitimate interest

As stated in the guidelines, when relying on legitimate interest it is very important that the interest is "clearly and precisely articulated and real and present, not speculative". [9, par. 49] This excludes generic statement such as "ensure that artificial general intelligence benefits everyone", [24] "make powerful and safe AI accessible to everyone", [23] "offer significant societal benefits to the wider public such as [...] creating content [...] and enhancing workplace productivity", "[act] so that artificial intelligence has a positive impact on society". [3] Giving an example about this would be useful to avoid doubts.

4.2.2 Balancing test

The position of the guidelines on the balancing test is worth some improvements as well.

[6] See for example the datasets distributed by Common Voice (voice recordings), Wikimedia Commons (media files) and Project Gutenberg (texts). [7; 17; 26]

Kind of interest Since any data may be processed in order to gain money, allowing economic interests to prevail over fundamental rights or freedoms of the data subjects would in fact allow anyone to process any data in any way, nullifying any protection on personal data. It should thus be made clear that this is not allowed.

The context of the processing The guidelines should also take into account the relation between the kind of personal data to be processed and their source, and the goals of the AI system to develop. For example, "developing an AI system to detect fraudulent content or behaviour" on a given platform (e. g. an image sharing platform) may be a legitimate interest for processing conversations on the same platform between its users, but not for processing their home addresses or data from users of an unrelated platform (e. g. a technical forum).

Deletion of data from AI models The guidelines state that "once the model is trained, personal data cannot be easily deleted". [9, par. 60] In fact, erasure is currently impossible (which seems to be implied in paragraph 74 of the document). This implies that, in the context of AI, article 17 of the GDPR can't be enforced other than either erasing the whole model, or rollbacking it to a checkpoint preceding the training on the personal to be erased. This is a known limitation, so the processor should take this fact into consideration and, especially when processing sensitive data, the technical impossibility to erase selected data from the model should not allow them to not comply with erasure requests.

Expectations of the data subject The following should be added to the criteria to evaluate the expectations of the data subject. [9, par. 64]

- First of all, it should be noted that, while "when the data has been made public and visible to everyone by the data subject themselves, the data subjects are more likely to reasonably expect that their personal data may be processed by others", [9, par. 64] this cannot, by itself, make that processing legitimate. Performing an action despite the knowledge that a given undesired consequence is possible does not make the consequence legitimate. Stating the opposite would imply, for example, that a robbery in an area known for its high crime rate is not prosecutable because it was reasonable for the victim to expect it, which is obviously absurd.

- With technological progress, new methods of crawling and processing arise also for data published in the past. Nonetheless, as acknowledged in the guidelines, "information published on the internet are rarely deleted" and "the scraped data may have been published during a long period of time". [9, par. 58] Therefore, the processor carrying out the balancing test should take into consideration the expectations of the data subject *when the data were published*.

  Special consideration is due for data published before AIs were made available to the general public. Until then, most people were not aware that AI even existed except in science-fiction, so no reasonable expectation can be assumed about their data

being used to train one. In fact, such expectation would have been unreasonable. For example, many free software projects manage their communications through mailing lists whose archives are publicly accessible and kept forever.[7] These mailing lists can date back more than 30 years and authors of the messages usually can't achieve removal of their data, as the projects consider them an essential part of their history and may also keep them for transparency purposes. Therefore, despite most of the senders having expertise in computer science, messages in these archives shouldn't be crawled for AI training under legitimate interest.

- While certain information may be considered public knowledge, some categories of people may not be able to understand them. For example, young children may not have developed abstract reasoning enough to understand that their chats exist out of their device, and elder people may lack the technical knowledge to understand how web crawling and AI training work. Thus, the processor should not assume that the data subjects understand something that is considered general knowledge, especially if the data concerns vulnerable persons.

Mitigation measures "Opt-out list[s]" on a per-controller basis should not be considered an appropriate mitigation measure. The provider – or worse, the users – would have to constantly monitor an indefinite number of organisations who *may* decide at any time to operate a crawler, trying to find an opt-out procedure that may not be offered to them personally. Moreover, the same provider may require a separate opt-out for each crawling campaign they run. The effort requested to data subjects would be overwhelming and unbearable, resulting in almost no effectiveness.

Instead of creating opt-out lists, controllers should be required, rather than recommended, to honour standardized and machine-readable "opt-out" signals, such as "robots.txt" files, as explained in section 3.2 of this feedback.

5 Special categories of personal data

Underlining that "for the intended scraping of [special categories of personal data] a derogation in Article 9(2) GDPR is required" [9, par. 67] and confirming that while "it remains likely that, despite the organisational and technical measures, the controller residually processes special categories of personal data[,] if such processing cannot be justified under EU data protection law, it will be unlawful" [9, par. 69] is highly appreciated.

However, the processing in the context of AI should not be considered comparable to that in the context of search engines. Under the data protection point of view, the two technologies are significantly different from each other. Search engines only store information on which documents are relevant for a given keyword, but do not store the contents of the documents themselves. If the document is edited or deleted, the search engine has no way to recover the original content, as it only "remembers" the topics. AIs, instead, encode and store the information from their training data in a form that

[7] See for example Debian and the GNU Project. [8; 11]

makes it possible to extract them from the model itself. While this kind of operation is not trivial, techniques are already known to "recover" training data working only on the model.

Some of the responsibilities proposed for the processor as a consequence of comparing AI training to the activity of search engines carry their own issues.

In particular, paragraph 74(iii) of the guidelines require applying output filters to the AI system. As explained in section 1.2 of this feedback, the guidelines do not take into account open weights and "open source" models, where it's easy to remove or bypass any filter. While these models should not be forbidden, output filters are not effective on them for data protection purposes. In fact, the effectiveness of any state-of-the art data protection measure applied after the training is at least debatable also for proprietary models and should not be assumed to be appropriate under the GDPR. It should be made clear that if no appropriate measure is available under current state-of-the-art, then the processing may not take place.

Also, paragraphs 74(iv) and 77 assume that it is not possible, at the moment, to remove personal data from a trained model ("in the longer term, model unlearning or other processes with equal effect [...] *might become available* through technological progress"), but instead of concluding that data processing may not take place the guidelines recommend again filtering inputs and outputs. These measures are not effective for the protection of the subject whose personal data were used as training data (which still reside in the AI model, even though in encoded form), and at the same time they constitute a general, continuous and automated surveillance of the users of the AI, with the explicit goal of monitoring their prompts and responses. These filters are both ineffective and dangerous,[8] so they should be considered disproportionate and forbidden. Moreover, they can only be deployed *ex post*, after a data breach already occurred, to prevent new, similar ones; hence, even if they were effective, they couldn't substitute preemptive measures.

The recommendation of regular "verification and assessment [...] of the effectiveness of the measures implemented" with "regard to the development as well as to the use of the AI model" [9, par. 77] is appreciated. However, it should be considered that technological progress brings not only better privacy protection measures, but also more effective attacks against these measures: as a consequence of progress, preaviously appropriate measures may become ineffective while still being state-of-the-art. Thus, it should be made clear that "[being] in line with the state-of-the-art techniques" is necessary but not sufficient for a measure to be implemented as appropriate.

Conclusions

The guidelines are welcome as a tool to help data subjects and processors navigate the effects of the GDPR on web scraping for AI systems. However, they carry some issues that must be fixed. The most important recommendations in this feedback are:

[8] This is also implied in paragraph 74(iv) of the guidelines, where they contemplate that "despite the organisational and technical measures already implemented, special categories of personal data is included in the output".

1. remove the recommendations for input and output filters (sections 1.2 and 5);
2. consider adding different recommendations for open weights and "open source" AIs (section 1.2);
3. require data processors to comply with machine-readable "opt-out" signals (sections 3.2 and 4.2.2).

These amendments are necessary in order to achieve proper protection of data subjects in a context where technological innovation keeps running, while regulation falls behind. Since inner working of AIs and their consequences on people and societies are not yet clear enough, but great threats are already foreseen, regulators like the EDPB should risk erring on the safe side, rather than under-regulating a field where reverting mistakes would be highly expensive.

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