

Anu Talus

Chair of the European Data Protection Board

Emily O'Reilly
European Ombudsman
1 avenue du Président Robert Schuman
F-67001 Strasbourg Cedex
France

Brussels, 28 June 2023

by e-mail only

Ref: OUT2023-0046

EDPB Response to the European Ombudsman's recommendation regarding joined cases 509/2022/JK and 1698/2022/JK

Dear Ms O'Reilly,

The EDPB is grateful for your letter of 29 March 2023 enclosing your recommendation on joined cases 509/2022/JK and 1698/2022/JK (the "**Recommendation**"), including the confidential annex providing a more detailed assessment on the nature and content of the preparatory documents. The EDPB thanks you for your Recommendation.

As we have noted in our previous correspondence, the EDPB values transparency and is committed to open decision-making and good administration. The EDPB takes a finding of maladministration very seriously and has used this opportunity to review this complaint. Your Recommendation was discussed during the Plenary meetings of the 24-25 May and 20 June 2023.

The EDPB fully supports providing the broadest possible access to the documents at issue, in compliance with Regulation (EC) No 1049/2001 and agrees with your Recommendation. The Court of Justice of the European Union (CJEU) has yet to deliberate and confirm in case law some of the matters in scope of this complaint. In the meantime and in the spirit of transparency and cooperation, the EDPB has endeavoured to achieve your proposed balanced solution. The EDPB agrees to disclose draft

European Data Protection Board

Rue Wiertz, 60

1047 Brussels

versions of documents in scope of the complaint, including with tracked changes, and agrees with your proposal to anonymise such documents so that they are unable to attribute views to a specific author.

The EDPB is pleased to provide you with our opinion in response to your Recommendation. In this opinion, the EDPB has presented the decision taken by the Plenary regarding the different categories of documents, before providing a detailed response to your assessment. We of course remain at your disposal should you wish to engage on these matters bilaterally.

1. The EDPB's position regarding the disclosure for each category of documents, following the Ombudsman's Recommendation

Following a reassessment of all the documents in scope of your Recommendation, the EDPB members have discussed this matter during its recent Plenaries of 24 May and 20 June 2023. Consequently, the EDPB has decided to revise its confirmatory decision regarding the disclosure of these documents, in order to grant the widest possible access to them, and fully comply with your Recommendation. The revised EDPB position is set out below, for each category of documents subject to your Recommendation.

2.1. Draft versions of EDPB Statement 04/2021¹

Case 509/2022

In its confirmatory decision, the EDPB has denied access to 8 draft versions² subject to your Recommendation. After a re-assessment of these documents and taking into consideration your Recommendation, the EDPB has decided to:

- **Fully disclose 7 of these drafts**³.
- **Partially disclose the remaining draft**⁴. **This document will be disclosed in an anonymised form.** The internal comments will not be disclosed, because the EDPB considers that redacting the reference to the supervisory authorities (“SAs”) which made the comments is not sufficient to ensure the document is anonymised. The EDPB has therefore decided that the contents of these internal comments shall remain confidential, and that the exception of Article 4(3) 2nd paragraph of Regulation (EC) No 1049/2001 is applicable in this case. The EDPB is committed to ensuring transparency of its decision-making process, and considers that this is achieved by granting access to the track changes in the document. The EDPB has provided its detailed reasoning on this matter below under Section 2.

¹ EDPB Statement 04/2021 on international agreements including transfers, adopted on 13 April 2021. Available at https://edpb.europa.eu/our-work-tools/our-documents/statements/statement-042021-international-agreements-including_en.

² Documents 19, 20, 21, 22, 23, 24, 25, 26.

³ Documents 19, 20, 21, 22, 24, 25, 26.

⁴ Documents 23.

Case 1698/2022

In its confirmatory decision, the EDPB has denied access to 7 draft versions⁵ subject to your Recommendation. After a re-assessment of these documents, and taking into consideration your Recommendation, the EDPB has decided to **fully disclose all 7 of these drafts**.

The remaining two categories of documents only concern case 509/2022.

2.1. Minutes and draft minutes of expert subgroup meetings

In its confirmatory decision, the EDPB has denied access to 4 draft versions⁶ subject to your Recommendation. After a re-assessment, and taking into consideration your Recommendation, the EDPB has decided to fully disclose the draft minutes to the extent that they fall within the scope of the request. Therefore, the EDPB will provide the draft minutes to the applicant fully disclosing section 7 thereof.

2.1. E-mail exchanges between the European Commission and the EDPB, as well as EDPB members and the EDPB Secretariat

In its initial decision, the EDPB has granted partial access to 3 documents which contain e-mails⁷ subject to your Recommendation. After a re-assessment of these documents, and taking into consideration your Recommendation, the EDPB has decided to confirm its position with respect to the parts which were not disclosed, and maintains that the exception of Article 4(3)2nd paragraph of Regulation (EC) No 1049/2001 is applicable in this case⁸, and that it has granted the broadest possible access without undermining the decision-making process of the EDPB. As regards document 8, the EDPB maintains its position with regard to one sentence, concerning a matter on which the EDPB has not yet decided, and considers that the exception of Article 4(3)1st paragraph of Regulation (EC) No 1049/2001 is applicable in this case. The EDPB has provided its detailed reasoning on this matter below under Section 2.

The EDPB notes that your Recommendation seems to identify issues with two e-mails, hence the EDPB would like to take the opportunity to provide some clarifications in this respect.

⁵ Documents 1, 2, 3, 4, 5, 6, 7.

⁶ Documents 1, 2, 3, 4. Please note that the parts in-scope of the request concerning documents 10, 13, 15 that were fully disclosed to the applicant; and documents 9 and 14 only contain redactions to prevent attributing the views expressed to specific parties, which is aligned with the EO's proposal for solution (see para 9 of the Recommendation). This was explained in our letter dated 3 June 2022.

⁷ Documents 8, 12, 17. Please note that documents 5, 6, 7, 11, 12, 16, 18 only contain redactions to prevent attributing the views expressed to specific parties, which is aligned with your proposal for solution (see paragraph 9 of the Recommendation), as well as to prevent the disclosure of personal data (which is not challenged by the applicant). This was explained in our letter dated 3 June 2022.

⁸ Documents 12 and 17. The application of Article 4(3)2nd paragraph of Regulation (EC) No 1049/2001 to document 8 only concerns redactions to prevent attributing the views expressed by specific parties, which is aligned with your proposal for solution (see paragraph 9 of the Recommendation).

For the first e-mail, while your Recommendation does not identify the specific document concerned, it maintains that the e-mail was not redacted on the basis of Article 4 Regulation (EC) No 1049/2001, but rather “to protect [the EDPB’s] internal process”. The EDPB Secretariat has identified one email that it believes could meet this description. In document 12, the EDPB Secretariat’s functional mailbox was redacted to avoid possible disruptions to its working methods, whereby this e-mail address is strictly used for communications between the EDPB members and its Secretariat. If that e-mail address became public, it would lead to very significant disruptions of the working methods of the EDPB, as this functional mailbox would likely become flooded with spam and e-mails from external parties. This would also likely lead to numerous duplicate e-mails being received, given that the EDPB already has a separate functional mailbox for correspondence with external senders.

Disclosing this internal functional mailbox address, which was created to be dedicated to correspondence with EDPB members, as well as the European Commission, would therefore mean the EDPB Secretariat would need more time to process incoming e-mails, leading to delayed responses to the EDPB members. Therefore, the EDPB considers that the redaction of this e-mail address is justified on the basis of Article 4(3) 2nd paragraph of Regulation (EC) No 1049/2001, as disclosure would severely hinder the EDPB Secretariat from performing its tasks in accordance with Article 75(6)(b) GDPR. The EDPB considers that there is no overriding public interest that could be relevant to disclose this internal e-mail address, as the EDPB has another functional mailbox specifically dedicated to exchanges with external parties, the address of the latter being public⁹.

For the second e-mail, your Recommendation provides an exact reference (“email of 09 February 2021 (18:59)”), which enabled the EDPB Secretariat to identify this as an e-mail in part of the e-mail chains in document 11. It was exchanged between two EDPB Secretariat staff members, hence falling outside of the scope of this access to documents request. The reasoning for this redaction was included in the replies to the initial¹⁰ and confirmatory requests¹¹ in case 2021-37-C, and in the correspondence between the EDPB or its Secretariat and your Office¹².

2. EDPB Response to the Ombudsman’s assessment

2.1. EDPB reliance on Article 4(3) of Regulation (EC) No 1049/2001

2.1.1. The risks to the independence of the EDPB and its members

With regard to the documents partially disclosed, the EDPB considers that the exception under Article 4(3) 2nd paragraph of Regulation (EC) No 1049/2001 applies. In the following lines, the EDPB provides detailed arguments in order to explain, in the most precise way possible, its reliance on that exception and the specific and actual risks that disclosure would cause to its decision-making process.

⁹ Letter from the EDPB Chair to the Ombudsman’s Director of Inquiries, 3 June 2022, p. 5.

¹⁰ Letter of 18 January 2021 from the EDPB Vice-Chair.

¹¹ Letter of 9 February 2022 from the EDPB Chair.

¹² E-mail of 10 March 2022 from the EDPB Secretariat, and letter of 3 June 2022 from the EDPB Chair.

The EDPB fully agrees with and is committed to ensuring transparency of its decision-making process, in line with Articles 1 and 10 TEU and Article 15 TFEU. The EDPB concurs with the Ombudsman in that the principle of transparency applies to all documents held by EU institutions, bodies and agencies, as it “*guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen*”¹³. The EDPB also acknowledges that such principle applies regardless of whether the documents form part of the EU’s legislative process¹⁴.

The EDPB underlines that, in cases where documents are part of the EU’s legislative process, the principle of transparency requires a wider access to the documents, which “*should be made directly accessible to the greatest possible extent*”¹⁵. The CJEU has emphasised this in consistent case law, where it recognised the importance of involving citizens in the decision-making process in the context of the legislative process by providing them with timely access to the information¹⁶. The EDPB highlights that the case law referred to in paragraph 24 of your Recommendation becomes relevant in the context of the legislative process. Indeed, both judgements quoted refer to final versions of internal documents used in the context of a legislative decision-making process¹⁷. On the contrary, the EDPB is a body with no legislative powers and the documents within the scope of your Recommendation are not final, but rather drafts containing track changes and internal comments made at staff level. Therefore, the findings made by the CJEU in T-144/05 and T-540/15 are not applicable *mutatis mutandis* to the case at hand. The EDPB had already provided partial access to the e-mails within the scope of the request, only redacting some parts whose disclosure would undermine its decision-making process¹⁸. In addition, and keeping in mind the Recommendation and the EDPB’s pursue of transparency, the EDPB decided to revisit its approach and disclose all the draft versions of Statement 04/2021, only redacting some of the internal comments made at staff level, in line with your proposal to anonymise the documents. By disclosing these documents, the EDPB believes that it provides the applicant with a clear overview of its decision-making process regarding the specific files, without it being necessary to disclose internal comments made by staff members in a draft document or an e-mail to achieve this goal.

In this respect, the EDPB wishes to reiterate that disclosure of internal comments containing views and opinions of staff members is not afforded since it could lead to the re-identification of the authors or, at the very least, the party(ies). This risk is not purely hypothetical but real, foreseeable and in fact, based on a previous recent experience: in the context of the Ombudsman Decision in case 386/2021/AMF, disclosure of internal comments where only the authors were anonymised did not

¹³ The Recommendation, paragraph 16 and Regulation (EC) No 1049/2001, Recital 2.

¹⁴ The Recommendation, paragraph 16.

¹⁵ Recital 6 of Regulation (EC) No 1049/2001.

¹⁶ Judgment of 4 September 2018, *ClientEarth v Commission*, [C-57/16P](#), EU:C:2018:660, paragraph 84 and the case law cited therein.

¹⁷ Judgment of 18 December 2008, *Pablo Muñoz v Commission*, [T-144/05](#), EU:T:2008:596, is about meeting minutes (paragraph 77); and judgment of 22 March 2018, *Emilio de Capitani v European Parliament*, [T-540/15](#), EU:T:2018:167, relates to multi-column tables used during the legislative decision-making process (paragraphs 1, 3-4).

¹⁸ See footnote 9 above.

prevent the attribution of views to specific parties¹⁹. This will affect the EDPB's decision-making process as it can be used in an attempt to discredit the EDPB and/or some of its members and/or exert pressure over them. This is especially the case if we take into account the role of the EDPB members at national level as the competent supervisory authorities ("SAs") to ensure compliance with national and EU data protection rules, including the supervision of the Member States' compliance with their obligations. Given the fact that the redacted comments (including the ones made in the e-mails) portray opinions and views of national authorities - at staff level - with regard to documents addressing data protection compliance in the field of international agreements and administrative arrangements between public bodies, it is particularly important to ensure that SAs are able to fulfil their tasks in an independent manner and without being subject to any external pressure²⁰, including from Member States' governments. Should the internal comments at issue be disclosed, the EDPB considers that there is a reasonably foreseeable risk that Member States' governments attempt to exercise pressure on their competent SA, especially considering that Statement 04/2021 invited Member States to assess and review their international agreements involving international transfers in light of the EU data protection framework, and the SAs' role in supervising compliance with data protection rules.

2.1.2. The risks to the EDPB's mission and the decision-making process

The EDPB also wishes to underline its task of ensuring the consistent application of the GDPR and the LED²¹. In order to achieve such mission, it is essential that the EDPB speaks with one voice in accordance with its guiding principles of collegiality, inclusiveness and cooperation²². In this respect, the EDPB understands the added value of the draft documents for stakeholders in order to understand the process leading to the adoption of the final documents. The different draft versions are a result of the discussions, cooperation and agreements of the EDPB members during the decision-making process and reflect the different stages which the documents underwent. In this respect, the documents that the EDPB proposes to disclose already provide the public with a clear understanding of the decision-making process in the given case²³, without jeopardising the EDPB's mission to speak with one voice.

¹⁹ Please see for instance of the public allegations by some stakeholders following disclosure of draft guidelines 2/2019 following the Ombudsman Decision in case 386/2021/AMF: noyb, *noyb's Second "Advent Reading": How the Irish DPC tried to lobby Facebook's "GDPR bypass" into European Guidelines* (available at <https://noyb.eu/en/second-noyb-advent-reading-facebookdpc-documents>); Politico, *'Contrary to everything we believe in': Irish data watchdog lobbied for business-friendly GDPR* (available at <https://www.politico.eu/article/irish-data-protection-commission-gdpr-lobby-business-friendly-general-data-protection-regulation/>).

²⁰ Article 39 TEU; Article 16(2) TFEU; Article 8(3) EU Charter; Article 52 Regulation 2016/679 ("GDPR"); Article 42 Directive 2016/680 ("LED").

²¹ Article 70 GDPR and Article 51(1)(b) LED. See also Article 2 of the EDPB's Rules of Procedure (available at https://edpb.europa.eu/our-work-tools/our-documents/rules-procedure/rules-procedure-version-8_en).

²² Article 3 EDPB Rules of Procedure.

²³ In relation to the views expressed by the Ombudsperson under section 3 of the confidential annex to the Recommendation.

By contrast, the EDPB is of the view that its role will be undermined in the event that internal deliberations are made public. Indeed, the redacted comments contain opinions for internal use as part of deliberations and preliminary consultations within the EDPB whose disclosure would undermine the decision-making process of the EDPB²⁴. Firstly, the EDPB underlines that the internal comments at hand were made during the drafting stage at staff level and do not necessarily reflect the official position of the concerned EDPB members. If staff members fear that internal comments expressed during deliberations may be made public, this could lead to the censoring of their own views and opinions²⁵. In this regard, even if the internal comments were anonymised by redacting only the name of the individuals and/or of their SA, there is still a risk of re-identifying the SA of the staff member and, therefore, the concrete author of the comment could also be identified²⁶. Likewise, the redaction of some parts of the e-mails at stake aims at addressing the risk of re-identification and attribution of a concrete view or opinion to the specific author or SA. This is a real, foreseeable and tangible risk which some EDPB members have already shared concerns about. This will undoubtedly have a very significant negative impact on the EDPB's deliberations during its decision-making processes. In this respect, the EDPB wishes to emphasise once again its working methods, whereby the EDPB members play an essential role in feeding the work of the EDPB. This is particularly the case in relation to guidelines, statements and other guidance, where the rapporteurs are usually SAs. In addition, in the context of the discussions in the dedicated expert subgroups, the EDPB members have a prominent role in providing written and oral comments, discussing options and reaching compromises. This is clearly reflected by the several draft versions of the statement within the scope of this case. Therefore, should some EDPB members censor sharing their views in preparatory work that is essential in the proper running of the EDPB, the risk that the EDPB is not able to fully achieve its tasks in the future, at least when it comes to drafting and adopting guidance, is reasonably foreseeable and not merely hypothetical²⁷. This reasoning applies both with regard to documents 12, 17 and 23 of the present case, where the redactions aim at protecting the decision-making process when a decision has already been taken, as well as to document 8, where the redacted view concerns an issue for which a decision has not been taken yet by the EDPB.

Considering the above, and with the aim of fully complying with your Recommendation of providing the broadest possible access to the documents in an anonymised format, the EDPB decided to disclose all the drafts of Statement 04/2021 at issue, including those with track changes, and only redact the

²⁴ Judgment of 21 July 2011, *Sweden v MyTravel and Commission*, [C-506/08 P](#), EU:C:2011:496 paragraph 78; and judgment of 22 May 2012, *Internationaler Hilfsfonds v Commission*, [T-300/10](#), EU:T:2012:247, paragraph 131.

²⁵ Judgment of 15 September 2016, *Philip Morris v Commission*, [T-18/15](#), EU:T:2016:487, paragraph 87: “[...] *The possibility of **expressing views independently** within an institution helps to **encourage internal discussions** with a view to improving the functioning of that institution and **contributing to the smooth running of the decision-making process**” (emphasis added).*

²⁶ For example, the use of specific language or formulations can give an indication of the geographical location or mother tongue of the author of the comment, which could be an element to identify either the SA, or the author or both.

²⁷ Judgment of 22 May 2012, *Internationaler Hilfsfonds v Commission*, [T-300/10](#), EU:T:2012:247, paragraph 91 and 92 and case law cited therein.

information whose disclosure was essential to protect the fulfilment of its mission and its decision-making process.

Finally, the EDPB wishes to clarify its previous references to the need to preserve its independence²⁸. The independence of the EDPB and its members is an essential element to enable the EDPB's task of ensuring the consistent application of the GDPR²⁹ and encouraging the consistent application of the LED³⁰, as well as the SAs' task of monitoring the application of the GDPR³¹ and of the provisions adopted pursuant to the LED³². In line with this, the EDPB Rules of Procedure establish the rules on confidentiality of the discussions in several situations, including when the EDPB decides so given the nature of the topic³³. The EDPB fully agrees with the Ombudsman in that internal rules of procedure do not take legal precedence over a Regulation, and reassures that this was never the understanding nor intention of the EDPB. On the contrary, the EDPB fully abides by the obligation stemming from Regulation (EC) No 1049/2001 and the case law to demonstrate that the risks posed by the disclosure of the internal comments at hand are real, foreseeable and not purely hypothetical, in addition to demonstrating that there is no overriding public interest³⁴. The independence of the EDPB and its confidentiality rules are mere elements stemming from the GDPR and the EDPB's Rules of Procedure which substantiate the EDPB's views that its decision-making process may be undermined by the disclosure of these internal comments, given the negative effect that it may have in the independence of the EDPB and its members. Thus, as explained above, the EDPB took these aspects into consideration when determining whether disclosure should be rejected on the basis of Article 4(3) of Regulation (EC) No 1049/2001.

3. Concluding remarks

In light of the above, we consider that the EDPB has sufficiently demonstrated a specific and actual risk to its decision-making, and the absence of an overriding public interest in disclosure of the internal comments.

To conclude, we would like to reiterate our intention to proactively apply the same approach as presented above, for future requests concerning revised versions of documents, where relevant, taking always into account the specificities of the request(s) assessed. We stand ready to review these arrangements regularly to ensure they remain fit for purpose.

As requested, we are enclosing a translation into French of this reply. Please note that in order to provide this reply within the deadline, only a machine translation could be provided. We trust that you will appreciate this sincere effort and the action, under our existing constraints. Considering that

²⁸ In relation to the views expressed by the Ombudsman in paragraphs 26-27 of the Recommendation.

²⁹ Articles 69-71 GDPR.

³⁰ Article 51(1)b) LED.

³¹ Articles 51, 52 and 57 GDPR.

³² Articles 41, 42 and 46 LED.

³³ Article 33 of the EDPB's Rules of Procedure.

³⁴ See section 2.1.3.



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the language of the complaint in Joint cases 509/2022 and 1698/2022 was English, please let us know should a formal translation be required.

We would like to conclude by reassuring you again that EDPB takes transparency matters very seriously, and will continue to do so in the future.

Yours sincerely,

Anu Talus

Chair of the EDPB