

To: Nicholas Lee - ask+request-10088-721ed014@asktheeu.org

Brussels, 13 December 2021

Subject: Your application for access to documents – Ref No 2021-33

Dear Mr. Lee,

We refer to your email dated 14/10/2021 in which you make a request for access to documents. Following a written exchange to clarify the scope of your request, it was registered on 28/10/2021. The deadline for our reply was originally set for 22/11/2021. Given the large number of documents which had to be identified and assessed, we had to extend the time limit for another 15 working days in accordance with Article 7(3) of Regulation (EC) No 1049/2001 regarding public access to documents. The new deadline was therefore set for 13/12/2021.

You have requested access to *“preparatory documents containing national Data Protection Authority statements, questions, opinions, and concerns, leading to the adoption of EDPB documents identified as “04/2021”, “02/2020”, “01/2019”, and “OUT2021-0119” (we understand “preparatory documents” to mean: (i) draft versions of the documents, as well as (ii) minutes of meetings where the documents were discussed);”*

Please note that although we have stated in our request for clarification that we understand preparatory documents to mean (i) draft versions of the documents, as well as (ii) minutes of meetings where the documents were discussed), we have additionally considered info notes prepared in advance of plenary meetings, to be part of the preparatory documents and hence in scope of this request.

Assessment

We have identified 101 documents that fall fully or partially within the scope of your present request.

To facilitate our assessment and your consultation of the files, the titles of the files have been adequately numbered. We will refer to the numbers of each single file in our assessment below.

We have conducted the following assessment in light of Regulation 1049/2001 regarding public access to documents and the relevant case law of the Court of Justice of the European Union

(CJEU). Please note that the assessment has been carried out only with regard to the documents or parts thereof falling within the scope of your request.

1. Full non-disclosure

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we have come to the conclusion that the documents mentioned below cannot be disclosed, as this is prevented by the following exceptions to the right of access laid down in Article 4 of the Regulation 1049/2001:

1. Exception 4(1)(b) (“Privacy and integrity of the individual”). The documents to which you request access contain personal data, in particular names of data subjects. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. When access is requested to documents containing personal data, Regulation 2018/1725 becomes fully applicable¹. According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

This exception applies to the following documents:

Document: 48, 49, 51, 57 - 60, 64, 66, 68 - 74, 78, 80, 83, 85, 86, 88, 89, 93

2. Exception 4(3), 2nd paragraph. The documents which you seek to obtain contain discussions, views and/or opinions of the EDPB members and/or of its Secretariat concerning decisions that have already been taken. Notwithstanding the fact that decisions regarding these documents have already been taken, their disclosure would seriously undermine the decision-making process of the EDPB as it would curtail the Members “space to think”, as it would prevent them from freely submitting their uncensored views on the matter, and freely discussing the issues at stake also in light of their national situations. The documents concerned are, in particular, draft versions of the following EDPB documents prior to their adoption, some of which contain track changes and comments: Statement 04/2021 on international agreements including transfers; Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies; EDPB Statement 01/2019 on the US

¹ Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECR 2010 I-06055. This case concerns the previous Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Foreign Account Tax Compliance Act (FATCA) and EDPB response to MEP Sophie in't Veld regarding the EDPB's statement 04/2021 on international agreements including transfers.

This exception applies to the following documents:

Documents: 1 -3, 5- 12, 22-27, 29, 30, 32 -37, 40, 45, 47 - 74, 77, 78, 80, 83, 85, 86, 88, 89, 93, 94, 96, 97,

Please note that the application of the exception under Article 4 (3) 2nd paragraph is the one leading to the full non-disclosure of documents also covered by the exception under Article 4 (1) (b). The application of Article 4 (1) (b) alone would have led to a partial disclosure of those documents (redacting all the personal data).

We have considered whether partial access could be granted to the documents requested. However, the documents or parts thereof falling within the scope of your request are either entirely covered by the exception(s), or the expungement of the information falling under the exception(s) is so significant that it renders the document irrelevant, which is why they are not provided.

The exception laid down in Article 4(3) of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. We have not been able to identify such an interest. For these reasons, access to these documents is denied.

2. Partial disclosure

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, alongside the scope of your request, we have come to the conclusion that full disclosure of the documents mentioned below cannot be granted, as some information in the documents falls outside the scope of your request and/or the information in the documents is prevented by the following exception to the right of access laid down in Article 4 of the Regulation 1049/2001:

Documents partially falling outside the scope of this request:

Documents: 15, 16, 19, 20, 21, 39, 82, 84, 87, 90, 91, 92, 98, 100, 101

Please note that the document 90 has already been partially disclosed in the context of a previous access to documents request. You are therefore receiving the version of this document as it was previously disclosed. This may mean that some of the unredacted information in this document may not be relevant to your specific request.

1. Exception 4(1)(b) ("Privacy and integrity of the individual"): The following document to which you request access contain personal data, in particular the name of a data subject. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The

applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. When access to documents containing personal data is requested, Regulation 2018/1725 becomes fully applicable². According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing a version of the document requested in which these personal data have been redacted.

This exception applies to the following documents:

Document: 41

2. Exception 4(2), 2nd indent (“court proceedings and legal advice”) The document to which you seek access contains information regarding ongoing court proceedings. Consequently, its disclosure would jeopardise the related legal proceedings. Therefore, we are disclosing a version of the document requested in which this information has been redacted.

This exception applies to the following documents:

Document: 41

3. Exception 4(2) 3rd indent (“purpose of investigations”):

The document to which you seek access contains information regarding an investigation, as well as information related to the working methods of EDPB members with regard to the cooperation mechanism. Disclosure of that information would undermine the purpose and result of such investigations. Therefore, we are disclosing a version of the document requested in which this information has been redacted.

This exception applies to the following documents:

Document: 41

Exception 4(3), 2nd paragraph. The documents which you seek to obtain contain discussions, views and/or opinions of the EDPB members and/or of its Secretariat concerning decisions that have already been taken. Notwithstanding the fact that decisions regarding these documents have already been taken, their disclosure would seriously undermine the decision-making process of the EDPB as it would curtail the Members “space to think”, as it would prevent them from

² Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd.*, ECR 2010 I-06055. This case concerns the previous Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

freely submitting their uncensored views on the matter, and freely discussing the issues at stake also in light of their national situations. The disclosure of these opinions will also have consequences in forthcoming discussions, since specific discussions/opinions/views of the EDPB are subject to updates and revisions and can thus be reopened at any time. Moreover, rapporteurs were redacted in order to avoid unnecessary pressure from external parties regarding the discussions and guidance provided. Rapporteurs should be able to discuss the matters free from external pressure and to freely provide their views and feedback on the matter.

This exception applies to the following documents:

Documents: 15, 16, 19, 20, 21, 82, 98, 101.

3. Full disclosure

The following documents are already published on the EDPB website and may be downloaded via the links provided:

Document 17 :

https://edpb.europa.eu/system/files/2021-04/20210309plenfinalminutes46thplenarymeeting_public.pdf

Document 18:

https://edpb.europa.eu/system/files/2021-06/20210413plenfinalminutes48thplenary_public_0.pdf

Document 99:

https://edpb.europa.eu/sites/default/files/files/file1/20201215plenfinalminutes43rdplenarymeeting_public_redacted.pdf

The following documents may be fully disclosed:

Documents: 4, 13, 14, 28, 31, 38, 42, 43, 44, 46, 75, 76, 79, 95

Please note that documents 28 and 31 are, respectively, a Word and a pdf version of the final version of the adopted statement 4/2021 on international agreements including transfers. Therefore the content of this document is identical to that in the published version, available via the EDPB website: https://edpb.europa.eu/system/files/2021-04/edpb_statement042021_international_agreements_including_transfers_en.pdf

Please note that document 4 is a Word version of the final version of the adopted statement 01/2019 on the US Foreign Account Tax Compliance Act (FATCA). Therefore the content of this document is identical to that in the published version, available via the EDPB website (https://edpb.europa.eu/sites/default/files/files/file1/edpb-2019-02-12-25-fatca_statement_en.pdf)

Please note that documents 38, 42 and 43 are, respectively, pdf and two Word versions of the final version of the adopted EDPB response to MEP Sophie in't Veld regarding the EDPB's statement 04/2021 on international agreements including transfers, with minor formatting changes. Therefore the content of this document is identical to that in the published version, available via the EDPB website: https://edpb.europa.eu/system/files/2021-07/edpb_letter_out2021-0119_intveld_igas.pdf

Please note that document 44 and 46 are Word versions of the adopted Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies (after public consultation), with minor formatting changes. Therefore the content of these documents is identical to that in the published version, available via the EDPB website: https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202002_art46guidelines_internationaltransferspublicbodies_v2_en.pdf

Please note that document 75, 79 and 81 are Word versions of the adopted Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies (before public consultation), with minor formatting changes. Therefore the content of this document is identical to that in the published version, available via the EDPB website: https://edpb.europa.eu/sites/default/files/consultation/edpb_guidelines_202002_art46guidelines_internationaltransferspublicbodies_v1.pdf

In your request, you have made reference to the decision of the European Ombudsman in case 386/2021/AMF, stating that any opinions of the National Supervisory Authorities should be included in the response to this request, in an anonymised form if necessary. I must underline that in case 386/2021/AMF, the EDPB decided to revise, to some extent, its confirmatory decision in light of the points raised by the European Ombudsman and of the facts of that specific case, and granted wider access to the applicant. In particular, some comments made by EDPB members were disclosed, as it was deemed that they related to information which was already in the public domain. In no case was the identity of individual SAs disclosed. I must also underline that each request for access to documents is assessed on a case-by-case basis. The decision of the European Ombudsman does not, therefore, set a precedent for the EDPB's handling of access requests to any of the other documents it holds.

Disclaimer


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Means of redress

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the European Data Protection Board to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the following email address: edpb@edpb.europa.eu. Please make reference to the case number of your request in the subject.

Yours sincerely,



Ventsislav Karadjov
Vice-Chair of the EDPB