

ICO consultation on the draft right of access guidance

The right of access (known as subject access) is a fundamental right of the General Data Protection Regulation (GDPR). It allows individuals to find out what personal data is held about them and to obtain a copy of that data. Following on from our initial GDPR guidance on this right (published in April 2018), the ICO has now drafted more detailed guidance which explains in greater detail the rights that individuals have to access their personal data and the obligations on controllers. The draft guidance also explores the special rules involving certain categories of personal data, how to deal with requests involving the personal data of others, and the exemptions that are most likely to apply in practice when handling a request.

We are running a consultation on the draft guidance to gather the views of stakeholders and the public. These views will inform the published version of the guidance by helping us to understand the areas where organisations are seeking further clarity, in particular taking into account their experiences in dealing with subject access requests since May 2018.

If you would like further information about the consultation, please email SARguidance@ico.org.uk.

Please send us your response by 17:00 on **Wednesday 12 February 2020**.

Privacy statement

For this consultation, we will publish all responses received from organisations but we will remove any personal data before publication. We will not publish responses received from respondents who have indicated that they are an individual acting in a private capacity (e.g. a member of the public). For more information about what we do with personal data [see our privacy notice](#).

Please note, your responses to this survey will be used to help us with our work on the right of access only. The information will not be used to consider any regulatory action, and you may respond anonymously should you wish.

Please note that we are using the platform Snap Surveys to gather this information. Any data collected by Snap Surveys for ICO is stored on UK servers. [You can read their Privacy Policy](#).

Q1 Does the draft guidance cover the relevant issues about the right of access?

- Yes
- No
- Unsure/don't know

If no or unsure/don't know, what other issues would you like to be covered in it?

The following matters are not dealt with by the guidance:

- Duty of confidentiality exemption – The draft guidance builds on the pre-existing guidance regarding the *legal professional privilege* exemption (Data Protection Act 2018 Schedule 2, Part 4, paragraph 19 (a)). However, no guidance is provided for the new exemption in paragraph 19 (b): *information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser*. This new exemption is distinct from and broader in its potential application to that relating to legal privilege, reflecting the broad confidentiality obligations owed by legal professionals, even when legal privilege is not engaged, and should be covered by the guidance.
- “Manifestly unfounded or excessive” – The ICO does not address whether public bodies subject to FOIA/EIR may take prior FOI/EIR requests, or correspondence made as part of any such FOI/EIR requests, or any determination that the requestor has made vexatious requests into account when determining whether or not the subject access request is manifestly unfounded?
- Where the data subject already has the information – The ICO does not comment on whether information that has already been seen by and/or is in the possession of the requester (e.g. because they are in copy of the relevant email) must always be provided to the requester again, or whether it may be reasonable for such information to be withheld.

Q2 Does the draft guidance contain the right level of detail?

- Yes
- No
- Unsure/don't know

If no or unsure/don't know, in what areas should there be more detail within the draft guidance?

Further detail would be welcome in relation to the following points:

- "When is a request complex?" (page 18) – The ICO does not make clear whether or not the receipt of a request as part of a bulk coordinated set of requests could be a factor which adds to the complexity of each single request?
- "How should we deal with bulk requests?" (page 22) – The guidance should make clear that the third party's authorisation to make a subject access request on behalf of an individual needs to be specific to the scope of the subject access request, and not merely part of a broader authority to act.
- "Can we clarify the request?" (page 23) – The ICO does not make sufficiently clear the distinction between "narrowing the scope" of the request (which is not permitted) and "clarifying the request" (which is permitted)?
- "A request may be manifestly unfounded if: ...the individual clearly has no intention to exercise their right of access. For example an individual makes a request, but then offers to withdraw it in return for some form of benefit from the organisation" (page 35) – The guidance does not explain what "clearly" means. In addition, the guidance does not address the scenario where individuals have agreed not to pursue their subject access requests as part of a settlement agreement in the context of an employment dispute.
- "Negotiations with the requester" (page 55-56) – The ICO does not explain exactly what it means by "negotiations", for example whether the "without prejudice" rule needs to be in play.

Q3 Does the draft guidance contain enough examples?

- Yes
- No
- Unsure/don't know

If no or unsure/don't know, please provide any examples that you think should be included in the draft guidance.

In addition to the areas of guidance we have highlighted elsewhere, more examples would be welcomed in respect of what would be considered to be "Management information" (page 55).

Q4 We have found that data protection professionals often struggle with applying and defining 'manifestly unfounded or excessive' subject access requests. We would like to include a wide range of examples from a variety of sectors to help you. Please provide some examples of manifestly unfounded and excessive requests below (if applicable).

See response to Question 8 below.

Q5 On a scale of 1-5 how useful is the draft guidance?

1 – Not at all
useful

2 – Slightly
useful

3 – Moderately
useful

4 – Very
useful

5 – Extremely
useful

Q6 Why have you given this score?

Q7 To what extent do you agree that the draft guidance is clear and easy to understand?

Strongly disagree

Disagree

Neither agree nor disagree

Agree

Strongly agree

Q8 Please provide any further comments or suggestions you may have about the draft guidance.

On page 22, the guidance expressly states that "if a request is made by a third party on behalf of an individual, the behavior of the third party should not be taken into account in determining whether a request is manifestly unfounded or excessive". Our view is that the behavior of the third party should be taken into account as needed to ascertain whether the request is a legitimate and genuine exercise of an individual's right of access, or whether the request is made as part of a fishing expedition to extract information for the commercial gain of the third party – and the guidance should be revised in this respect.

Q9 Are you answering as:

- An individual acting in a private capacity (eg someone providing their views as a member of the public)
- An individual acting in a professional capacity
- On behalf of an organisation
- Other

Please specify the name of your organisation:

Eversheds Sutherland (International) LLP

What sector are you from:

Legal

Q10 How did you find out about this survey?

- ICO Twitter account
- ICO Facebook account
- ICO LinkedIn account
- ICO website
- ICO newsletter
- ICO staff member

- Colleague
- Personal/work Twitter account
- Personal/work Facebook account
- Personal/work LinkedIn account
- Other

Thank you for taking the time to complete the survey.