

Walter Stanish

Brussels, 5 October 2012

PH/HK/mk D(2012)1990 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.

By letter of 18 September 2012, we informed you about our decision to grant full access to three, and partial access to one Council document. Furthermore, we informed you about the decision to disclose two Commission documents, which at present still need to be declassified, and one EDPS document containing informal comments. In an annex to the letter of 18 September 2012, we identified several 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. home.a.3(2011)1220788, 9.11.2011; Draft Proposal for signature (EU-US PNR) - RESTREINT UE, (Document from the Commission);

2. 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), (Document from the EDPS);

3. 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, (Document from the EDPS).

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 PNR. 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), third indent, which envisages the protection of the public interest as regards international relations.

As to this provision, 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*, para 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*, para 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 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: home.a.3(2011)1220788, 9.11.2011

This document is a letter from the Director-General of DG HOME to the EDPS asking for his opinion on the proposal for a Council Decision on the signature of the agreement between the US and the EU on the use and transfer of PNR to the US Department of Homeland Security. The draft agreement is annexed to the proposed Council Decision.

We have decided to grant access to the letter and to the proposal for a Council Decision. However, we decided to refuse access to the annexed draft agreement.

The refusal to grant access to the draft agreement 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.

Should you still wish the public disclosure of this data, you are invited to provide an express and legitimate justification or convincing argument in order to demonstrate the necessity of having these names transferred in the light of Article 8(b) of Regulation (EC) No 45/2001 as interpreted by the Court of Justice of the European Union in its ruling in Case C-28/08 P (see in particular para 78).

The draft agreement on which the EDPS was consulted is not fully identical to the agreement published in the Official Journal of 11 August 2012. According to the Commission, the disclosure of drafts of agreements that are not identical in terms of substance to the final version that is published in the OJ would allow the comparison of the texts and assist in revealing the conduct of the negotiations and the position the EU has taken. This also could give indications about the EU's negotiation directive. Furthermore, disclosing such drafts may assist other third countries who may wish to conclude a similar agreement with the EU in a better position preparing their position. This would weaken the EU's negotiation position vis-à-vis such countries. This applies to the whole draft agreement

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

As to document 2: EDPS D(2011)1993, 11.11.2011

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 in **Document 1** above on the proposal for a Council Decision on the signature of the agreement between the US and the EU on the use and transfer of PNR to the US Department of Homeland Security.

We have decided to grant access to this document, with the exception of one sentence in which a reference is made to the position of the institutions legal services.

The deletion of the sentence is based on Article 4(2), second indent. According to this provision access to a document is refused where disclosure would undermine the protection of legal advice.

The Commission has submitted that members of the Legal Services should be free to express their views without being exposed to undue pressure from outside. This freedom would be curtailed if they have to take into account the possibility that their opinions and assessments could be disclosed to the public. The disclosure of this sentence would undermine the protection of legal advice. The public interest in disclosing the reference does not outweigh the harm that would be caused to the protection of legal advice regarding such a sensitive file.

As to document 3: EDPS D(2010)1080, 7.7.2010

This document is a letter from the EDPS to the Director-General of DG HOME providing him with the EDPS informal comments on the draft Communication on the transfer of PNR data: a global EU approach – The next steps, and the proposals for Recommendations to authorise the Commission to (re)negotiate Agreements between the EU and respectively Australia, Canada and the US.

We have decided to grant access to the cover letter and to the parts of the informal comments which relate to the draft Communication. However, we decided to refuse access to the informal comments which relate to the proposals for Recommendations.

The refusal to grant access to the EDPS informal comments on the proposals for Recommendations 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.

Disclosure of the EDPS comments would reveal the content of the proposals for Recommendations. We would like to point at the fact that the underlying document is in essence similar to the Council document we partially refused access to in our letter of 18 September (Council document ST 15083/10).

As explained to us by the Commission, the EDPS comments would reveal information on negotiations which have not in all cases yet been completed (Canada). 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. According to the Commission it would also weaken the future position of the EU in the framework of such negotiations.

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

As to all documents

Regarding all cover letters, the name and contact details of desk officers have been removed (see documents home.a.3(2011)1220788, EDPS D(2011)1993 and EDPS D(2010)1080). 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.

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.

In order to prevent any issue of inadmissibility, we wish to draw your attention to the fact that with regard to the partial refusal of access to Council document ST 15083/10 in our letter of 18 September, the confirmatory application should be lodged ultimately on 9 October.

Yours sincerely,



Hielke HIJMANS

Head of Unit Policy and Consultation