

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC FRONTIER FOUNDATION)

1875 Connecticut Avenue, N.W.)

Suite 650)

Washington, DC 20009,)

Plaintiff,)

v.)

DEPARTMENT OF HOMELAND SECURITY)

Washington, DC 20528,)

Defendant.)

CASE NUMBER 1:06CV01988

JUDGE: Ellen Segal Huvelle

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 11/21/2006

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Plaintiff Electronic Frontier Foundation seeks injunctive and other appropriate relief for the release of agency records requested by Plaintiff from the Defendant Department of Homeland Security. Specifically, Plaintiff seeks disclosure of records concerning a temporary agreement between the United States and European Union allowing Defendant access to passenger data from airline flights between the European Union and United States.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff Electronic Frontier Foundation (“EFF”) is a not-for-profit corporation established under the laws of the State of California, with offices in San Francisco, California and Washington, DC. EFF is a donor-supported membership organization that works to inform policymakers and the general public about civil liberties issues related to technology, and to act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and disseminate information concerning the activities of federal agencies.

4. Defendant Department of Homeland Security (“DHS”) is a Department of the Executive Branch of the United States Government. DHS is an “agency” within the meaning of 5 U.S.C. § 552(f).

The International Agreements Allowing DHS Access to Passenger Data From Flights Between the European Union and United States

5. In 2004, the United States (“U.S.”) and European Union (“EU”) reached an agreement on the processing and transfer of Passenger Name Record (“PNR”) data to DHS from airline flights between the U.S. and EU. Agreement Between the European Union and the United States of America on the Processing and Transfer of PNR Data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2004 O.J. (L 183) 84, *available at* http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/pnr/2004-05-28-agreement_en.pdf. Shortly thereafter, DHS published a set of representations reflecting how the agency (specifically, its component the Bureau of Customs and Border Protection) would handle the data. Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection Regarding the Handling of Passenger Name Record Data, 69 Fed. Reg. 41543-41547 (July 9, 2004) (hereinafter “2004 Undertakings”).

6. The European Court of Justice ruled the EU-U.S. agreement inconsistent with EU law in May 2006, ordering that it would become ineffective on September 30, 2006. Joined Cases C-317/04 and C-318/04, *European Parliament v. Council of the European Union and Comm'n of the European Communities*, 2006 ECJ CELEX LEXIS 239 (May 30, 2006), available at http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/pnr/judgement_ecj_30_05_06_pnr_en.pdf. In light of the decision, the U.S. and EU renegotiated the agreement.

7. In October 2006, the U.S. and EU reached a temporary agreement on the processing and transfer of passenger data from airlines to DHS to replace the 2004 arrangement. Agreement Between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (Oct. 27, 2006), http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/pnr/2006_10_accord_US_en.pdf.

8. At the same time, DHS sent a letter to EU officials stating that it will interpret the 2004 Undertakings more broadly to permit, among other things, more substantial disclosure of passenger data to other U.S. agencies with counterterrorism functions. Letter to the Council Presidency and the Commission from the Department of Homeland Security of the United States of America, Concerning the Interpretation of Certain Provisions of the Undertakings Issued by DHS on 11 May 2004 in Connection with the Transfer by Air Carriers of Passenger Name Record (PNR) Data (Oct. 27, 2006), http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/pnr/2006_10_letter_DHS_en.pdf.

9. Even with the new agreement in place, Reuters reported, the U.S. plans to “push for more flexible arrangements with Europe on how U.S. agencies can use the personal records of

air passengers to combat terrorism.” Mark John, *U.S. to Seek More Leeway on Air Passenger Records*, Reuters, Oct. 17, 2006.

10. In the absence of further government action, the interim agreement will expire on July 31, 2007.

Plaintiff's Freedom of Information Act Request

11. By letter sent to DHS via facsimile on October 20, 2006, Plaintiff requested under the FOIA the following agency records from May 30, 2006 to the date of the request (including, but not limited to, electronic records):

- A. 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 U.S. for prescreening purposes;
- B. 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;
- C. 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
- D. complaints received from EU citizens or official entities concerning DHS acquisition, maintenance and use of passenger data of EU citizens.

12. On information and belief, DHS received Plaintiff's FOIA request on October 20, 2006.

13. By letter dated November 1, 2006, DHS acknowledged receipt of Plaintiff's request and stated, “[w]e will make every effort to comply with your request in a timely manner; however, there are currently 61 open requests ahead of yours. Nevertheless, please be assured that one of the processors in our office will respond to your request as expeditiously as possible.”

14. To date, DHS has failed to disclose any records responsive to Plaintiff's request.

15. DHS has violated the 20-working-day statutory time limit for the processing of a FOIA request.

16. Plaintiff has exhausted all applicable administrative remedies.

17. DHS has wrongfully withheld the requested records from Plaintiff.

CAUSE OF ACTION

**Violation of the Freedom of Information Act for
Wrongful Withholding of Agency Records**

18. Plaintiff repeats and realleges paragraphs 1-17.

19. DHS has wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for the processing of FOIA requests.

20. Plaintiff has exhausted the applicable administrative remedies with respect to DHS's wrongful withholding of the requested records.

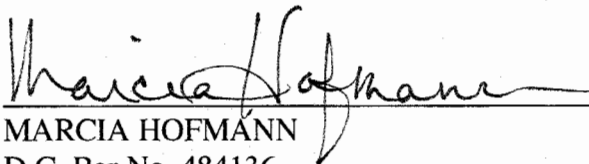
21. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- A. order Defendant DHS to disclose the requested records in their entireties and make copies available to Plaintiff;
- B. provide for expeditious proceedings in this action;
- C. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
- D. grant such other relief as the Court may deem just and proper.

Respectfully submitted,



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