



Walter Stanish

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Brussels, 18 September 2012

PH/HK/mk D(2012)1857 C 2012-0673

Please use 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 PNR 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.

In the annex to the present letter, we have identified several more relevant documents the EDPS holds which are already publicly available. We have again indicated where to find these documents on the Internet.

As regards the documents held by the EDPS which needed further examination, some of those documents are drawn up by the EDPS, others originate from the Council or the Commission.

As regards the documents originating from the Council and the Commission, we have consulted these institutions in accordance with Article 4(4) of Regulation (EC) No 1049/2001. This was done with a view to assess whether any of the exceptions in Article 4(1) (documents where disclosure would undermine (a) the protection of the public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the Union or a Member State; or (b) privacy and the integrity of the individual) or Article 4(2) (documents where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure) would be applicable.

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I. As regards the Council documents

We have identified the following Council documents:

- I.1. ST 13986/10, 27.9.2010;** EU external strategy on Passenger Name Record (PNR) data - Handling of draft negotiation mandates for PNR Agreements with Canada, the United States of America and Australia;
- I.2. ST 13869/11, 7.9.2011;** Joint Declaration of the European Union and Australia on the Agreement on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service;
- I.3. ST 16981/11, 15.11.2011;** Draft declarations regarding the draft Agreement on the use and transfer of Passenger Name Records by air carriers to the United States Department of Homeland Security;
- I.4. ST 15083/10, 18.10.2010;** Draft Council decision authorising the opening of negotiations for an agreement between the European Union and Australia / Canada / the United States of America for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime.

Following the consultation of the Council, we have decided to grant access to documents I.1. to I.3. and to grant partial access to document I.4.

Document I.4. (ST 15083/10) is a note from the Presidency to JHA Counsellors and Coreper and concerns a draft Council decision authorising the opening of negotiations for an agreement between the European Union and Australia / Canada / United States of America for the transfer and use of PNR data to prevent and combat terrorism and other serious transnational crime. It is classified as "RESTREINT UE", which means that the unauthorised disclosure of the information it contains could be disadvantageous to the interests of the European Union or of one or more of its Member States.¹

This document contains information on negotiations which have not yet been completed. Disclosure of this information would impede the proper conduct of the negotiations and prejudice relations between the European Union and Australia, Canada and the United States of America. It would also weaken the future position of the EU in the framework of such negotiations. Accordingly, pursuant to the third indent of Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations), we are unable to publicly disclose the document.

However, pursuant to Article 4(6) of the Regulation, you may have access to those parts of the document which are not covered by this exception. Following our consultation the Council has made this document partially available through their register (see <http://www.consilium.europa.eu/documents/access-to-council-documents-public-register.aspx?lang=EN>).

II. As regards the Commission documents

We have identified the following Commission documents:

- II.1. home.a.3(2011)1220788, 9.11.2011;** Draft Proposal for signature (EU-US PNR) - RESTREINT UE;

¹ See the Council Decision of 31 March 2011 on the security rules for protecting EU classified information (2011/292/EU), OJ L 141, 27.05.2011, p. 17.

II.2. 2011/HOME/035, without date: Draft Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service - RESTREINT UE;
II.3. 2011/HOME/036, without date: Draft Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service - RESTREINT UE.

Following the consultation of the Commission, we have decided to grant access to document II.2. and II.3. We regret that we are not able to actually provide you with a copy of these documents, as the declassification procedure within the Commission has not yet been finalised. We will provide you with a copy, once this procedure is finalised. We will urge the Commission to declassify the documents as quickly as possible.

We regret that the consultation process has not been finalised yet with regard to document II.1. We are therefore not in a position to decide on the possible disclosure of this document. The Commission has indicated today that it will inform the EDPS as soon as possible. A copy of the present letter will be forwarded to the Commission with an accompanying letter indicating that we require an answer from the Commission as soon as possible, and in any event no later than Tuesday 25 September.

III. As regards the EDPS documents

We have identified the following EDPS documents:

III.1. EDPS D(2010)1080, 7.7.2010; EDPS Informal Comments on the draft Communication on the global approach to PNR and the proposals for Recommendations to authorise the Commission to (re)negotiate Agreements between the EU and respectively Australia, Canada and the United-States;

III.2. EDPS D(2011)845, 5.5.2011; EDPS Comments regarding the two draft Proposals for Council decisions on (i) the conclusion and (ii) the signature of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service;

III.3. EDPS D(2011)1993, 11.11.2011; EDPS Comments regarding the draft Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security (DHS).

As these documents have been drawn up by the EDPS, there is no obligation to consult third parties under Article 4(4) of Regulation (EC) No 1049/2001. However, since these comments are based on documents which originate from the Commission and are provided to the EDPS on a need to know basis, the assessment of whether these comments can be disclosed depends on the assessment of the possible disclosure of the underlying documents. Therefore, we have also asked the Commission's opinion on the possible disclosure of these comments.

Following this consultation, we have decided to grant access to document III.2.

We regret that the consultation process has not been finalised yet with regard to documents III.1 and III.3. We are therefore not in a position to decide on the possible disclosure of these documents. The Commission has indicated today that it will inform the EDPS as soon as possible. As stated, a copy of this letter will be forwarded to the Commission with an

accompanying letter indicating that we require an answer as soon as possible, and in any event no later than Tuesday 25 September.

Please find attached the documents to which you have been granted full or 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.

However, we are currently not in a position to assess whether the remaining three documents should be disclosed, in whole or in part. In such circumstances you may find it more convenient to await the decision following the outcome of the consultation process with the Commission before lodging your confirmatory request.

Yours sincerely,

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

Hielke HIJMANS
Head of Unit Policy and Consultation

Annex: List of documents already publicly available

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Council documents

- ST 16981/11, 15.11.2011; Draft declarations regarding the draft Agreement on the use and transfer of Passenger Name Records by air carriers to the United States Department of Homeland Security;
- ST 17432/11, 8.12.2011; COUNCIL DECISION on the signing, on behalf of the Union, of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security;
- ST 13986/10; ST17325/10; ST17326/10; ST17327/10, 1.12.2010; Draft Council decision authorising the opening of negotiations for an agreement between the European Union and Australia / Canada / the United States of America: Council discussions.

To be found through the Council register:

<http://www.consilium.europa.eu/documents/access-to-council-documents-public-register.aspx?lang=EN>

Commission document

- COM(2011) 807 final, 14.6.2010; Proposal for a COUNCIL DECISION on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security.

To be found through EUR-LEX: <http://eur-lex.europa.eu>

Other

- 18.12.2008; Report concerning passenger name record information derived from flights between the U.S. and the European Union (http://www.dhs.gov/xlibrary/assets/privacy/privacy_pnr_report_20081218.pdf)