

To: Nicolas Lee - ask+request-10408-974edff0@asktheeu.org

Brussels, 8 March 2022

Subject: Your confirmatory application for access to documents – Ref No 2021-38-C

Dear Mr Lee,

I refer to your email dated 22/01/2022 in which you made a confirmatory request, which was registered on 25/01/2022 under reference number 2021-38-C. In accordance with Article 8 (2) of Regulation 1049/2001, a 15 working day extension of the initial deadline was submitted to you on 15/02/2022. The agreed final deadline is therefore 08/03/2022.

In your initial request, you requested access to *“The draft of letter OUT2021-0119 containing one "sentence underlined in yellow regarding the powers of SAs regarding already validly concluded international agreements" and discussed in the plenary meeting on 7 July 2021.*

This draft is referenced in this EDPB document:
https://www.asktheeu.org/en/request/10088/response/34614/attach/7/Document%2041.pdf?cookie_passthrough=1

Any associated documents (including written comments, forum posts, edits to wikis, etc.) containing discussion or commentary would also be responsive to this request.”

In your confirmatory application, you request a review of the initial assessment, as regards the documents 1, 2, 3, 4, 5, 7, and 8.

In accordance with Article 4(3) 2nd paragraph of Regulation 1049/2001, access to documents containing opinions for internal use shall be refused even after the decision has been taken, if such disclosure would undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

In the initial response, it was considered that disclosure of the above referenced documents would seriously undermine the EDPB’s decision-making process, since the documents contain discussions, views and/or opinions of the EDPB members and/or its Secretariat that are part of

internal deliberations and positions. Thus, their disclosure 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. The disclosure of these opinions would 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. In this manner, public access to these documents would seriously impair the quality of the decision-making process of the EDPB.

In your confirmatory application, you have argued that the EDPB did not explain in its response how “space to think” is severely impacted by the disclosure of these documents, and you have noted that the public is capable of understanding that they are draft and non-final versions of the documents. You have further argued that the track-changes / comments / revisions of documents are precisely what is of interest to the public, as this allows the EDPB's processes to be understood. Finally, you have noted that it is unclear for you how, acting in good faith, uncensored views by public bodies on a topic are problematic, and what the relevance of national situations is. You refer to correspondence exchanged in the context of other requests for access to documents addressed to the EDPB, where you have noted that there are adequate means to ensure that the comments are not linked back to national situations and that the comments are attributable only to the EDPB as a whole, not particular members.

It seems from the arguments presented in your confirmatory application that you consider that there is a public interest to understand the EDPB’s process.

The Court of Justice of the European Union (“CJEU”) is consistent in considering that the applicant has to prove the existence of an overriding public interest in the disclosure.¹ In order to do this, the applicant has to refer to the specific circumstances that demonstrate the prevalence of the public interest over the reasons given for the non-disclosure based on Article 4(3) 2nd paragraph of Regulation 1049/2001.

In your confirmatory request, you state that draft documents are precisely what is of interest to the public, as this allows the EDPB's processes to be understood, but you do not include any elements to substantiate the existence of an overriding public interest. The CJEU has found that in cases where the documents concerned are not part of legislative procedures, as is the case here, the principle of transparency can only constitute an overriding public interest if it is especially pressing and based on concrete elements, as the CJEU has held in several rulings, such as *Pint v Commission*; *LPN and Finland v Commission*; *Strack v Commission* and *Sweden and Others v API and Commission*, among others.²

After having examined again whether there is an overriding public interest in disclosing the documents, I have reached the same conclusion as in the initial reply, as I consider the harm to the EDPB’s decision-making procedures, which would result from the disclosure of these

¹ In this regard, see e.g. Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, EU:C:2013:738, par. 94; and Case C-127/13, *Strack v Commission*, EU:C:2014:2250, par. 128.

² See case T-634/17, *Pint v Commission*, EU:T:2018:662, par 70; Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, EU:C:2013:738, par. 92-93; Case C-127/13, *Strack v Commission*, EU:C:2014:2250, par. 131; and Case C-514/07, *Sweden and Others v API and Commission*, EU:C:2010:541, par. 156-159.

documents, outweighs the vague public concern you refer to in your confirmatory application regarding the need to understand the EDPB's process.

Therefore, since disclosure of the documents would seriously undermine the decision-making process of the EDPB, and the existence of an overriding public interest in disclosure has not been demonstrated, the exception enshrined in Article 4(3) 2nd paragraph of Regulation 1049/2001 applies. Accordingly, I maintain the initial assessment with regard to these documents.

I have taken note of your remark that the EDPB's initial response did not explain, in your view, how its "space to think" would be severely impacted by disclosure and I would therefore like to take this opportunity to provide you with more detailed explanations, on the documents themselves, as well as on the reasoning for denying their disclosure.

Document 8 is a draft version of document 6, which was partially disclosed in the initial response. The remaining documents are draft versions of the EDPB letter of response to MEP in't Veld regarding its statements on international transfers. Some of these drafts are clean documents, while others contain track changes and/or comments. The comments were made by EDPB members, its Secretariat or the European Commission.

I consider that releasing these draft versions to the public would cause confusion, making comments of individual members and/or the staff of the EDPB Secretariat publicly available, even if the organisation concerned is not identified, would seriously undermine the decision-making process of the EDPB, as members would be less likely to share their uncensored views on a matter if they knew in advance these were to be subsequently published (even if in an anonymised manner).

I must underline that in the preparatory phases of a document, comments are usually made at staff level, and do not always necessarily reflect the official view of their SA. On that basis, the EDPB considers there is a real and concrete risk that some members will not make comments if known they will be published. The EDPB will not be able to achieve its tasks without the active participation of its members during meetings and written comments' stages held before a document is ready for adoption by the Plenary.

Furthermore, if disclosed, the information contained in drafts, opinions and suggestions for their drafting can be then compared to the final adopted document, and accordingly the EDPB's internal discussions would be disclosed. However, this would risk conflicting with the EU legislators' will to protect the EDPB from external pressure under Article 76(1) GDPR. This is confirmed by Article 33 (c) of the EDPB's Rules of Procedure, according to which the discussions shall be confidential where the Board deems it necessary. I consider the independence of the EDPB, and consequently, its mission to ensure the effective protection of personal data of individuals would be seriously undermined if these internal discussions were made public, given the impact it would have on the decision-making process of the EDPB.

Finally, I also note that this document is related to FATCA, an area where the EDPB is still working. Disclosing internal comments would therefore also seriously undermine the EDPB decision-making process.

In accordance with Article 8(1) of Regulation 1049/2001, you are entitled to institute court proceedings against the EDPB and/or make a complaint to the Ombudsman, under the conditions laid down in Articles 263 and 228 of the TFEU, respectively.

Yours sincerely,



Andrea Jelinek
Chair of the EDPB