

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 The draft guidance also explores the special rules involving certain categories of personal data, how to deal with requests involving the personal data of others, and the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We are running a consultation on the draft guidance to gather the views of stakeholders and the public.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Q1 Does the draft guidance cover the relevant issues about the right of access? No

This response is made by UCL's MIRRA (Memory – Identity – Rights in Records – Access). This work has been designed and delivered by academics and care leavers in conjunction with the Care Leavers Association. The study was approached as a 'recordkeeping perspective', meaning that it focused on how records are created, conceptualised and mobilised by the people who use them. This included social work practitioners, information professionals (such as data protection officers and records managers), academic researchers and, most importantly, the children, young people and care leavers who the records are about. The study concluded that whilst there are good case studies of DPOs processing SARs for care leavers, there were many authorities with poor processes in place. Often the process of undertaking a SAR was extremely distressing for care leavers.

In the light of this context, we conclude that the draft guidance is relatively clear for Data Protection Officers (DPOs) and to be welcomed. However, in its procedural tone, it misses an important component that prepares a DPO for properly performing the role – this is the impact on the individual of the decisions and processes a DPO makes. Even if this is a formal document, this nevertheless should be further stressed. We think the significance of this within this general document could be evidenced by a couple more case examples and an expanded discussion. We are happy to provide a case example.

In addition, we would strongly stress that this guidance needs to be supplemented by more specific and detailed guides for particular groups of people who make SARs. We would like to see a supplementary guide for care leavers. There are estimated to be up to half a million people in the UK who are care leavers. In such cases the state carries parental responsibilities, which include documenting a child's life. Often these records remain the only tool that a care leaver has to make sense of their life and identity. Case law has highlighted that as these records exist and are made with the focus as the child, wherever possible the whole set of information should be released. However, DPOs do often unnecessarily redact information and do not weight the process sufficiently in the favour of the child in care or care leaver. This is because the DPOs are naturally risk averse and it appears that redaction is the easiest choice to make. However, this is often not the correct choice. More detailed guidance in this domain would have a significant impact in empowering DPOs to make the right choices. During the MIRRA project a film was made (available at <https://www.youtube.com/watch?v=xs28tczL3yA>) which does provide a strong case example as to why this matters; we would be happy for the ICO to embed the film on the ICO site and link to it. We would state, that this particular Guidance as it stands, will not improve processes for this community. The ICO need to better empower DPOs in this context, so that they understand the choices to be made with clear examples.

As a separate procedural point, we would note that exemptions on page 46 are not comprehensive. As this is highlighted as a general guide this should be addressed. For example it does not cover exemptions permitted under GDPR Article 89 and specified in Schedule 2 part 6 to the UK Data Protection Act 2018. It was noted that one of the links did not actually take the reader to any text.

The Guidance is targeted as DPOs but in fact many others often have a role in SARs, e.g. social workers. The focus and tone of the Guide should be considered in the light of all those involved in SARs.

We are keen to work with the ICO on specific care leaver SARs guidance. We could write a special cases section as an interim solution. The ICO should further consider the special needs of certain populations.

Q2 Does the draft guidance contain the right level of detail? No

In general yes, but as noted above there does need to be some discussion on the impact of the processes to individuals. We strongly suggest that the guidance is supplemented with further case specific guidance, e.g. for care leavers.

We welcome the statement that SARs are a fundamental right and that individuals do not need to state their intentions when making a request. In addition, it is beneficial to cover the rights of youths from 13 years plus.

We note the timelines. We would stress that bulk of information and complexity are not synonymous. Where delay is necessary, this should not be used as a reason for the individual to be pressured into explaining why they want the information or narrowing a request.

There is mention of retention and deletion policies which is to be welcomed but not the related processes. It would be beneficial to emphasize the existence of statutory retention.

In regard to redaction, more detailed guidance on how to explain redactions in covering letters and highlighted within the information provided would be beneficial for the sake of transparency and clarity for the individual. Redaction is often overly defensive focused on the organization (which employs the DPO) as opposed to the requestor's rights. More needs to be said on the proper checks and balances required, the discretion available to DPOs and a need to look at case contexts, e.g. a lot of care records are not protected information. The warning that there is no presumption of confidentiality merely because a document is so marked is a useful inclusion in the Guidance.

We would further note, that often the 'harm test' is inappropriately applied when in fact it is the redaction that can cause greater 'harm'. Some further surfacing of this complexity is required although this section is generally welcomed.

The consent expectations should be developed. For care leavers, greater efforts should be made to get consents to release information. In addition, organisations should be encouraged to get consents when collecting information.

Some additional mention of the need to consult case law would be helpful and an example of how, why and where this matters would be beneficial.

Organisations, their lawyers and their insurers tend to be defensive. An explanation of why this is not appropriate behaviour would be beneficial.

Some consideration of how to provide the records appropriately and sensitively considering any barriers to access would be beneficial. In addition, the suggestion that there should be signposting to further support for a range of SARs populations would be beneficial. The need to be clear on where and how the information has been located should be mentioned. For care leavers, finding their records is a journey and it is important they understand the search processes for an individual SAR to make sense of whether they have a complete set of records. We would point to the MIRRA work with Family Action to help provide a better journey, see <https://www.familyconnect.org.uk/>.

Often certain populations do make requests via the agency of third parties. Organisations should be clearer on what ID is required in such instances. In addition, we would not wish to see verification as a barrier; some flexibility in this regard could be discussed.

The guide would be more useable with greater cross-referencing.

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.

There could be many more examples. We are happy to provide an example detailing the case of care leavers' access requests.

During the MIRRA research, we found that care leavers received documents where whole pages were redacted, with very poor explanations. Often no assessment was made of what a care leaver would reasonably know but all third-party data was removed even including the names of parents which are available through other avenues and should be known to a child.

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).

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 |
| <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

Q6 Why have you given this score?

The draft guidance is very useful as a general guide but a 4 has not been scored as the need to explain the impact of SARs on individuals is a very significant omission. In addition, we would like to see other points in our submission addressed.

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 |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

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

We welcome this guidance and hope it will be further strengthened and supplemented as noted above.

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:

MIRRA Research Project (<https://blogs.ucl.ac.uk/mirra/>), Department of Information Studies, University College London.

What sector are you from:

University – but representing care leavers.

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.