

Anu Talus

Chair of the European Data Protection Board

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France

Brussels, 28 June 2023

by e-mail only

Ref: 2023-0045

EDPB Response to the European Ombudsman's recommendation regarding case 201/2022/JK

Dear Ms O'Reilly,

The EDPB is grateful for your letter of 29 March 2023 enclosing your recommendation on case 201/2022/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 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.

1.1. Draft versions of EDPB Statement 04/2021¹

In its confirmatory decision, the EDPB has denied access to 19 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 18 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.

1.2. Draft versions of the EDPB response to MEP in't Veld⁵

In its confirmatory decision, the EDPB has denied access to 8 draft versions⁶ subject to your Recommendation. After a re-assessment of these documents, and taking into consideration your Recommendation, the EDPB has decided to:

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 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 22, 23, 24, 25, 26, 27, 29, 30.

³ Documents 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 22, 23, 24, 25, 27, 29, 30. Please note that documents 8 and 22 are duplicates.

⁴ Documents 26.

⁵ EDPB response to MEP Sophie in't Veld regarding EDPB Statement 04/2021 on international agreements including transfers, adopted on 7 July 2021. Available at https://edpb.europa.eu/system/files/2021-07/edpb_letter_out2021-0119_intveld_igas.pdf.

⁶ Documents 32, 33, 34, 35, 36, 37, 40, 102.

- **Fully disclose 4 of these drafts⁷.**
- **Partially disclose the 4 remaining drafts⁸. These 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 authority which made the comment is not sufficient to ensure the documents are 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 documents. The EDPB has provided its detailed reasoning on this matter below under Section 2.

1.3. Draft versions of EDPB Guidelines 2/2020⁹

In its confirmatory decision, the EDPB has denied access to 41 draft versions¹⁰ subject to your Recommendation. After re-assessment of these documents, and taking into consideration your Recommendation, the EDPB decided to:

- **Fully disclose 9 of these drafts¹¹.**
- **Partially disclose the 32 remaining drafts¹². The documents will be disclosed in an anonymised form.** The EDPB has decided that some comments in one of the documents¹³ may be disclosed, as their contents would not allow the author to be identified, given their general nature. The other internal comments in that document, as well as in the remaining documents, will not be disclosed because the EDPB considers that redacting the reference to the supervisory authority which made the comment is not sufficient to ensure the documents are 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 documents. The EDPB has provided its detailed reasoning on this matter below under Section 2.

⁷ Documents 32, 33, 36, 37. Please note that documents 34 and 35 are duplicates, as well as documents 36 and 37.

⁸ Documents 34, 35, 40, 102.

⁹ Guidelines 2/2020 on Articles 46(2)(a) and 46(3)(b) of Regulation for transfers of personal data between EEA and non-EEA public authorities and bodies, version 2.0 adopted on 15 December 2020. Available at https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22020-articles-46-2-and-46-3-b-regulation_en.

¹⁰ Documents 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77, 78, 80, 83, 85, 86, 88, 89, 93, 94, 96, 97.

¹¹ Documents 45, 52, 53, 55, 56, 77, 93, 96, 97

¹² Documents 47, 48, 49, 50, 51, 54, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 78, 80, 83, 85, 86, 88, 89, 94.

¹³ Document 47.

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.

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”*¹⁴. The EDPB also acknowledges that such principle applies regardless of whether the documents form part of the EU's legislative process¹⁵.

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”*¹⁶. 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 information¹⁷. 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 process¹⁸. 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. This being said, 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, Guidelines 2/2020 and the reply to an MEP, 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

¹⁴ The Recommendation, paragraph 20 and Regulation (EC) 1049/2001, recital 2.

¹⁵ The Recommendation, paragraph 20.

¹⁶ Recital 6 of Regulation (EC) No 1049/2001.

¹⁷ Judgment of 4 September 2018, *ClientEarth v Commission*, [C-57/16 P](#), EU:C:2018:660, paragraph 84 and the case law cited therein.

¹⁸ 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).

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 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 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 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

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.

documents that the EDPB proposes to disclose already provide the public with a clear understanding of how the EDPB interpreted the GDPR in the given cases²³, without jeopardising the EDPB's mission to speak with one voice.

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. 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, guidelines and letter 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.

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 at issue, including those with track changes, and only redact the information whose disclosure was essential to protect the fulfilment of its mission and its decision-making process.

²³ In relation to the views expressed by the Ombudsman in paragraph 29 of the Recommendation.

²⁴ Judgment of 21 July 2011, *Sweden v MyTravel and Commission*, [C-506/08P](#), 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. See section 2.1.3 below.

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.

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.

2.1.3 The lack of an overriding public interest in disclosure of the comments

As required by Article 4(3) Regulation (EC) No 1049/2001, the assessment of the applicability of an exception consists of balancing the opposing interests in a given situation, which outcome shall favour the interest prevailing in the particular case³⁵.

We note that your comments on this aspect are focussing on the draft versions of Guidelines 2/2020, hence we understand them as not questioning the EDPB's assessment of whether an overriding interest was prevailing for the application of exceptions to the draft versions of Statement 04/2021 and the reply to MEP in't Veld.

Regarding Guidelines 2/2020, the EDPB wishes to reassure the Ombudsman³⁶ that this balancing exercise has been duly performed in this particular case. Whilst the CJEU keeps exclusive jurisdiction over the authoritative interpretation of EU law³⁷, we thank you for the consideration you attach to

²⁸ In relation to the views expressed by the Ombudsman in paragraphs 35-36 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.

³⁵ Judgment of 27 November 2018, *VG v Commission*, joined cases [T-314/16](#) and [T-435/16](#), EU:T:2018 841, paragraph 60 and case-law cited.

³⁶ In relation to the views expressed in paragraph 30 of the Recommendation.

³⁷ Judgment of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, [T-485/18](#), EU:T:202035, paragraph 83 and case-law cited.

guidelines adopted by the EDPB. They are indeed a valuable tool contributing to ensuring the consistent application of the GDPR - the EDPB's main task³⁸.

Concerning the drafts of Guidelines 2/2020 that do not contain any track changes or internal comments made by staff, the EDPB acknowledges that the interest of stakeholders in understanding how the EDPB's decision-making process relating to these Guidelines 2/2020 worked, prevails. The same applies to the draft versions of these Guidelines that contain track changes (without internal comments). This is why we agree to fully disclose these documents with the complainant.

As per the draft versions of Guidelines 2/2020 that contain track changes and internal comments made by staff, we also acknowledge the overriding public interest in accessing such documents with their track changes, for the same reasons as explained above. The EDPB considers that such disclosure is sufficient to enable people understanding how the EDPB's decision-making process worked, without any need to access the internal comments made by staff, which are redacted to anonymise their authors, as recommended by the Ombudsman.

On that aspect, we underline that, like the Ombudsman³⁹, the EDPB has no knowledge of publicly known dissenting views on the subject-matter addressed by Guidelines 2/2020, contrary to the situation arisen for Guidelines 2/2019⁴⁰. This could however change in the future. Besides, as explained above, simply hiding the name of the authors who made internal comments in a document is not an efficient method to anonymise such comments. It is true that they could appear anonymous at first sight⁴¹, but the application of one or more factors specific to some members of the EDPB could re-identify the authors of these internal comments.

Furthermore, the EDPB can only agree with the Ombudsman⁴² that personal data are important for citizens and businesses. This is precisely why the decision-making process of the EDPB should be protected, where necessary, to ensure consistent application of the data protection legislation throughout the EEA. Therefore, the EDPB considers that the public interest of data protection overrides, in these specific circumstances, the public interest in disclosing the internal comments made by staff.

For the sake of clarity, the EDPB indicates that its position above also applies to the internal comments made by staff in the draft versions of Statement 04/2021 and of the reply to MEP in't Veld.

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.

³⁸ Article 70 GDPR.

³⁹ Paragraph 29 of the Recommendation.

⁴⁰ In relation to the reference included in footnote 16, under paragraph 30 of the Recommendation.

⁴¹ Judgment of 19 March 2013, *In 't Veld v Commission*, EU:T:2013:135, paragraph 126.

⁴² Paragraph 31 of the Recommendation.



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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 the language of the complaint in case 201/2022 was English, please let us know should a formal translation be required.

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

Yours sincerely,

Anu Talus

Chair of the EDPB

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