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Guidelines 01/2022 on data subject rights – Right of access

The Austrian Federal Economic Chamber provides the following comments:

General remarks

The guidelines do not seem to be very mature yet, in some places they are unclear and contradictory. They also contain formal errors, e.g. placeholders are not removed.

It should also be noted that some decisions of the ECJ on the right of access are pending. This concerns, for example, the question of information on recipients or on categories of recipients, but also issues related to providing a copy pursuant to Article 15(3) GDPR.

Some of the examples given (e.g. regarding filing claims) are confusing, seem to go beyond the wording of the GDPR and impose further obligations on controllers, which is to be rejected.

In general, a practical interpretation that does not create additional burdens would be necessary for companies, which are usually the controllers.

To individual points:

Para.13

According to para.13 the controller should not deny access on the grounds or the suspicion that the requested data could be used by the data subject to defend themselves in court in the event of a dismissal or a commercial dispute with the controller.

This is seen as problematic because it could lead to difficulties in ongoing court proceedings.

The document should be adapted to the effect that, in the course of the right of access, there is only a right to information that is necessary to verify the lawfulness of the data processing by the controller. The example should be corrected accordingly (in this context para. 187 third case should also be adapted).

At least the special situation of the individual case must be taken into account and the controller must not be forced to disclose data that would be to his or her disadvantage in the proceedings.

Para. 23 et seq.

The obligation to provide a copy is addressed in several points.
In paragraphs 3, 16 and 103, it describes it as a "modality of providing access". Unfortunately, the Guidelines do not clarify what this means exactly. It is not an additional right (para. 22 et seq.), especially it does not include a "mandatory access to a reproduction of the original document" (para. 23). The term "copy" is to be interpreted broadly and includes the various access options as long as the data is reproduced in full in the copy (para. 25).

It should be clear, that it is sufficient to present the “compilation” (para. 150) of data (in categories).

A decision of the ECJ on this is pending.

Para. 35b

The document should be adapted to the effect that there is only a right of access if the data subject participates in the information process in an appropriate manner and specifies his or her request (for example, by naming a context), at least if large amounts of different information are used by a controller.

Para. 37 et seq.

It is stated that the data processed at the time of receipt of the request are to be provided. Since the receipt of such a request is not dealt with directly, but at least an identity check is carried out in advance, and the usual business processes continue, it could possibly happen that data is also deleted within the usual deletion periods before the possibility of answering the request for information.

This should be taken into account in the guidelines, because a controller will need time to comprehensively examine the request for information and to answer it properly. However, the usual business processes continue to run, and it could therefore lead to the deletion of data of the requesting person, in the ordinary course of business. Only if a controller takes the request for information as an opportunity to delete the data of the data subject should this be judged to be unlawful.

Para. 48

The controller should ask the data subject accordingly in case of doubt. However, an obligation to provide access should not arise "in parallel", but only if the request is sufficiently specified as a request for access under Art 15.

Para. 62

Para. 62 states, that *“If the controller has reasonable doubts concerning the identity of the natural person making the request, the controller may request the provision of additional information necessary to confirm the identity of the data subject (Art. 12(6))”*. Examples in which cases it can be argued the controller has reasonable doubts concerning the identity of the natural person making the request would be helpful.

Para. 67

Regarding the example it is not clear how the controller can verify whether the cookie identifier is associated with Mr. X. It could also be the cookie identifier of another person.

Para. 69

The need to minimize data in the case of prior identification of the person concerned seems excessive, although it is positive, that the note e.g. " ID card was checked " is recommended as good practice (para. 78).

Para. 76

The second example (bank customer, Mr. Y) does not relate to Art. 15. This is about identification when making an application in the bank. The example should be deleted.

Para. 83

It should be further elaborated when an acting on behalf of the child by the holder of parental responsibility is needed. Examples would be useful.

Para. 115

Not least with regard to the principle of data minimization, no excessive requirements should be placed on the question of recipients or categories of recipients.

Para. 151

Does this mean that controllers are allowed to make all emails available in a ZIP folder or how shall a huge number of e-mails be compiled in a GDPR-compliant manner?

Para. 153

A transcript should exist as an option in addition to the handing over of the recordings. When the recordings are handed over, the data protection of other recorded persons may be affected.
Therefore, issuing a transcript should also be considered equivalent (without an agreement with the data subject)

Para. 162

The interpretation, at least in exceptional cases, of recognising a high volume of requests for information as a reason for extending the one-month period is welcomed.

Para. 164

There is no justification for the categorical exclusion of the possibility of restricting the right to information by contract.

Para. 163 and 167

According to para. 163 “The right of access is subject to the limits that result from Art. 15(4) GDPR (rights and freedoms of others)…”.
Para. 167 states that “Art. 15(4) GDPR applies to the right to obtain a copy of the data ….. It is also applicable, …..if access to the personal data is exceptionally granted by other means than a copy. For example, there is no difference justified whether trade secrets are affected by providing a copy or by granting on sight site access to the data subject…..”
(Para. 167 also states: “Art. 15(4) GDPR is not applicable to the additional information on the processing as stated in Article 15(1) lit. a.-h. GDPR.” - However, there is no justification as to why Article 15(4) is not applicable to this information.)

It is also apparent from para. 103 that Article 15(4) GDPR has to apply to the access to data per se: “…This does not automatically mean that access to personal data also relating to someone else should be granted, as the controller needs to comply with Art. 15(4) GDPR.” However, the EDPB contradicts itself when it states in para. 13 that an ongoing

court case only prevents access if national provisions pursuant to Art. 23 GDPR provide for it (see also the note to para.13 above).

Para. 172 and 191

Regarding para. 172 and 191, it is noted that Art. 15(1)(f) GDPR only obliges the controller to inform the data subject about the existence of a right of appeal to a supervisory authority, not also about the possibility of judicial remedy.

Best regards

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