

**Comments to the EDPB Guidelines 01/2022 on
Data Subject Access, version 1.0 as
adopted on 18 January 2022**

The Dutch Confederation of Dutch Industries and employers and the Royal Association of small and medium enterprises (VNO-NCW/MKB-Nederland) welcomes the opportunity to provide input and ask questions regarding the EDPB guidelines 01/2022 on Data Subject Access. We appreciate the effort the EDPB put into drafting the Guidelines, illustrated with examples, with the aim to provide businesses with guidance on providing access to data subjects regarding personal data pertaining to them.

The Guidelines include criteria to assess whether and how data subjects are provided with access to personal data. Legal certainty how to interpret and implement the complex GDPR is essential for companies, big and small. In this context clarity is also needed regarding the interplay between new proposals for European legislation initiatives such as the Data Act, the AI Act and the existing GDPR. Such legal certainty and clarity are necessary to reach the ambition of the European Commission to protect fundamental rights such as the protection of personal data and empower growth and strengthen the position of Europe in the global market.

We appreciate clarification as well as adjustment of certain aspects of the guidelines to give companies more assurance how to interpret the obligations to provide access to data subjects.

Summary

- 1. Proportionality should be relevant for all obligations under the GDPR. We request the EDPB to take the principle of proportionality into account regarding the implementation of Article 15.*
- 2. We are of the opinion that the identity of the data subject can be reliably verified - in line with the principles of the GDPR - by requesting – via a protected route – a copy of the ID of the party requesting access to personal data (without the photo and BSN being visible) for verification purposes which require a high degree of certainty.*
- 3. Under circumstances using the right to access can constitute an abuse of rights. Therefore, the “why” can most certainly be relevant for the controller.*
- 4. The EDPB has the task to issue guidelines, recommendations, and best practices in order to encourage consistent application of the GDPR.¹ We request the EDPB to refrain from interpretations which are reserved for the legislator and the competent court. For instance, ‘rights and freedoms’ in Article 15(4); whether a data subject has a right to raw data; and ‘commonly used electronic form’ in Article 15(3).*
- 5. Questions arose regarding terms used in the guidelines for which clarification would be much appreciated: very vast amounts/vast amounts/large quantity/large amounts of data; large scale processing of data; as well as questions regarding the role of the DPO regarding the right to access.*

We would like to take this opportunity to ask some specific questions and make some comments regarding the Guidelines 01/2022:

¹ Article 70 paragraph 1 sub e GDPR

1. **Proportionality** (paragraph 164 Guidelines – recital 13 GDPR)

Could the EDPB elaborate on its remark in paragraph 164 that “*the right of access is without any general reservation to proportionality with regard to the efforts the controller has to take to comply with the data subjects request under article 15 GDPR*”, in relation to the general principle included in recital 4 of the GDPR that “*The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.*” As well as in relation to recital 13 of the GDPR that “*Union institutions and bodies, Member States and their supervisory authorities are encouraged to take into account the specific needs of micro, small and medium-sized enterprises in the application of the Regulation.*” It seems that proportionality should be relevant for all obligations under the GDPR. There is no discernible reason why the right to access is without a general reservation to the principle of proportionality, certainly not regarding SME-controllers. We request the EDPB to take the principle of proportionality into account regarding the interpretation of Article 15.

2. **Specification of Access Rights (paragraph 35)**

If we understand the wording in paragraph 35 correctly, it seems to assume that no matter how broad and unspecific the request for access, the controller has the obligation to comply with such request. We refer to our earlier remarks regarding proportionality (point 1). Such an interpretation of Article 15 does not seem proportionate and not in line with established case law in the Netherlands which does take the principle of proportionality into account.² The interpretation given by the EDPB to Article 15 does not take the day-to-day practice into account nor the reasonableness of what could be required of businesses, big and small.

3. **Identity verification data subject (section 3.3, paragraphs 69-78)**

In paragraph 73 is stated that using a copy of an ID for verification of the identity of the data subject should be considered inappropriate as this *may* lead to unauthorized or unlawful processing. However, we are of the opinion that the identity of the data subject can be reliably verified - in line with the principles of the GDPR - by requesting – via a protected route – a copy of the ID of the party requesting access to personal data (without the photo and BSN being visible) to verify with a high degree of certainty that such person is indeed the data subject it states to be. Taking into consideration that the copy of the ID is deleted once the identity has been duly verified. Such a verification process can be necessary to prevent data from being shared with unauthorized third parties (such as ex-partners). In our opinion, this verification method guarantees proper identification without prejudice to the right of data subjects to contact an organization freely and without excessive processing taking place in view of the mitigating measures mentioned. This approach is also in line with the decision of the Dutch Council of State dated 9 December 2020³, in which the Council does not consider the principle that a copy of an identity document is required with a request for access to be unreasonable. We request the EDPB to take this into consideration and rewrite paragraph 73 to reflect that requesting a copy of an ID may be a reasonable verification method, in situations where the requesting party has not yet been authenticated as the data subject.

4. **Raw Data (paragraph 96 & 139)**

In paragraph 96, 139 and in the executive summary on p. 3, the EDPB states that the data subject has a right to access the raw data it provided. Could the EDPB elaborate how this

² Appeals Court ‘s-Hertoghenbosch, 11 December 2014, ECLI:NL:GHSHE:2014:5221, overw. 7.12.5-9; Appeals Court ‘s-Hertoghenbosch, 1 February 2018, ECLI:NL:GHSHE:2018:363, nr. 3.7.6.; District Court of Middle Netherlands 15 June 2020, ECLI:NL:RBMNE:2020:2222, nr. 12. We also refer to the comments made by Professor dr. G.J. Zwenne of the University of Leiden regarding (the specification of access requests, paragraph 35) the Guidelines 01/2022 version 1.0.

³ ECLI:NL: RVS: 2020:2833, paragraphs 5.1 and 5.2.

relates to the decision of the European Court of Justice (YS)⁴. In this decision, the European Court of Justice stated in recital 58: “Therefore, in so far as the objective pursued by that right of access may be fully satisfied by another form of communication, the data subject cannot derive from either Article 12(a) of Directive 95/46 or Article 8(2) of the Charter the right to obtain a copy of the document or the original file in which those data appear. In recital 59 it stated: For that right of access to be complied with, it is sufficient for the applicant for a residence permit to be provided with a full summary of all of those data in an intelligible form, that is, a form which allows him to become aware of those data and to check that they are accurate and processed in compliance with that directive, so that he may, where relevant, exercise the rights conferred on him by Articles 12(b) and (c), 14, 22 and 23 of that directive. That there is no obligation to provide the data subject with a copy of the original file (e.g. raw data) is not only the correct interpretation of Article 15, it is also an understandable and logical one. For the data subject to become aware and verify the lawfulness of the processing (recital 63 GDPR), it makes the most sense that they receive information about the processing in an intelligible readable form. Which, in most cases, cannot be achieved by providing the data subject with raw data.

5. (un)Lawfulness of processing

In paragraph 13 is stated that *the controller should not assess “why” the data subject is requesting access, but only “what” the data subject is requesting*. In addition, in paragraph 36 it is stated that data should not be corrected for the data subject to have the possibility to know about unlawful processing. How does this interplay with the obligation of the data controller to keep data up to date and correct? But more importantly, if the data controller is not allowed to correct data, this could lead to self-incrimination and would go against/harm the right of the data controller. The right exists to verify *lawfulness* of processing and should not be construed as an e-discovery right to demonstrate unlawfulness. Could the EDPB elaborate on this by also taking the rights of the data controller into account? It is worth noting that paragraphs 13 and 36 do not take into consideration established case law in the Netherlands⁵ in which respectively the District Court of Rotterdam dated 21 January 2020, the Supreme Court dated 16 March 2018 and the Council of State dated 6 November 2019 have stipulated that Article 15 gives the right to access to data subjects to verify whether his/her personal data are correct and have been lawfully processed, which may lead to rectification, erasure or blocking of the data. But it does not give the right to – solely – obtain proof for court proceedings. In such instances access does not fulfill the purpose of protecting privacy but obtaining proof for court proceedings. In short, under circumstances using the right to access can constitute an abuse of rights. Therefore, the “why” can most certainly be relevant for the controller.

6. Article 15(4)

Could the EDPB elaborate on its wording in the last sentence of paragraph 168 where it states “It is important to note that not every interest amounts to “rights and freedoms” pursuant to Art. 15(4) GDPR. For example, *economical interests of a company not to disclose personal data are not to be taken into account when applying Art. 15(4) as long as they are no trade secrets, intellectual property or other protected rights*”? In recital 63 GDPR it is not narrowed down to *fundamental* rights and freedoms. If such an extra requirement would, however, be included in the guidelines, this would mean that the scope of paragraph 4 of Article 15 is narrowed down by the EDPB. The EDPB has the task to issue guidelines, recommendations,

⁴ ECLI:EU:C: 2014:2081, Joint decisions C-141/12 and C-372/12 YS v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. M and S, Judgment of 17 July 2014, paragraphs 58 and 59, 17 July 2014.

⁵ District Court of Rotterdam 21 January 2020, ECLI:NL: RBROT:2020:515, nr. 4.8.; Supreme Court 16 March 2018, ECLI:NL:HR:2018:365, nr. 3.3.3; Council of State 6 November 2019, ECLI:NL: RVS:2019:3754, nr. 8.

and best practices in order to encourage consistent application of the GDPR.⁶ The EDPB has no legislative powers and should refrain from interpretations which are reserved for the legislator and the competent court. Maintaining the fundament of the trias politica is of utmost importance.

7. Duty to inform data subject becoming controller

In paragraph 104 it is mentioned “*the controller should inform the data subject about the fact that they may become controller in such case*”. Could the EDPB elaborate where such an obligation is based upon?

8. Technically feasible access to back-up data

In paragraph 108 there is an obligation to provide access to back-up data “where technically feasible”. It is worth noting that to regain access to data in (binary/raw) back-ups in many cases an entire backup will have to be restored, and systematically having to search through back-up data would require more authorized personnel having access to such data. Which results in excessive processing of personal data and could adversely affect the rights of others. In the instances, where the back-up data is identical to the data in the live system, having to restore and search through the back-up would be an excessive administrative burden on companies, especially SMEs, without adding value to the data subject. In the instances where back-up data is not identical to the data in the live system, this is in most instances the result of a termination of contract or request of correction or deletion of data by the data subject. The data has been deleted from the live system and is in the process of being overwritten on the back-up. During this process the data still exists in the back-up until the next back-up cycle. Taking into consideration our remark about proportionality (point 1), we request the EDPB to reconsider the obligation to access back-up data.

9. Omission of reference to article 22

In paragraph 119 it seems that the EDPB has omitted that art 15(1)(h) requirements relate to art 22 paragraphs 1 (and 4), which refer to *solely* automated decision making *with legal or similarly significant effect*. From the perspective of legal certainty, it is important to include the reference to article 22 in paragraph 119.

10. Commonly used electronic form

In paragraph 147 it is stated that the data controller should be “based upon the reasonable expectations of the data subjects and not upon what format the controller uses in its daily operations.” “Commonly used electronic formats” (Article 15.3 GDPR) does not necessarily mean the same as “the reasonable expectations of the data subjects”. The EDPB has the task to issue guidelines, recommendations, and best practices in order to encourage consistent application of the GDPR.⁷ The EDPB has no legislative powers and should refrain from interpretations which are reserved for the legislator and the competent court. The same is to be said of the last sentence of paragraph 147. Nowadays, the Word-format as well as the PDF-format are in our opinion commonly used electronic formats. If the data subject, however, does not have these programs on its electronic device, he/she might have to buy such software to be able to read the document. We request the EDPB to delete the wording of 147 which entails an interpretation which goes beyond what is stipulated by the legislator.

11. Clarification of terms and role of DPO

A. In paragraphs 35b, 64, 127, 134, 138, 141-145, 150, 161, 162, 186 and in the executive summary the terms *very vast amounts/vast amounts/large quantity/large*

⁶ Article 70 paragraph 1 sub e GDPR

⁷ Article 70 paragraph 1 sub e GDPR

amounts of data are used to justify asking a data subject to specify their access request on the one hand and an obligation to provide supplementary information in layers on the other:

- a) are these words used interchangeably throughout the text of the draft guidelines?
 - b) do they mean the same as “large scale” data processing as defined in the “Guidelines on Data Protection Impact Assessment (DPIA)”? It seems that there is a difference since the draft guidelines also consider at least the structure of controller and modalities of data processing.
 - c) an additional example or further explanation of the meaning of “very vast amounts” / “vast amounts” / “large quantity” / “large amounts” of data would be helpful.”
- B. Could EDPB please elaborate on the tasks of the DPO in the context of the right to access; Can the DPO also be tasked with honoring the right of access; Does the DPO have a task to monitor how the right of access is executed; If a DPO honors the right of access and monitors execution, what bearing does that have on potential conflicts of interest?

We also refer to the comments made by Professor dr. G.J. Zwenne of the University of Leiden regarding the Guidelines 01/2022.

Kind regards,

Mrs. Mr. Irvette Tempelman
E-mail: tempelman@vnoncw-mkb.nl
Phone (mobile): +31(0)6 12462344