

COMMENTS ON GOOGLE'S RESPONSE TO DATAINSPEKTIONEN'S INVESTIGATION (DI-2019-740)

The Swedish Consumers' Association and The Norwegian Consumer Council welcome that Datainspektionen has taken the initiative to investigate the coordinated complaint brought by the Swedish Consumers' Association. We also thank the authority for the disclosure of Google's comments, since it enables us to respond to the comments on the report and complaint.

Summary

- While we appreciate Google's efforts to argue that it provides users with comprehensive privacy information, we would like to restate that the information provided, the way this information is provided and how choices are presented to users is not satisfactory from our standpoint.
- We do not share Google's view that users can tell the difference between the processing of "Location History" and "Web & App Activity" and understand what each feature entails as easily as the company suggests. Information is scattered between different documents, sometimes important information regarding processing purposes is not given up front, and click flow processes seem designed to prompt the user to simply "agree".
- The answers provided by Google with regards to the legal bases for processing used by the company are not satisfactory either. For "Location History" we uphold our claim that the consent obtained by Google is not valid for the reasons explained in our complaint, despite minor adjustments. For "Web & App Activity" the situation is even more confusing now, as Google states it seeks user consent (agreement), even when it is using other legal bases.

- Our complaint and the supporting report are based on the state of play at the time they were made. Any substantive changes carried out since then by Google should not affect the merits of the complaint as they have not had any effect on the complainant. This is also likely to be the case for a great number of other users that have been subject to the practices described in the complaint. Moreover, ex-post changes, even if they were deemed to successfully address the identified concerns, should not preclude any eventual finding that Google infringed the GDPR. We are of the firm opinion that the changes Google is now presenting do not affect the merits of the coordinated complaint brought to the Datainspektionen by the Swedish Consumers' Association.

Remarks on specific questions

Information about number of users affected, data collected and frequency of collection

- Google's answer to this question is not acceptable. As far as we can see, there is no indication of the number of users affected and there is no plausible explanation for not providing this information beyond stating that it is confidential. The number of users affected is an important element to evaluate the risks of processing operations and the impact of Google's practices, also for the calculation of an eventual administrative fine. Google should be able to provide at least an estimate number.
- The justification that Google provides to refrain from giving information about the frequency of location data collection is unacceptable. The company should be able to provide more detailed information, even if indicative, about how often location data is processed in a given circumstance (e.g. when the user is moving or when the phone is at rest).

Legal Basis and Information provided to users

- Web & App Activity. Google claims that there are different purposes and different legal bases apply, and for this reason it requires a clear affirmative action from the data subject. First of all, according to the GDPR Google should disclose the specific legal basis for each specific processing operation, something that the company fails to do, as explained in our complaint. Secondly, Google's answer is confusing, and its practices can be misleading for users. This requirement of a clear affirmative action could imply in the eyes of the user that all the processing operations for this feature are based on consent, which is not the case as Google itself points out. Also, even if that were the case and consent is the legal basis at least for certain purposes, consent would not be valid. This feature is activated by default. The "affirmative action" is only used to reconfirm Google's pre-ticked choice. Something which is against the requirements of the GDPR for valid consent.

- Location History. Google clearly states the legal basis for all processing taking place in the framework of this “product” is consent. As explained in our complaint, we contest the validity of consent, notably for those purposes, in particular advertising, that are hidden behind extra clicks. Also, the choice is not granular enough, when you turn on location services, it is turned on for all purposes encompassed by the service. Moreover, we consider that the screenshots provided by Google in its answers are sometimes misleading as they show the information that is presented to the user when he/she have decided to proactively click on the option to have more. For example, the screenshot in Page 6 of Google’s response does not seem to show the text that is initially displayed (which does not mention ads) but rather the ‘expanded’ text (which does mention advertising). This is indicated by the small upward-pointing arrow on the right of the text, which is pointed downward until the user clicks it to reveal the additional information. Having a layered approach should not lead to important information being hidden several clicks away. In line with the evidence presented in the complaint, we reiterate Google’s design is done in a way that users are prompted to “agree”.
- In its answer Google refers to a “reconfirmation” pop up notice related to personalised advertising. We wish to underline that, to the best of our knowledge, this had not been implemented at the time of our complaint and was not present during the testing for the NCC report. We recommend obtaining further information regarding when this was implemented and how, including how users were notified; as well as an estimation of the number of users that have encountered this “reconfirmation” notice and whether this is now standard practice for all Android devices and Google accounts.
- We agree that the GDPR gives companies a certain leeway in terms of how to provide the information and what to prioritise in their transparency notices. However, certain elements are mandatory. We still consider Google is not fulfilling all the necessary requirements, in particular when it comes to communicating the legal basis and purposes for processing. While Google does not entirely hide the fact that it uses location data to tailor advertising, it is not something that is directly told to the user with the prominence it deserves.
- Retention policy for Location History. Google claims users are informed that their location data will be stored indefinitely and tied to their Google accounts unless they delete it. We have not seen such information. Users are told that they can see their data, delete it and change their settings (pause the collection). We also contest that such an “indefinite” storage period is in line with the requirements of the GPDR.

Special categories of data

We strongly disagree with Google's answer that there are no special categories of data involved. For example, location data that shows repeated visits to a Church could reveal religious views and be considered a special category of data. We therefore encourage Datainspektionen to consider this matter.

Statements related to the "Every Step You Take" report

On page 12 of its answer, Google states that they "have engaged directly with the Norwegian Consumer Council in an attempt to better explain our philosophy and understand their observations.". It is true that we have had two meetings on the topic. However, these communications have served to underline that Google and the NCC have different views on whether Google's consent flows are deceptive or not.

On pages 13-14, Google claims that the NCC report is inaccurate on several points. These claims are addressed below:

- ***The report often confuses the Location History and Web & App Activity settings.***
Google does not give any examples of how these settings are being confused, which makes this point difficult to address. If Google was as clear to users as it claimed to be, this would perhaps not be a concern at all.
- ***The report fails to mention an additional step to confirm the Web & App Activity settings toward the end of the registration process.***
This prompt did not appear at the time when the report was written. Additionally, as the screenshot from Google shows, this prompt also requires the user to navigate through a "more options" button in order to make any changes, while the blue "confirm" button keeps the setting enabled.
- ***The report fails to mention that a significant part of the consent flow deals with giving users information and control about advertising options.***
In fact, the report mentions at several occasions that users who actually go looking for it, can find more information about advertising purposes (e.g. in p. 17, 19 and 27). However, this is usually "hidden" behind extra clicks and prompts, which is one of the main arguments in the report to find Google in breach of its obligations under the GDPR.

- ***The “factory reset” performed by the NCC resulted in reverting to an old version of the consent flow, and Location History is actually not required in order to use the Assistant or geotagged photos.***

The testing conducted for the report was done from a consumer experience perspective. This meant going through the process of registering a new account on a “clean” (factory reset) device. Thus, the consent flow encountered and documented in the report was representative of what a consumer would encounter when registering a Google account on a factory reset device.

Additionally, as demonstrated in the report, the consent flow made it appear as if Location History was a requirement for enabling other functions, and thus many users would not have been aware that they did not have to enable Location History if they wanted these other features.

In conclusion, it is our opinion that the answers provided by Google do not clear the company of infringing the GDPR.

We thank you in advance for considering this letter and remain at your disposal for any clarification you may require.

Yours sincerely,



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