



# Homeland Security

*Privacy Office*

July 27, 2007

Ms. Marcia Hofmann  
Electronic Frontier Foundation  
1875 Connecticut Avenue, N.W.  
Suite 650  
Washington, DC 20009

**Re: DHS/OS/PRIV 07-90/Hofmann request**

Dear Ms. Hofmann:

Pursuant to the order of the court, this is our fifth partial release to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated October 20, 2006, for DHS records concerning Passenger Name Records (PNR) from May 30, 2006 to the present including:

1. Emails, letters, reports or other correspondence from DHS officials to European Union officials concerning the transfer and use of passenger data from air carriers to the US for prescreening purposes;
2. Emails, letters, statements, memoranda or other correspondence from DHS officials to U.S. government officials or employees interpreting or providing guidance on how to interpret the undertakings;
3. Records describing how passenger data transferred to the U.S. under the temporary agreement is to be retained, secured, used, disclosed to other entities, or combined with information from other sources; and
4. Complaints received from EU citizens or official entities concerning DHS acquisition, maintenance and use of passenger data from EU citizens.

In our December 15, 2006 letter, we advised you that we had determined multiple DHS components or offices may contain records responsive to your request. The DHS Office of the Executive Secretariat (ES), the DHS Office of Policy (PLCY), the DHS Privacy Office (PRIV), the DHS Office of Operations Coordination (OPS), the DHS Office of Intelligence and Analysis (OI&A), the DHS Office of the General Counsel (OGC), the Transportation Security Administration (TSA), and U.S. Customs and Border Protection (CBP) were queried for records responsive to your request. We have now expanded our search to include U.S. Immigration and Customs Enforcement (ICE).

Continued searches of the DHS components produced an additional 6 documents consisting of 26 pages of records responsive to your request. Of those 6 documents, I have determined that 5 documents are releasable in part. The releasable information is enclosed. The withheld

information, which will be noted on the *Vaughn* index when completed, consists of names, telephone numbers, email addresses, drafts, recommendations, legal opinions, Law Enforcement information, and homeland security information. I am withholding this information pursuant to Exemptions 2, 5, 6, and 7(E) of the FOIA, 5 USC §§ 552 (b)(2), (b)(5), (b)(6), and (b)(7)(E).

FOIA Exemption 2(low) exempts from disclosure records that are related to internal matters of a relatively trivial nature, such as internal administrative tracking. FOIA Exemption 2(high) protects information the disclosure of which would risk the circumvention of a statute or agency regulation. Included within such information may be operating rules, guidelines, manuals of procedures for examiners or adjudicators, and homeland security information.

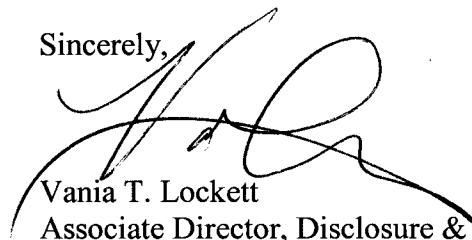
FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel. The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information.

FOIA Exemption 6 exempts from disclosure records the release of which would cause a clearly unwarranted invasion of personal privacy. Weighed against the privacy interest of the individuals is the lack of public interest in the release of their personal information and the fact that the release adds no information about agency activities, which is the core purpose of the FOIA.

Finally, FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

Our office continues to process your request. If you have any questions regarding this matter, please refer to **DHS/OS/PRIV 07-90/Hofmann request**. The DHS Privacy Office can be reached at 703-235-0790 or 1-866-431-0486. Thank you for your patience as we proceed with your request.

Sincerely,

A handwritten signature in black ink, appearing to read 'V. Lockett', with a large, sweeping flourish extending from the end of the signature.

Vania T. Lockett  
Associate Director, Disclosure & FOIA Operations

Enclosures: 14 pages

From:   
Sent: Tuesday, August 08, 2006 11:24 AM  
To: McKibben, Tracy; Rosenzweig, Paul;

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Scardaville, Michael;

Cc: Baker, Stewart

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Subject: RE: URGENT: DC DISCUSSION PAPER FOR IMMEDIATE COMMENT

FOR NSC

Tracy

I will send comments via SIPRNET but as back-up, I'm sending DHS's comments to the August 7 Draft DC Discussion paper. Below are DHS comments:

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Page 3

*(Handwritten signature/initials)*

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7/3/2007

Sent on behalf of:

DHS

Paul Rosenzweig

Counselor to the Asst. Secy. (Policy Directorate) and

Acting Assistant Secretary for Policy Development Dept. of Homeland Security Washington, DC 20528

Ph:

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DHS Privacy Office

Tel:

Fax:

Email:

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7/3/2007

RP 03-29  
ADM-9-03-RR:RD:BS  
914892 bc

DEPARTMENT OF HOMELAND SECURITY  
BUREAU OF CUSTOMS AND BORDER PROTECTION

RIN 1651-XXXX

Interim Agreement Between the European Union and the United States Regarding  
the Transfer of Passenger Name Record Data

AGENCY: Bureau of Customs and Border Protection; Department of Homeland  
Security,

Deleted: HS

ACTION: General Notice.

SUMMARY: This Notice is intended to update a General Notice published in the Federal Register (69 FR 41543), advising that the Department of Homeland Security (DHS), Customs and Border Protection (CBP), had issued a document on May 11, 2004 (referred to as the "Undertakings") containing a set of representations regarding the manner in which CBP would handle certain Passenger Name Record (PNR) data relating to flights between the United States and European Union (EU) member states. This Notice describes updates and adjustments to the Undertakings to reflect changes in the law and circumstances surrounding these data transfers.

EFFECTIVE DATES: This Notice is effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT:

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toll free number).

SUPPLEMENTARY INFORMATION:

Background

On July 9, 2004, a General Notice was published in the Federal Register (69 FR 41543) advising that the Department of Homeland Security (DHS), Customs and Border Protection (CBP), had issued a document on May 11, 2004 (referred to as the "Undertakings") containing a set of representations regarding the manner in which CBP would handle certain Passenger Name Record (PNR) data relating to flights between the

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United States and European Union (EU) member states.

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On October 19, 2006, the United States and the EU concluded an agreement to last until July 31, 2007. This agreement was accompanied by a letter of the United States updating and making adjustments to the Undertakings to reflect changes in the law and circumstances surrounding this data transfer. The letter was discussed extensively with the EU, and the EU has acknowledged it without objection. Copies of the agreement and letter are set forth below in this notice. All representations contained in the Undertakings, as published on July 9, 2004, are to be interpreted consistent with the October 19, 2006 agreement and its accompanying letter, which reflects changes in U.S. law and experience since the Undertakings were issued and is consistent with existing relevant provisions of U.S. law.

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Both the agreement and the Undertakings shall terminate on July 31, 2007, unless extended.

ADDITIONAL 7 pages  
withheld in full.

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**DISCUSSION DOCUMENT**  
DHS Objectives and Critical Factors in Renegotiating the US-EU PNR Arrangement  
Department of Homeland Security

Dated: September 1, 2008

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*Limitations on Sharing PNR:* The Undertakings adopted unilaterally by US Customs and Border Protection in tandem with the 2004 Agreement expressly prohibit direct access by 3<sup>rd</sup> parties, define DHS agencies other than CBP as 3<sup>rd</sup> parties and limit sharing to a case-by-case basis.<sup>1</sup>

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- *The Data Retention Period:* The Undertakings limit the retention of PNR to 3.5 years (11.5 if it has since been manually accessed due to the identification of a high risk individual and then only in a "deleted items" folder).<sup>2</sup>

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<sup>1</sup> Paragraphs 3 (through the narrow use definition), 17, 28 and 31.  
<sup>2</sup> Paragraph 15

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- *Early Access:* the Undertakings generally prohibit CBP from doing an automated pull earlier than 72 hours before the flight and limits the number of pulls to four for any given flight.<sup>4</sup>
- *Mandated Migration to a "Push" system:* CBP is committed to migrate towards a system in which each carrier would be responsible for sending data to CBP instead of CBP accessing it directly from the carriers systems.<sup>3</sup>
- *Restrictions on Data:* CBP is also limited to accessing only 34 of over 50 potential fields.<sup>6</sup>

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<sup>1</sup> Paragraphs 6 and 43 and 45 respectively. Paragraph 6 of the Agreement and 45 of the Undertakings obliges DHS to encourage US carriers to comply with an EU system without mention of assurances by the EU. Paragraph 43 of the Undertakings obligates DHS to host a joint review for European authorities to monitor DHS compliance, again without opportunity to review EU systems.

<sup>2</sup> Paragraphs 5 and 14.

<sup>3</sup> Paragraph 13 of the Undertakings and paragraph 1 of the agreement

<sup>4</sup> Paragraphs 4 and 5

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From: [redacted] ] (b)(6)  
Sent: Monday, August 14, 2006 11:01 AM  
To: [redacted] ] (b)(6)  
Subject: W/ PNR meeting

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(S)(X)(E) [ ]  
(S)(X)(E) [ ]

Dear Mr. Faulstich:  
I am writing to you regarding the PNR meeting that took place on August 10, 2006.

From: Rosenzweig, Paul [redacted] ] (b)(2)  
Sent: Friday, August 18, 2006 9:04 PM (b)(6)  
To: [redacted]; Baker, Stewart  
Cc: [redacted]

(S)(X)(2) [ ]  
(b)(6) [ ]

Subject: RE: PNR meeting

Dear Mr. Faulstich:

As you know, Stewart left Brussels en route to the mountains of Poland for a hiking vacation. Despite our efforts he hasn't yet had the chance to learn of your invitation and formally respond. I know from others that he expressed in his meeting with you a tentative agreement to this date and from a brief conversation with him that he anticipated the invitation. But, as you may imagine, his formal acceptance of your invitation will have to await his return. You may expect to hear from Stewart next Thursday or Friday.

If I can be of any further assistance, please let me know.

Cordially,  
Paul Rosenzweig  
Counselor (Policy Directorate)

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(S)(X)(6) [ ]

From: [redacted] (S)(X)(2) (b)(6)  
Sent: Friday, August 11, 2006 11:08 AM  
To: Baker, Stewart  
Cc: [redacted] (b)(2) (b)(6)

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Subject: RIF meeting

Mr. Stewart A. Bauer  
Assistant Secretary for Policy  
Department of Homeland Security

Dear Stewart,

Further to our exploratory discussions in Brussels on 11 August, we would like to schedule our first formal negotiating session in the week of 4 September. We understand you have a preference for the latter part of the week and therefore suggest Thursday 7 September in Brussels.

Please let us know as soon as possible whether this suits you and your colleagues.

We look forward to seeing you again.

Yours sincerely,

Irma Ertman

Jonathan Faull



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Ensuring a seamless data flow from CBP officers who may initially apprehend violators, to ICE agents who investigate them and finally ICE intelligence analysts who research violators and their associates to develop intelligence and new leads is a Departmental priority.

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Paragraph 17 expressly prohibits CBP from providing other agencies direct access to EU PNR data through CBP systems. Paragraph 28 commits CBP to treating other DHS agencies as third parties for the purposes of evaluating information sharing.

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Paragraph 6 of the Agreement and article 45 of the Undertakings require CBP to encourage U.S. airlines to participate in any EU PNR system deployed in the future.

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The review held last year, while successful and useful, was a politically charged event that required significant time and resources of DHS. As carried out, it began with a lengthy independent investigation by the DHS Privacy Office, which ultimately issued a 45-page report about CBP's compliance. Similarly, the European Commission conducted its own review, culminating in a 35-page report that found CBP in substantial compliance with the agreement but also "identified some areas for improvement and monitoring."

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The primary difficulty associated with the joint review was ensuring CBP compliance with the Undertakings prior to the meeting and completion of the Privacy Office report. With both of these steps completed, future joint reviews would likely be greatly simplified, even without other substantive changes and DHS remains committed to ensuring visibility into practices on both sides of the Atlantic

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Paragraph 3 of the Undertakings defines the use limitations for EU PNR accessed by CBP to include terrorism or "other serious crimes, including organized crime, that are transnational in nature." In the past, the EU has indicated that it would like to further narrow this definition.

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CBP personnel are limited from accessing the full SSI SSR (open) fields of a PNR to those cases in which an individual has otherwise been identified as high risk. Further CBP is prohibited from automatically pulling data from a carriers system prior to 72 hours before a flight and to conducting no more than 3 pulls. If CBP requires a PNR before the 72 hour window it is required to request such information through law enforcement channels instead of using automated systems already in place.

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Provisions limiting the time period in which CBP can initiate an automated pull and restrictions on access to the general remarks and open fields of PNR, have resulted in additional steps for CBP officers but have not posed an obstacle to the completion of CBP's mission.

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