



EUROPEAN DATA  
PROTECTION SUPERVISOR

Walter Stanish

Brussels, 5 October 2012

PH/HK/mk D(2012)1991 C 2012-0673

Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu) for all correspondence

**Subject: Your requests for access to documents of 5 August 2012 (C 2012-0673)**

Dear Mr. Stanish,

On 5 August 2012, you have sent an access to documents request to the EDPS on the basis of Regulation (EC) No 1049/2001.

The request concerns information regarding any and all international financial data sharing agreements that are either presently active or under consideration by EU bodies. Furthermore, the request concerns any and all information available regarding the name, scope, and content of any similar information sharing scheme operating within the European Union or individual EU nations.

By letter of 27 August 2012, we informed you that, due to the relatively large number of documents relating to different dossiers, and due to the absence of certain persons during the summer period in the Commission and in the Council, the EDPS was forced to extend the deadline by 15 working days on the basis of Article 7(3) of Regulation (EC) No 1049/2001. In the same letter, we provided you with a list of documents we hold that were already publicly available and information on where to find these documents on the Internet.

By letter of 18 September 2012, we informed you about our decision to grant full access to one Commission document. In an annex to the letter of 18 September 2012, we identified two more relevant documents the EDPS holds which were already publicly available. We indicated where to find these documents on the Internet.

In the letter of 18 September 2012, we also informed you that we were not in a position to decide on the disclosure of three remaining documents, since the consultation process with the Commission, as prescribed by Article 4(4) of Regulation (EC) No 1049/2001, had not been finalised. It concerned the following three documents:

- 1. JLS D(2010)737, 22.1.2010;** Recommendation for opening of negotiations (TFTP);
- 2. EDPS D(2010)0188, 15.2.2010;** TFTP Informal Comments - EU RESTRICTED;
- 3. EDPS D(2010)0526, 13.4.2010;** EDPS Comments on the Recommendation from the Commission to the Council to authorise opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial payment

messaging data for the purposes of the Terrorist Finance Tracking Programme (TFTP II agreement) - RESTREINT UE.

As announced, we have forwarded the letter of 18 September to the Commission with an accompanying letter indicating that we required an answer from the Commission as soon as possible and in any event no later than Tuesday 25 September. We received input from the Commission on Monday 1 October.

#### Preliminary remarks

Before turning to the individual assessment of the three documents, we wish to make some general remarks about the particular position the EDPS finds itself in as an advisor to the EU legislator and the institutions, as foreseen in Regulation (EC) No 45/2001. In order to effectively perform this role, the EDPS receives, on a confidential basis, drafts of proposals from the Commission for informal comments. These documents are provided to the EDPS on a need to know basis.

The Commission document to which you request access is received by the EDPS in his advisory role. On the basis of Article 4(4) of Regulation (EC) No 1049/2001 we have consulted the Commission on the document we hold which originates from the Commission. As explained in our letter of 18 September, we also consulted the Commission on EDPS informal comments which were based on Commission documents, as they could reveal the content of the underlying Commission documents.

The documents you requested access to concern international agreements on the transfer of financial data. As will be set out in greater detail below, in order to justify the position not to provide (full) access to the three documents, the Commission relied on the exception contained in Article 4(1)(a), first and third indent, which envisages the protection of the public interest as regards public security and international relations.

As to Article 4(1)(a), third indent, the General Court considered in the *In 't Veld* ruling (T-529/09), with reference to the *Sison* ruling of the Court of Justice of the EU (C-266/05 P):

‘that the decision to be adopted by an institution pursuant to that provision is of a complex and delicate nature and calls for the exercise of particular care, having regard in particular to the singularly sensitive and essential nature of the protected interest’ (In ‘t Veld, 24).

As to the scope of the Court’s review, the Court considered:

‘Since such a decision calls for a wide margin of discretion, the General Court’s review of its legality must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’ (In ‘t Veld, 25).

As to the request for public access to the three documents listed above, the EDPS feels itself compelled to take a similar approach as the Court formulated in the *In ‘t*

*Veld* ruling. The Commission clearly is in the best position to assess whether the public disclosure of the documents would undermine the protection of the public interest as regards public security and international relations. We have entered into a constructive dialogue with the Commission during which we have critically assessed the Commission's argumentation on proposed refusals. This explains why the consultation process took longer than foreseen.

We wish to emphasise, as follows clearly from Regulation (EC) No 1049/2001, that the final decision on the possible disclosure of the three documents is still ours.

As to document 1: JLS D(2010)737, 22.1.2010

This document is a letter from the Director-General of DG HOME to the EDPS asking for his opinion on a draft recommendation, which was annexed to the letter, from the Commission to the Council to open negotiations for an agreement between the EU and the US to make available to the US Treasury Department financial payment messaging data for the purposes of the Terrorist Finance Tracking Programme (TFTP II agreement).

We have decided to grant access to the cover letter.

However, the name and contact details of a desk officer has been removed (see document JLS D(2010)737). This is done on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001 which states that access to a document shall be refused where disclosure would undermine the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

With regard to the name and contact details of the desk officer in the requested documents, we have carefully analysed the request under Article 8(b) of the Regulation (EC) No 45/2001, as required by the Court of Justice of the European Union in its ruling in Case C-28/08 P. The analysis under Article 8(b) of Regulation (EC) No 45/2001, as interpreted by the Court of Justice in its ruling in Case C-28/08 P, made us conclude that these personal data could not be disclosed.

We have decided to refuse access to the draft recommendation.

The refusal to grant access to the draft recommendation is based on Article 4(1)(a), first and third indent of Regulation (EC) No 1049/2001. According to these provisions access to a document is refused where disclosure would undermine the protection of the public interest as regards public security and international relations.

The draft recommendation contains security related information on the TFTP referring to its role in the Member States' fight against terrorism. According to the Commission disclosure of this information would undermine the public interest as regards public security as it could be used to those who the programme aims to fight.

Furthermore, as the Commission has explained, the document contains information on how the Commission intended to propose to the Council the negotiation position the Commission as EU negotiator should take on behalf of the EU. Disclosure of this information would be detrimental for the EU's position vis-à-vis the US as the TFTP

is an ongoing programme and the basis for numerous contacts with the US, such as an annual joint evaluation of the application of the agreement.

In addition, future negotiations on this topic may be necessary in order to adapt the current agreement to new developments. Also with other countries negotiations cannot be excluded. Disclosing the draft negotiation directives allows comparing them with the publicly available agreement and assists in revealing the conduct of the negotiations and could give indication to the other third countries on how the EU handles this kind of negotiations. Disclosure undermine the public interest as regards international relations as it would weaken the EU's position if such negotiations were to take place as it would reveal to the EU's negotiating counterpart(s) elements pertaining to the position taken or to be taken by the EU in these kinds of negotiations. This applies to the whole draft recommendation.

As to document 2: EDPS D(2010)0188, 15.2.2010

This document is a letter from the EDPS to the Director-General of DG HOME providing him with the EDPS informal comments in answer to the request as described in **Document 1**.

We have decided to grant access to the cover letter. However, access to the informal comments is granted only partially.

The refusal to grant access to part of the informal comments is based on Article 4(1)(a), third indent of Regulation (EC) No 1049/2001. According to this provision access to a document is refused where disclosure would undermine the protection of the public interest as regards international relations.

The document reveals information on how the Commission intended to propose to the Council the negotiation position the Commission as EU negotiator should take on behalf of the EU. According to the Commission, disclosure of this information would be detrimental for the EU's position vis-à-vis the US as the TFTP is an ongoing programme and the basis for numerous contacts with the US, such as an annual joint evaluation of the application of the agreement.

In addition, as the Commission has explained, future negotiations on this topic may be necessary in order to adapt the current agreement to new developments. Also with other countries negotiations cannot be excluded. Disclosing the informal comments in full would allow comparing them with the publicly available agreement and assists in revealing the conduct of the negotiations and could give indication to other third countries on how the EU handles this kind of negotiations. Disclosure undermine the public interest as regards international relations as it would weaken the EU's position if such negotiations were to take place as it would reveal to the EU's negotiating counterpart(s) elements pertaining to the position taken or to be taken by the EU in these kinds of negotiations.

The EDPS takes the view that the Commission by using this reasoning did not manifestly exceed its margin of appreciation

As to document 3: EDPS D(2010)0526, 13.4.2010

This document is a letter from the EDPS to the President of the Commission providing him with the EDPS comments on the final recommendation from the Commission to the Council to open negotiations for an agreement between the EU and the US to make available to the US Treasury Department financial payment messaging data for the purposes of the Terrorist Finance Tracking Programme (TFTP II agreement).

We have decided to grant access to the cover letter. However, access to the informal comments is granted only partially

The refusal to grant access to parts of the comments is based on Article 4(1)(a), first and third indent of Regulation (EC) No 1049/2001. According to these provisions access to a document is refused where disclosure would undermine the protection of the public interest as regards public security and international relations.

The comments reveal security related information on the TFTP referring to its role in the Member States' fight against terrorism. According to the Commission, disclosure of this information would undermine the public interest as regards public security as it could be used to those who the programme aims to fight.

Furthermore, as the Commission has explained, the comments reveal information on how the Commission intended to propose to the Council the negotiation position the Commission as EU negotiator should take on behalf of the EU. Disclosure of this information would be detrimental for the EU's position vis-à-vis the US as the TFTP is an ongoing programme and the basis for numerous contacts with the US, such as an annual joint evaluation of the application of the agreement.

In addition, as the Commission has explained, future negotiations on this topic may be necessary in order to adapt the current agreement to new developments. Also with other countries negotiations cannot be excluded. Disclosing the comments in full would allow comparing the recommendations with the publicly available agreement and assists in revealing the conduct of the negotiations and could give indication to other third countries on how the EU handles this kind of negotiations. Disclosure of such information undermines the public interest as regards international relations as it would weaken the EU's position if such negotiations were to take place as it would reveal to the EU's negotiating counterpart(s) elements pertaining to the position taken or to be taken by the EU in these kinds of negotiations.

The EDPS takes the view that the Commission by using this reasoning did not manifestly exceed its margin of appreciation.

#### Final remarks

Please find attached the documents to which you have been granted (partial) access.

Please note that pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may make a confirmatory application asking the EDPS to reconsider his position as regards the total or partial refusal of your request. Such a confirmatory application

should be addressed within 15 working days upon receipt of this letter to the EDPS  
general e-mail: [edps@edps.europa.eu](mailto:edps@edps.europa.eu).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hielke', followed by a horizontal line.

Hielke HIJMANS

Head of Unit Policy and Consultation