

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

Brussels, 14 January 2022

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

Dear Mr Lee,

I refer to your email dated 13/12/2021 in which you made a confirmatory request, which was registered on 15/12/2021 under reference number 2021-33-C.

In your initial request, you 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).”*

As mentioned in the reply to this initial request, info notes prepared in advance of plenary meetings, were additionally considered to be part of the preparatory documents and hence in scope of this initial request.

In your confirmatory application, you state that out of the 101 documents in scope of this request, 20 were either fully or partially provided. In fact, 33 documents were provided (16 partially and 17 fully).

In your confirmatory application, you request a review of the initial assessment, as regards those documents which were either fully not disclosed or partially disclosed due to the application of one or more of the exceptions of Article 4 of Regulation 1049/2001.

1. Documents which were fully not disclosed (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 during the reassessment, I have concluded that some of the documents which were not disclosed are in fact duplicates (documents 8 and 22; documents 34 and 35; documents 36 and 37).

I have further concluded that two documents were mistakenly not included in the original assessment. The first document concerned is a draft version of the EDPB response to MEP Sophie in’t Veld regarding the EDPB’s Statement 04/2021 on international agreements including transfers, which contains track changes and comments. Although several draft versions of this document were included in the initial assessment, including versions which include the same track changes as this one, it has come to my attention that some of the comments do not appear in the drafts which were assessed for the initial response.

The second document is the minutes of the plenary meeting where the above mentioned document was discussed and adopted (please section 3 of this letter below).

There are therefore 103 documents in scope of this request, and not 101, as mentioned in the initial response.

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 there is an overriding public interest, as you state that there have been credible public reports of pressure by the European Commission on the independent EDPB and that the public has a clear interest in understanding what that pressure was, why it was applied, and what changes resulted. You also refer to criticism of the European Parliament directed at the European Commission in relation to international transfers, stating that this demonstrates the public interest and warrants additional public visibility into the decision making process. Finally, you refer to the Ombudsman decision¹ and the view expressed by her that there is an interest in the public "knowing how an authoritative interpretation of its provisions was decided", and favouring the "widest possible public access".

As regards your reference to "credible public reports of pressure by the European Commission", please note that pursuant to Article 68(5) of the GDPR, the European Commission attends EDPB meetings and participates in the discussions, both at plenary and expert subgroup levels. They are one voice among the 32 sitting around the table and do not have voting rights.

It seems from the arguments presented in your confirmatory application that you consider the public interest overrides due to the need to understand how and why parts of the documents changed during the drafting process.

¹ Decision on the European Data Protection Board's refusal to grant public access to the preparatory documents for its guidelines on the processing of personal data in the context of the provision of online services (case 86/2021/AMF).

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 documents, outweighs the public concern you refer to in your confirmatory application regarding the need to understand how and why changes were made to these documents.

In this context, I would like to provide you with some further information on the contents of the documents to which access was denied in the initial response.

The following documents are clean draft versions, which do not contain any track changes, nor comments: 3, 5, 7, 11, 12, 23, 25, 27, 30, 32, 33, 52, 53, 77 and 97.

The following documents are draft versions, which contain track changes without any comments: 1, 2, 6, 10, 24, 29, 36, 37, 45, 55, 56, 93, 96.

In the above-mentioned cases, there is no reasoning visible in the documents for the changes which were made. I consider that making previous versions of the draft documents publicly available would cause confusion. These draft documents are part of the internal deliberations and preliminary consultations within the EDPB and do not necessarily reflect the position of the EDPB as a whole.

As regards the remaining documents, including document 102, referred to above, these contain comments made, either by EDPB members, its Secretariat or the European Commission. In some cases the documents also contain track changes. I consider that, in addition to the argument above 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).

It must be underlined that these comments represent views expressed by EDPB members, its Secretariat or the European Commission at different stages of the process of drafting these documents, which were further discussed in meetings of the rapporteurs' team, at expert subgroup and at plenary levels. These are "snapshots" from the drafting process, and reflect individual EDPB members' views and/or those of its Secretariat or the European Commission on the draft documents in scope of this request at different moments during the drafting process. As also outlined above, the EDPB believes that its decision-making process, independence, and consequently, its ability to fulfil its mission as set out in the GDPR would be severely compromised by disclosing these preliminary deliberations.

In light of the above and since 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, access to the documents concerned is denied.

2. Documents which were partially disclosed (15, 16, 19, 20, 21, 41, 82, 98, and 101)

Please note that during the re-assessment, I have concluded that the initial response letter mistakenly referred to Article 4 (3) 2nd paragraph of Regulation 1049/2001 applying to documents 16 and 19. In fact, the redactions in both of these documents are due to the fact that those parts are out of scope of your request. All points regarding the preparation of the documents which are the subject of your request have been fully disclosed.

As regards document 15, I have concluded that the EDPB decision-making process would not be seriously undermined by the disclosure of the first part of the second paragraph on page 5. The remaining redacted parts of this point may not be disclosed as they relate to matters which may be re-opened for discussion in the future. Disclosure would consequently seriously undermine the EDPB decision-making process, as it would curtail the expert subgroup members “space to think”, as it would prevent them from freely submitting their uncensored views on the matter.

As regards document 20, I have decided that the EDPB decision-making process would not be seriously undermined by the disclosure of the information in the remaining part of the second paragraph under point 7. Please note that I do consider that the disclosure of the speaker (at the beginning of the third paragraph) would seriously undermine the EDPB decision-making process, as this would expose them to pressure from external parties regarding the opinions expressed. Speakers/rapporteurs should be able to discuss the matters free from external pressure and to freely provide their views.

As regards document 21, I have concluded that the EDPB decision-making process would not be seriously undermined by the disclosure of the information which was previously redacted.

As regards document 41, I have decided to revise the initial assessment, which stated that some parts of the document could not be disclosed due to the fact that the exception of Article 4(2), 2nd indent (“court proceedings and legal advice”) of Regulation 1049/2001 applied. Following a reassessment, I have concluded that the information provided by the Luxembourg supervisory authority is now in the public domain and can therefore be disclosed. Please note that the exception of Article 4(2) 3rd indent (“purpose of investigations”) of Regulation 1049/2001 continues to apply to the redacted parts of the first bullet point (page 2) and this information may not be disclosed as this would undermine an ongoing investigation. Furthermore, personal data has been redacted in the third bullet point.

As regards document 82, all information related to the guidelines (the other documents in scope of your request were not discussed at this meeting) has been disclosed, with the exception of the identity of the SA which acted as rapporteur. I consider that disclosing the identity of the rapporteur would seriously undermine the EDPB decision-making process for the reasons explained in the previous paragraph.

As regards document 98, all information related to the guidelines (the other documents in scope of your request were not discussed at this meeting) has been disclosed, with the exception of the identity of the SA which acted as rapporteur. I consider that disclosing the identity of the

rapporteur would seriously undermine the EDPB decision-making process for the reasons explained above.

As regards document 101, I have decided that the EDPB decision-making process would not be seriously undermined by the disclosure of some of the information which was previously redacted, namely on page 1 as this relates to a change made as a result of the public consultation. The remaining redacted parts of this point may not be disclosed as they relate to a question raised by an SA on a specific case, which was not further discussed during the meeting, as well as a phrase which was not included in the final version of the guidelines. Disclosure would consequently seriously undermine the EDPB decision-making process, as it would curtail the EDPB Members, Secretariat staff and/or the European Commission's "space to think", as it would prevent them from freely submitting their uncensored views on the matter.

3. Full disclosure

As mentioned above, this document (document 103) was mistakenly not included in the initial assessment. It is already published on the EDPB website and can be downloaded via the link below:

https://edpb.europa.eu/system/files/2021-09/20210707plenfinalminutes_51stplenary_public_0.pdf

Finally, as regards your comments in relation to the Ombudsman decision 386/2021/AMF, as stated in the initial reply, this does not set any precedent for the EDPB's handling of access requests to any of the other documents it holds, given that each request for access to documents must be assessed on a case-by-case basis². An assessment of the presence of an overriding public interest is always part of the EDPB's assessment when the exceptions of Article 4(2) and/or Article 4(3) are applied.

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

² Judgment of the Court of Justice of the European Union of 14 November 2013 in Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, ECLI:EU:C:2013:738. This case concerns Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. See paragraph 42.