

Feedback on

**‘Guidelines 01/2022 on data subject rights - Right of access
Version 1.0 Adopted on 18 January 2022’**
in the context of the public consultation

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1. This short contribution wishes to alert the European Data Protection Board (EDPB) about two major problems with the published version of the *Guidelines 01/2022 on data subject rights – Right of access*, which could have extremely negative consequences for data subjects and their enjoyment of the European Union (EU)’s fundamental right to personal data protection. The first concerns the **‘layered approach’**, and the second the possibility for data controllers to unilaterally decide **not to provide data through a portal** that the data subject has chosen as means to exercise their rights.

About the ‘layered approach’

2. The published version of the Guidelines is ambiguous regarding the ‘layered approach’, stating in essence that sometimes it would be appropriate approach, although sometimes it won’t be an appropriate approach. The Guidelines state indeed it *‘could be an appropriate measure to fulfil both the requirements in Art. 15 and 12(1)’* (§ 139), which generates much uncertainty, uncertainty being what the Guidelines are supposed to be trying to reduce.
3. Not only it is unclear when would the ‘layered approach’ be appropriate; it is also completely unclear what does the ‘layered approach’ entail in practice: the Guidelines state that *‘Access to the different layers shall not entail any disproportionate effort for the data subject and shall not be made conditional to the formulation of a new data subject request’* (§ 144). As we know that formulating a data subject request might basically consist, as general rule, in **sending an email to the data controller**, one would imagine that access to another layer could thus – according to the Guidelines – be possible only if not made conditional to the sending of a further email: **is that the case? Or is that not the case?** Again, the Guidelines generate much uncertainty in this regard: there is no indication of what could and what could not be imposed on data subjects in the name of the ‘layered approach’.
4. The EDPB specifically suggests that data controllers can impose on data subjects additional efforts as long as they do not entail a *‘disproportionate effort’*. This is inappropriate. **The obligation to facilitate the exercise of data subject rights does not mean that data controllers can impose additional efforts on data subjects as long as these additional efforts would be deemed ‘proportionate’**: the obligation to facilitate the exercise data

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subject rights means that data controllers have to reduce the efforts imposed on data subjects as much as possible.

5. In light of the recurrent problems experienced by data subjects who try to exercise their right of access, the Guidelines should be **as clear and precise as possible**, and send a clear message to all data controllers regarding their obligation to fully comply with the GDPR without imposing any additional, unnecessary efforts on data subjects.
6. In practice, data controllers already often reply to data access requests in a partial way, while leaving the room open for data subjects to request further data or further information. **It is crucial that the EDPB takes this reality as starting point of their reflection on any arguments around any possible added value of ‘layered approach’.**
7. For example, data controllers, once satisfied with the identification of the data subject (often after demanding and time-consuming exchanges related to identification) often reply with some limited data and/or information and sentences such as these (all taken from real responses from different data controllers):²
 - a. *“If you have other Data Subject Requests, please contact us again in English and by entering the Subject Matter in the headline”.*
 - b. *“I invite you to consult our privacy policy (...) combined with your data, you should have the information you ask. And I suggest you to contact us again if, after consulting our privacy policy and receiving the data you requested through the app (which should happen within 30 days maximum), you still miss something.”*
 - c. *“We again apologize for the disturbance and the efforts you needed to take to address your request. We hope we could have clarified your questions and have dealt appropriately with your concerns. Please do not hesitate to contact us directly again if we unintentionally left questions unanswered.”*
 - d. *“If you have any additional questions, please contact a member of the privacy team.”*³
 - e. *‘We want to work with you on getting you the data that you are looking for. Please advise us what additional data you would like to receive. These details can help us accelerate the process by telling us where to locate the specific data you’re looking for’.*
8. The Guidelines must **send a clear message to dissuade data controllers from this kind of delaying strategies**, based on a deliberate fragmentation of the data and information provided, and to make sure that data controllers stop putting on the data subject the burden of specifying what they are requesting, or even what they are legally entitled to obtain. Encouraging a fuzzy ‘layered approach’ will not contribute to increasing compliance with the GDPR, it will only complicate things further. Thus, it is suggested that the EDPB **abandons** encouraging a ‘layered approach’.

² The examples below are taken from responses received by the author, available in her files. The names of the data controllers are not disclosed as it is not the objective of this contribution to comment on specific data controllers.

³ Sentence in a message sent from a “no-reply” account.

About the possibility for a data controller to decide not to send the data to a portal

9. The Guidelines argue that when a data subject submits a request through a portal there is no obligation for a data controller to provide the data through the portal. According to the Guidelines, if the controller *'for example, establishes that the security measures are insufficient, it would be deemed appropriate to use another way for the disclosure of data to the data subject'* (§ 89). This idea is unfounded, problematically worded, potentially extremely detrimental for the rights of data subjects, and contrary to ongoing EU policy developments aimed at strengthening individual rights. **It must thus be obliterated.**
10. The idea is **unfounded** because there is no reason why data controllers should be granted a right to decide on behalf of data subjects which is their preferred means to exercise their right of access. This is a core principle in the GDPR: the data subject shall be free to decide how to exercise their right of access – there is no imposed specific formal requirement. Art. 12(3) GDPR is clear about the fact that *'Where the data subject makes the request by electronic form means, the information shall be provided by electronic means where possible, unless otherwise requested by the data subject'*. If the data subject has decided to request their personal data through a specific portal, there is no reason why the data controller could then have the right to be exempted from the obligation to **facilitate the exercise of data subject rights** by deliberately refusing to provide through such electronic means chosen by the data subject.
11. As a matter of fact, it is not clear if the Guidelines are trying to say that the data controller might be free to decide not to send the data to the third party operating the portal *via the portal*, or if they are trying to say that data controllers can decide not to send the data to the third party at all - reference is made to other ways to disclose the data *to the data subject*, as if the issue was the disclosure to a third party, and not the use of a portal as a technical means. Again, this idea is surrounded by much uncertainty, which is problematic. In any case, it should be clear that it is not up to the data controller to judge whether it was a good choice of the data subject to ask for the data to be sent to a third party operating a portal.
12. The idea that data controllers could unilaterally decide not to provide data or information through the means which are the electronic means used by the data subject to introduce their request is furthermore **problematically worded**, notably because it is open-ended: data controllers, the Guidelines state, could decide not to provide the data through the portal selected by the data subject, *'for example'*, if they would have established that security measures would be insufficient. This is already an obscure possibility, as it is not explained how the data controller would be able to establish the existence of such a security issue. In any case, **it is clearly not the responsibility of the requested data controller but of the data controller behind the portal to guarantee the security of the data processing by the portal.** In addition, the wording leaves the door open to potentially other – unspecified - arguments that could be used by requested data controllers to unilaterally impose on data subjects having to accept another means for receiving the data, in addition to the mentioned presumed security concerns of a portal which is operated by another data controller.
13. The idea is in any case **potentially extremely detrimental for the rights of data subjects**, as it could annihilate existing and future innovative initiatives that aim at helping data subjects in the exercise of their rights. That cannot be the purpose of the EDPB.

14. Finally, the idea is actually **contrary to ongoing EU policy developments aimed at strengthening individual rights**, which acknowledge the fact that individuals can be supported in the exercise of their rights by third parties. In this sense, the proposal for a Data Governance Act (DGA) of the European Commission, refers to a ‘*specific category of data intermediaries*’ which ‘*includes providers of data sharing services that offer their services to data subjects in the sense of Regulation (EU) 2016/679. Such providers focus exclusively on personal data and seek to enhance individual agency and the individuals’ control over the data pertaining to them*’.⁴ By artificially curtailing the legitimate actions of such data intermediaries, making the success of any data access request conditional to a subjective assessment by data controllers, the Guidelines would since the very day of their publication appear to go against the future strengthening of data subject rights, instead of aiming at their defence.

Conclusion

15. In sum, the EDPB should:

- a. abandon the encouragement of a ‘layered approach’ to data access requests, and
- b. reject the idea that data controllers receiving requests through portals operated by third parties can unilaterally decide not to provide the requested data and information through the portal selected by the data subject.

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⁴ See Recital 23 of the proposal, COM(2020)767 final.