TWP
RECHTSANWÄLTE

European Data Protection Board

Rue Wirtz 60
1047 Brussels
BELGIUM

Dr. Viktor Thurnher LL.M.
Mag. Lukas Pfefferkorn
Dr. Alexander Wittwer LL.M.
auch zugelassen in Deutschland
MMag. Dr. Christian Wirthensohn
MMag. Dr. Gregor Lässer
Dr. Gabriele Meusburger-Hammerer M.E.S.
Mag. Simone Rädler, BSc
Mag. Dominik Bischof
Dr. Christina Lindner LL.M.

Thurnher Wittwer Pfefferkorn & Partner
Rechtsanwälte GmbH
Messestraße 11
6850 Dornbirn Österreich
T. +43 5572 23503
F. +43 5572 23503-10
office@twp.at www.twp.at
www.schrade-international.com

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Dear Madam or Sir,

Reference is made to the "Guidelines 01/2022 on data subject rights – Right of access – Version 1.0" adopted by the EDPB on 18 January 2022 (in the following the "Guidelines") which were published for public consultation on the website of the EDPB on 28 January 2022.

First of all, I would like to express my appreciation for the work done in connection with the compilation of the Guidelines. In my opinion, the Guidelines contain various important clarifications and explanations regarding the practical implementation of the rights of access pursuant to Art 15 GDPR and will serve as a valuable tool for data protection practitioners after their final adaption by the EDPB.

Nevertheless, I would like to comment on the following issues that could be included or clarified in the Guidelines in order to strengthen data subjects' rights and to fulfill the main aim of

the right of access, namely, to enable data subjects to have the control over their own personal data and verify the lawfulness of the processing of such data (*Guidelines*, para. 10):

1. Access to personal data that is processed partly by automated means

In Art 2 (1) GDPR the material scope of the GDPR is defined and such definition naturally also has a bearing on the scope of the rights of access pursuant to Art 15 GDPR.

In practice, it is not always easy to establish whether information on data subjects which is not processed by automated means falls within the scope of the GDPR and, consequently, also the scope of the right of access.

This may be illustrated by a practical case in which my firm represented a data subject which had applied for a tenured position at an academic institution and filed an access request after such application had been rejected. In its reaction to the access request the controller provided a copy of some basic data that was processed in an IT system (and therefore, the processing was partly effected by automated means) but refused to provide a copy of the handwritten notes that apparently contained further information on the data subject that had been the reason for the refusal of the application and pointed out that such handwritten notes in themselves were not contained in a filing system and, therefore, did not fall into the scope of the GDPR.

Therefore, I would suggest that a clarification could be added to para. 97 of the Guidelines explaining that if data is processed at least partly by automated means, the scope of the right of access does include all processed data including information on data subjects that is contained in paper documents.

2. Providing access only to personal data contained in documents

The Guidelines explicitly point out that the obligation to provide a copy of the processed data as set out in Art 15 (3) GDPR is not an additional right granted to data subjects but a modality of providing access to such personal data. Furthermore, the Guidelines state the obligation to provide a copy shall not widen the scope of the right of access and refers (only) to a copy of the personal data undergoing processing, not necessarily to a reproduction of the original document (*Guidelines*, para. 23).

Leaving aside the question, whether the obligation to provide a copy of the data processed by a controller as set out in Art 15 (3) GDPR is a separate right, which – in my opinion – is still open for discussion, I would like to point out that it is important that the scope of the right to obtain a copy of the processed data is not defined to narrowly either.

As a practical example I would like to refer to a case which is currently pending before the Austrian Federal Administrative Court (*Bundesverwaltungsgericht*) in which my firm is representing a data subject who requested access to their personal data including a copy of the processed data. In this case the controller eventually provided excerpts from documents that contained individual statements referring to the data subject without any further context and then argued that those statements contained all the personal data contained in such documents. From the point of view of the data subject such information was not intelligible without the missing context and, therefore, they did not consider the provided information to be complete.

Therefore, I would suggest that the scope of the copy of the processed data to be provided to the data subject requesting access to their data should not be defined too narrowly either because only then it can be assumed that the interpretation of Art 15 (3) GDPR contained in the Guidelines really is in accordance with the case law of the CJEU (CJEU Joined Cases C-141/12 and C-372/12, YS et al.) regarding this issue (*Guidelines*, para. 150).

3. Scope of the confirmation whether personal data are being processed

The Guidelines correctly point out that the first step in reacting to a request for access that has to be taken by the controller is to confirm whether or not the controller is processing personal data concerning the data subject making the request (*Guidelines*, para. 16).

It should be noted, however, that a simple confirmation by the controller that data are being processed may not be sufficient in all circumstances.

Since some of the additional information listed in Art 15 (1) GDPR or Art 15 (2) GDPR must only be provided if personal data has been disclosed or transferred to other recipients the confirmation to be given by the controller should also include an indication whether the personal data of the data subject making the request has actually been transferred to other parties.

This requirement follows directly from the definition of the term “processing” contained in Art 4 (2) GDPR which does not only cover the collection or storage of personal data but also the disclosure (by transmission) of personal data.

Therefore, I would suggest to amend para. 18 of the Guidelines accordingly.

4. Information on the content of transfers of the personal data

In its decision in the case *Rijkeboer* the CJEU has clearly and repeatedly stated that the right of access pursuant to Art 12(a) of Directive 95/46/EC not only includes information on the

recipients or categories of recipients of personal data but also information on the content of data disclosed (CJEU case C-553/07 – *Rijkeboer*).

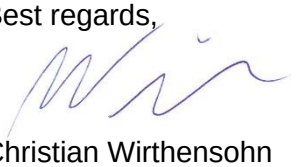
Even though the wording of Art 12(a) of Directive 95/46/EC is not completely identical to the wording of Art 15 GDPR the above-mentioned decision of the CJEU still applies. This also follows from the definition of the term “processing” in Art 4 (2) GDPR which also includes the disclosure of personal data. The controller’s obligation pursuant to Art 15 (1) to provide access to the personal data (that is being processed), therefore, also includes access to the personal data disclosed to third parties.

Based on the above-mentioned decision of the CJEU, the Austrian Federal Administrative Court (*Bundesverwaltungsgericht*) as well as the Austrian Data Protection Authority (*Datenschutzbehörde*) have ruled in several cases that the right of access pursuant to Art 15 GDPR also includes information regarding the content of the data disclosed.

Consequently, I would suggest to amend the Guidelines accordingly and also include a reference to the obligation to provide information regarding the content of the data disclosed in fulfilling an access request. Such explanation may be included in para. 114 or 115 of the Guidelines.

If you have any further questions, please do not hesitate to contact me.

Best regards,



Christian Wirthensohn