

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 The draft guidance also explores the special rules involving certain categories of personal data, how to deal with requests involving the personal data of others, and the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We are running a consultation on the draft guidance to gather the views of stakeholders and the public.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Q1 Does the draft guidance cover the relevant issues about the right of access?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 Council considers that it may be useful for the Commissioner to provide clarity between the Right of Access and data sharing in relation to compliance with the six data protection principles. This is particularly in reference to an observation made by the Council later in this response concerning the exercise of rights on behalf of others.

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?

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.

The Council believes that it may be better to provide examples in relation to where a parent seeks to exercise the Right of Access on behalf of their child aged 12 or over.

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).

From experience, the Council puts forward the following circumstances would could be viewed as being "manifestly unfounded or excessive"

- where a data subject submits a new request for the same personal data which the Council has previously provided and the personal data has not changed or
- where it is clear that a requestor is seeking to use their rights under data protection laws for the purpose of harassing the controller or its employees into adopting a course of action sought by the requestor. It is suggested that this would be similar to a "vexatious" request under FOIA or FOISA where there has been extensive case law.

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

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 |
| <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.

See attached note

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:

South Lanarkshire Council

What sector are you from:

Local Government

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.

Attached Note to response by South Lanarkshire Council

The Council welcomes the opportunity to comment upon the draft guidance prepared by the Commissioner and wishes the following comments to be considered as suggestions and not criticism of the guidance:

Use of Social Media

The guidance confirms that there is no restrictions on how data subjects may request to exercise their Right of Access. Existing Council Guidance takes most of these methods into account. However, the ICO has specifically mentioned the use of any social media as being a possible way to make the request. Whilst this is correct, the Guidance does not mention that to use this method is more likely to require proof of ID from the requestor as the Council does not use this method for communication with particular individuals and so is likely to be more limited in being able to satisfy itself on the identity of the requestor without proof of identity. This possibility is referred to by the ICO in relation to other forms of communication but not social media. It may be that the ICO should consider mentioning this possibility specifically in this section of the guidance.

Third Party SARS

The guidance explains how third parties can make SARS on behalf of a data subject through powers of attorney or guardianships or other court orders. The guidance, also, explains that a child aged 12 and above is deemed to have capacity to make a request in their own right. She explains in her guidance that upon gaining such capacity, a parent can exercise the right on behalf of the child if the child consents or "*if it is evident that this is in the best interests of the child*". It is suggested that the latter proposal in italics is inconsistent with the principle of all rights being exercised by the child. However, it would, however, be consistent with data sharing with parents in compliance with the data protection principles. It is suggested that the guidance should be confined to the powers of third parties to act on behalf of a data subject when legally authorized to do so.

Clarification and the time to respond

In terms of the ICO's guidance, the period to respond does not stop or reset where the Council seeks "clarification". This appears to present difficulties in responding as how could the Council respond if it does not know what information is being sought? Upon reading the context of the guidance, it looks like the Commissioner may be better to clarify the difference between where the information sought is unclear and where the information sought is large and the request narrowed. Clearly, in the latter case, the clock would still be running but not the former, revising the wording to clarify this would be helpful.

The Applied GDPR

The Applied GDPR applies to personal data held in an unstructured manner. The Council is permitted to refuse a request for information where it would exceed the maximum level of costs in terms of FOIA/FOISA. If it is intended that the calculation of limits be based upon either FOIA or FOISA, the guidance should refer to the different capped hourly rates in respect both pieces of legislation.

Health records held by the Council

~~This is a requirement that the Council must consult with a medical professional when considering disclosure of medical records. The guidance states that the Council is restricted from providing the information unless the medical professional states that there would be no harm caused in doing so. However, the DPA 2018 states that the duty to provide comply with the Right of Access does not apply unless the Council has obtained an opinion from the appropriate healthy professional to the effect that the serious harm test is met with respect to that data. There is no indication that the duty to comply with the Right of Access including time limit of 1 month to respond is suspended during the period of consultation so far as the Council can see. This is very different from the position of the Principal Reporter. In that case, the DPA is clear that the duty does not apply e.g. the time limits for compliance do not run unless the Principal Reporter has informed the Council that, in his/her opinion, the serious harm test is not met with respect to the data. This reflects the position set down in previous legislation and the view has been taken that, unless a response is received from the appropriate health professional within the time limits, the Council would need to reach a view of its own in respect of the personal data and whether the serious harm test was met as the time limit still applied in relation to compliance with rights. y where the medical professional states that there is a risk of harm.~~

~~However, the guidance seems to treat both scenarios in the same manner and states that the Council is restricted from providing the information unless the medical professional states that there would be no harm caused in doing so. However, this appears to be inconsistent with the DPA in relation to the time limit for responding. Whilst the Council welcomes the interpretation of the Commissioner in respect of suspending the compliance period while it consults with the appropriate medical professional, it is unsure as to whether that is what is set down in the DPA. This is, apparently, inconsistent and so the Council suggests~~It may be that the Commissioner may wish to reconsider the guidance provided on this topic.

FOISA and the Right of Access

The guidance sets down the expectations of the Commissioner in relation to dealing with requests for personal data that refer to FOIA/FOISA and similar legislation. The guidance clearly reflects the Commissioners joint role in relation to the interaction of these regimes for non-devolved public bodies and states that the Commissioner would not expect a request to be dealt with under FOIA where it is clearly a SAR. The Council is unsure whether the Scottish Information Commissioner would take the same view. It is understood that the SIC would expect a formal response to be issued under FOISA and similar legislation. It may be that the SIC has contributed to this section. If that is the case, it may be useful for the guidance to say so or for the SIC to issue his own guidance regarding what to do in those circumstances.