Center for AI and
Digital Policy

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Dr. Andrea Jelinek
Chair of the European Data Protection Board
Rue Montoyer 30, B-1000 Brussels
(via public consultation portal)

The Center for AI and Digital Policy (CAIDP) welcomes the opportunity to comment on the European Data Protection Board's (EDPB) Guidelines 01/2022 on Data Subject Rights - Right of Access.[1] We write to make four comments:

(1) The EDPB should make explicit the right of "algorithmic transparency" in the Guidelines on Data Subject Rights – Right of Access
(2) The EDPB should incorporate the relevant provisions (Transparency and Explainability) of the recently adopted UNESCO Recommendations on the Ethics of AI
(3) The EDPB should remind data subjects that they have a right to contest proposed costs to exercises data access rights
(4) The EDPB should review carefully draft provisions of the EU AI Act that may adversely impact the GDPR. For example, one proposal submitted to the JURI committee would designate the processing of personal data by means of "machine learning" as a legitimate purpose under the GDPR.

About CAIDP - Artificial Intelligence and Democratic Values

The Center for AI and Digital Policy (CAIDP) is an independent, non-profit organization that provides advice on AI and digital policy to national governments and international organizations, including the OECD, the Global Partnership on AI, the Council of Europe, the European Union, the G7/G20, and others.

The Center for AI and Digital Policy aims to ensure that artificial intelligence and digital policies promote a better society, more fair, more just, and more accountable – a world where technology promotes broad social inclusion based on fundamental rights, democratic institutions,

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[1] EDPB, *Guidelines 01/2022 on data subject rights - Right of access* (28 January 2022) ("*EDPB Guidelines on Right of Access*"), https://edpb.europa.eu/our-work-tools/documents/public-consultations/2022/guidelines-012022-data-subject-rights-right_en

and the rule of law. We work with more than 100 AI policy experts in almost 40 countries and recently published the report Artificial Intelligence and Democratic Values which surveys and assesses the AI policies and practices of 50 countries around the world.[2] We have provided recommendations to the G20 nations - in our Statement to G-20 Digital Economy Task Force (DETF), we urged the G20 to focus on fairness, accountability, transparency for all AI systems, and to endorse "red lines" for certain AI deployments that violate fundamental freedom.[3]

One of CAIDP's core goals is to promote public participation in the AI policy process. We have established the "Public Voice" page to encourage public participation in the policy process.[4] This initiative supports government efforts to engage the public in AI decision-making and helps to produce better informed and more legitimate AI policies.

We appreciate the opportunity the EDPB has provided for public comment on the Right of Access for Data Subjects. Access is a critical requirement for automated decision-making as it promotes transparency and helps ensure accountability. Our comments below speak to the particular need to ensure this right is robustly applied in AI applications, including algorithmic-based decision-making and machine learning.

We also commend the EDPB for your report last year with the European Data Protection Supervisor (EDPS) calling for a ban on the use of AI techniques for facial recognition in public spaces.[5] In our report *Artificial Intelligence and Democratic Values*, we called for a prohibition on facial surveillance.[6] We have since determined that the ability to prohibit the use of facial surveillance may, at this time, be one of the best indicators of democratic limits on AI technology.[7] We noted the report and resolution of the European Parliament following the EDPB-EDPS report.[8] We hope that the EU AI Act will incorporate the recommendations you have provided.

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[2] CAIDP, *Artificial Intelligence and Democratic Values 2021* (2022) ("*CAIDP AI and Democratic Values report*") https://www.caidp.org/app/download/8376927963/AIDV-Index-2021.pdf?
[3] CAIDP, *Statement for the Digital Economy Task Force* (17 March 2021), https://www.caidp.org/app/download/8303562963/CAIDP-DETF-03172021.pdf
[4] CAIDP, *The Public Voice,* https://www.caidp.org/public-voice/
[5] EDPB, *EDPB & EDPS call for ban on use of AI for automated recognition of human features in publicly accessible spaces, and some other uses of AI that can lead to unfair discrimination (*21 June 2021), https://edpb.europa.eu/news/news/2021/edpb-edps-call-ban-use-ai-automated-recognition-human-features-publicly-accessible_en
[6] *CAIDP AI and Democratic Values report.*
[7] CAIDP, *Statement in support of European Citizen Initiative to Ban Biometric Mass Surveillance* (3 March 2021), https://www.caidp.org/app/download/8299428763/CAIDP-ECI-03032021.pdf
[8] European Parliament Research Service, *Regulating facial recognition in the EU* (September 2021), https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/698021/EPRS_IDA(2021)698021_EN.pdf; European Parliament*, Resolution on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters* (6 October 2021)

We agree also with other recommendations contained in the EDPB/EDPB Report on the EU AI Act, including a ban on AI systems using biometrics to categorize individuals by ethnicity, gender, political or sexual orientation, as well as the use of AI to infer emotions, except for very narrow cases (and for the benefit of individuals). We also support your recommendation to prohibit any type of social scoring. The UNESCO's Recommendation on the Ethics of Artificial Intelligence states that "*AI systems should not be used for social scoring or mass surveillance purposes.*"[9] The UNESCO AI Recommendation also found that "*greater transparency contributes to more peaceful, just, democratic and inclusive societies.*"[10] The UN High Commissioner for Human Rights has called for a prohibition on AI practices that violate international human rights law and a moratorium on the use of facial recognition for mass surveillance.[11]

We also support the recent call of EDPB for Experts to "cooperate with Supervisory Authorities around the European Economic Area (EEA), on different stages of their investigation and enforcement activities in the field of data protection law."[12] One of the key tasks of Supervisory Authorities, as set out in the GDPR, is to "monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies and commercial practices."[13] In addition to assisting Supervisory Authorities enforce the safeguarding of personal data, the Pool of Experts could also provide advice concerning new technologies and new business practices that implicate data protection. The Working Party 29, the predecessor of the EPDB, issued many such reports on these topics.[14]

The EDPB's Guidelines 01/2022 on data subject rights - rights of access

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https://www.europarl.europa.eu/doceo/document/TA-9-2021-0405_EN.pdf

[9] *UNESCO Recommendations on the Ethics of AI* at 7 (2021) (Recommendation #26), https://unesdoc.unesco.org/ark:/48223/pf0000380455; CAIDP, *UNESCO Finalizes Recommendation on AI Ethics,* CAIDP Update 2.25 (2 July 2021), https://www.caidp.org/app/download/8330514463/CAIDP-Update-2.26.pdf;

[10] *UNESCO Recommendations on the Ethics of AI* at 9 (2021) (Recommendation #38), https://unesdoc.unesco.org/ark:/48223/pf0000380455;

[11] United Nation Human Rights Office of the High Commissioner, *Artificial intelligence risks to privacy demand urgent action – Bachelet* (15 September 2021), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27469&LangID=E

[12] EDPB, *Call for Experts, the new EDPB Support Pool of Experts* (21 February 2022), https://edpb.europa.eu/news/news/2022/call-experts-new-edpb-support-pool-experts_en

[13] GDPR, Article 57(1)(i), https://gdpr-info.eu/art-57-gdpr/

[14] See, for example, Article 29 Data Protection Working Party, *Opinion 2/2002 on the use of unique identifiers in telecommunication terminal equipments: the example of IPv6* (30 May 2002), https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2002/wp58_en.pdf

Our assessment of the draft Guidelines 01/2022 on data subject rights - rights of access[15] ("Guidelines") is favorable. The proposed Guidelines strengthen the purpose and application of the GPDR. The EDPB Guidelines contribute to more accountability on the use of personal data within the European Union and provide a reference for promoting algorithmic transparency and explainability. As such, this document addresses regulatory shortcomings with regards to the enforcement of the GDPR[16] as recognized by the European Commission.[17]

The EDPB Guidelines strenghthen data subjects' rights. As the EDPB Guidelines explain:[18]

> 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. This will make it easier - but is not a condition - for the individual to exercise other rights such as the right to erasure or rectification.

The EDPB Guidelines further explain:

> The right of access includes three different components:
> - Confirmation as to whether data about the person is processed or not,
> - Access to this personal data and
> - Access to information about the processing, such as purpose, categories of data and recipients, duration of the processing, data subjects' rights, and appropriate safeguards in case of third-country transfers.

These factors are vital to creating ethical data handling policies and frameworks, including for future AI design and development.[19] The CAIDP, thus, praises the steps that these guidelines take in the service of addressing a regulatory and logistical gap with regards to the GDPR's implementation to AI-empowered systems and celebrates the opportunity to comment on this vital legislative document.

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[15] *EDPB Guidelines on Right of Access* at 2.
[16] European Commission, *Two years of the GDPR: Questions and answers* (24 June 2020) https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1166
[17] European Commission, *Report on the implementation of specific provisions of the General Data Protection Regulation* (6 January 2021), https://www.dataguidance.com/news/eu-commission-publishes-report-implementation-specific
[18] *EDPB Guidelines on Right of Access* at 2.
[19] *CAIDP AI and Democratic Values report*

Below are further recommendations of the CAIDP for the deliberations of the Guidelines, including several provisions from the UNESCO Recommendation on the Ethics of AI[20] that could be incorporated (in whole or part) into the Guidelines.

CAIDP recommends that the Guidelines Explicitly Require Algorithmic Transparency for All Decisions Concerning the Processing of Personal Data

The Guidelines clarify in 4.3 that according to Art. 15 (1)(h) GDPR "every data subject should have the right to be informed, in a meaningful way, inter alia, about the existence and the underlying logic of automated decisions, including profiling concerning the data subject and about the significance and the envisaged consequences that such processing could have."[21]

This obligation follows from the obligation to make known the "logic of the processing" in the original EU Data Protection Directive,[22] as well as modernized Council of Europe Convention on Privacy ("108").[23] Theses normative standards have received a fuller elaboration in the recently adopted UNESCO Recommendation on the Ethics of AI.[24] In the Age of AI, algorithmic transparency should be the cornerstone of the right of access concerning the processing of personal data.

The EDPB Guidelines should make clear the need for algorithmic transparency concerning employment,[25] credit, education, criminal justice, and public benefits decisions. All of these are considered high risk in the proposed EU Artificial Intelligence Act[26] as they have far-reaching consequences for data subjects and therefore need special attention and safeguards. Transparency and responsible disclosure regarding AI systems, particularly in these areas, is crucial to enable

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[20] *UNESCO Recommendations on the Ethics of AI* (2021),
https://unesdoc.unesco.org/ark:/48223/pf0000380455
[21] *EDPB Guidelines on Right of Access* at 38.
[22] Directive 95/46/EC On the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995),
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31995L0046
[23] Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (1981),
https://rm.coe.int/1680078b37
[24] *UNESCO Recommendations on the Ethics of AI* (2021)
https://unesdoc.unesco.org/ark:/48223/pf0000380455
[25] CAIDP, *Dutch Uber Case Highlights Concerns About AI Decision-making,* CAIDP Update (13 February 2021)
https://dukakis.org/center-for-ai-and-digital-policy/dutch-uber-case-highlights-concerns-about-secretive-ai-decision-making/
[26] European Commission, *Regulatory framework on AI | Shaping Europe's digital future* (2021),
https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai

those affected by an AI system to understand the outcome as stated in the OECD AI Principles 1.3[27]. In this line, algorithms should be subject to independent third-party audits to determine whether they are accurate, fair, provable, reliable, replicable, and verifiable.[28]

Disclosing the decision-making process allows the detection of bias or unfair decisions, and enables data subjects to take appropriate action. In addition, individuals should be able to access the reasons for a decision affecting their rights and freedoms and have the option of making submissions to a designated staff member of the private sector company or public sector institution able to review and correct the decision.

As the UNESCO Recommendation on AI Ethics has found:

> The transparency and explainability of AI systems are often essential preconditions to ensure the respect, protection and promotion of human rights, fundamental freedoms and ethical principles. Transparency is necessary for relevant national and international liability regimes to work effectively. A lack of transparency could also undermine the possibility of effectively challenging decisions based on outcomes produced by AI systems and may thereby infringe the right to a fair trial and effective remedy, and limits the areas in which these systems can be legally used.[29]

UNESCO further observed that transparency "allows for public scrutiny that can decrease corruption and discrimination, and can also help detect and prevent negative impacts on human rights. Transparency aims at providing appropriate information to the respective addressees to enable their understanding and foster trust."

For these reasons, the UNESCO Recommendation states:

> People should be fully informed when a decision is informed by or is made on the basis of AI algorithms, including when it affects their safety or human rights, and in those circumstances should have the opportunity to request explanatory information from the relevant AI actor or public sector institutions. In addition, individuals should be able to access the reasons for a decision affecting their rights

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[27] *OECD AI Principles* (2019),
https://oecd.ai/en/dashboards/ai-principles/P7
[28] CAIDP, *The Public Voice*
https://www.caidp.org/public-voice/
[29] *UNESCO Recommendations on the Ethics of AI* at 9 (2021) (Recommendation #37),
https://unesdoc.unesco.org/ark:/48223/pf0000380455

and freedoms, and have the option of making submissions to a designated staff member of the private sector company or public sector institution able to review and correct the decision.[30]

Separate from transparency is the principle of explainability. As UNESCO has stated:

> Explainability refers to making intelligible and providing insight into the outcome of AI systems. The explainability of AI systems also refers to the understandability of the input, output and the functioning of each algorithmic building block and how it contributes to the outcome of the systems. Thus, explainability is closely related to transparency, as outcomes and sub-processes leading to outcomes should aim to be understandable and traceable, appropriate to the context.

For these reasons, UNESCO recommends:

> AI actors [controllers and processors] should commit to ensuring that the algorithms developed are explainable. In the case of AI applications that impact the end user in a way that is not temporary, easily reversible or otherwise low risk, it should be ensured that the meaningful explanation is provided with any decision that resulted in the action taken in order for the outcome to be considered transparent.

We strongly support the UNESCO Recommendation on AI and believe that the EDPB should take the opportunity of this review of the right of data subject access to incorporate the UNESCO text, which has already been endorsed by 193 countries.

CAIDP recommends that there should be legal redress in instances where a data subject is asked to pay fees

As a general proposition, individuals should not be required to pay fees to exercise their access rights. The EDPB Guidelines make clear that fees may only be considered in those instances where the controller contends that the request is excessive.

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[30] *UNESCO Recommendations on the Ethics of AI* at 9 (2021) (Recommendation #38), https://unesdoc.unesco.org/ark:/48223/pf0000380455

In cases where controllers contends that a request is excessive and proposes to charge a fee to exericise the data access right, the data subject, in addition to being informed of the fee[31], should also be informed of their right to lodge a complaint according to Art. 77 GDPR similar to the proposed guideline for a refusal of requests.[32] In all cases, special consideration should be made for persons who are unable to afford data request fees. The right of access should be guided by the principles of transparency and accessibility for the data subject.

CAIDP warns that some of the proposed provisions of the EU AI Act could pose a threat to the GDPR

We also take this opportunity to call the attention of the EDPB to a proposal for the EU AI Act that would designate machine learning as a "legitimate purpose" under the GDPR.[33] We believe this is an extremely concerning proposal that could undermine the entire purpose and structure of the GDPR. We have no dispute with the use of machine learning applications unrelated to the collection and use of personal data. But the processing of personal data necessarily implicates rights and obligations under the GDPR, and there should be no blanket exception simply because the processing is designated as "machine learning."

More generally, we urge the EDPB to review carefully the proposed EU AI Act for provisions that may adversely impact rights currently established in the GDPR. We are specifically interested in how the EU AI Act may "tip the balance" from the well-established rights in the GDPR toward machine-driven AI-systems that could be given *carte blanch* for the processing of personal data.

Conclusion

The Center for AI and Digital Policy supports the proposed EDPB Guidelines on Data Subject Access but strongly suggests the incorporation of the relevant text from the UNESCO Recommendation on AI Ethics to strengthen the right of algorithmic transparency. This will advance the goal of providing individuals meaningful information about the processing of their personal data.

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[31] *EDPB Guidelines on Rights of Access*

[32] Id.

[33] *Draft opinion of the Committee on Legal Affairs for the Committee on the Internal Market and Consumer Protection and the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts* at 13 (March 2, 2022) (Amendment #11, proposed recital 44), https://www.kaizenner.eu/post/juri-draft-aia

We also provide a warning about the forthcoming debate over the EU AI Act and the possibility that "machine learning" would provide a legitimate basis for the processing of personal data.

Thank you for your consideration of our views.[34] We would welcome the opportunity to discuss these recommendations with you.

Sincerely yours,

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