

# Letters



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

Brussels, 21 November 2022

Ref: OUT2022-0076

**EDPB views on the proposal of the European Ombudsman for a solution in complaint 201/2022/JK on the decision of the EDPB not to grant public access to the preparatory documents for its statements and guidelines on international data transfers and its response to a letter from an MEP**

Dear Ms O'Reilly,

Thank you for your letter dated 21 September 2022 regarding the above-mentioned complaint. In this letter, you propose that the EDPB reconsiders its decision on the complainant's access to documents request as regards those documents not disclosed in their entirety on the basis of the exception of Article 4(3) 2nd paragraph Regulation (EC) No 1049/2001. In particular, you propose that the EDPB grants access to the views expressed by its members in anonymised format, that is, without attributing the views to specific parties.

In your letter, you have requested the EDPB to submit its reply to the abovementioned proposal by 21 November 2022.

The EDPB has carefully considered your proposal.

As a preliminary remark, I regret that the you did not take into consideration most of the EDPB's arguments<sup>1</sup> explaining how the EDPB works and its specificities compared to other EU institutions, agencies and bodies, how the disclosure would seriously undermine the EDPB's decision-making

---

<sup>1</sup> Submitted both orally during the meetings with the Ombudsman's inquiry team and by writing. The meetings were held on 15 February 2022 to present the EDPB in general and on 5 May 2022 to discuss two complaints, including complaint 201/2022/JK specifically. The report of this meeting concerning the complaint 201/2022/AMF is available on the EO's website: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/156600>. As regards the written exchanges, I sent you a letter on 24 June 2022 on complaint 201/2022/AMF regarding the EDPB confirmatory decision in case 2021-37-C; an additional email was sent on 3 May 2022 replying to your questions on complaints 201/2022/JK and 509/2022/JK.

process but also the specific risks linked to the disclosure of draft versions of EDPB documents in general and also in particular the draft versions of the EDPB Statement 04/2021 on international agreements including transfers.

Article 4(1)(a) 3rd indent of the Regulation 1049/2011 specifies that international relations is a valid exception to refuse access to documents. It shall be emphasized that the EDPB Statement 04/2021 has been adopted for inviting Member States to assess and review their international agreements that involve transfers of personal data, including those relating to taxation (e.g. the automatic exchange of personal data for tax purposes based on the US Foreign Account Tax Compliance Act (FATCA)).

Please allow me to once again stress that **the independence of the EDPB** will be seriously harmed if the requested drafts were to be disclosed. This disclosure will affect the EDPB's decision-making process and will be used in an attempt to discredit the EDPB and/or some of its members, even when drafts are anonymised. It shall be underlined that that had already happened in the past with the disclosure of draft versions of the EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects for which the disclosure of document in an anonymised format did not prevent the attributing the views to specific parties<sup>2</sup>. Therefore, the **damage is real, foreseeable and not purely hypothetical**.

In addition to that, if the drafts were disclosed, not only the independence of the EDPB will be undermined but also the **effective protection of personal data**, stemming from Article 7 of the Charter of Fundamental Rights of the European Union, will be weakened. As a result, the role of the EDPB to ensure respect for private and family life will be compromised.

In addition, by disclosing the information contained in draft versions (including views and wording suggestions), this will detract attention from the adopted version of the EDPB documents. The sharing of multiple draft versions and separate views of the EDPB's members will seriously undermine the EDPB's mission to ensure a **consistent interpretation** of the GDPR and to **speak with one voice**. **That will also affect** the authority of the EDPB as a whole and **encourage stakeholders not to follow the EDPB's adopted position**. Accordingly, the EDPB's internal discussions will be disclosed whereas the legislator, when adopting the GDPR, provided the EDPB with the possibility to have **confidential exchanges where the EDPB deems it necessary**<sup>3</sup>.

In your proposal, you refer to the Court's Case T-540/15 *Emilio de Capitani v. European Parliament*, in which the complainant requested access to a document in the ongoing legislative procedure<sup>4</sup>. I would like to draw your attention to the fact that the decision-making process within the **EDPB cannot be compared to discussions of EU institutions in the context of legislative procedures**, since the EDPB is an EU body, composed of the national data protection supervisory authorities, and is in charge of ensuring the **consistent application of the GDPR**.

---

<sup>2</sup> 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/artide/irish-data-protection-commission-gdpr-lobby-business-friendly-general-data-protection-regulation/>).

<sup>3</sup> See Art. 76(1) GDPR, as well as Art. 33(c) of the EDPB's Rules of procedure. The mission to ensure the effective protection or personal data would be seriously undermined if these internal discussions were made public, given the impact it would have on the decision-making process of the EDPB.

<sup>4</sup> Case T-540/15, *Emilio de Capitani v. European Parliament*, para. 1.

Furthermore, I note that your letter refers to a previous Ombudsman's decision<sup>5</sup> and seems to imply that it should be applied to EDPB guidelines in general. First of all, I would like to respectfully highlight that the Court requires each access to documents request to be assessed on a case-by-case basis<sup>6</sup>. Second, it is critical to emphasise that Decision 386/2021/AMF and the ongoing case 201/2022/JK have **different circumstances**. Indeed, in the context of Decision 386/2021/AMF, **the dissenting approaches on a specific issue, which were expressed in the draft versions of the set of EDPB guidelines 2/2019, were already in the public domain. This is not the case for any of the documents covered by the complaint in case 201/2022/JK**, i.e., there are no dissenting voices in the public domain in relation to EDPB guidelines 02/2020, EDPB statement 04/2021, EDPB statement 01/2019, and the EDPB response to MEP in 't Veld dated 07 July 2021.

Finally, I note that whilst your letter acknowledges that the nature of EDPB statements and replies to MEPs differs from that of guidelines, it does not specify the consequences of such different nature on requests to access draft versions of statements and replies to MEPs.

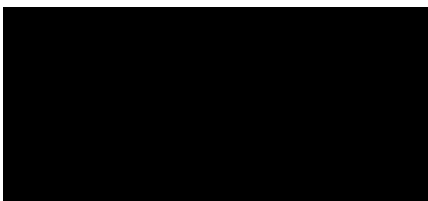
For the reasons set out above, **the EDPB strongly believes that the harm that would result in the disclosure of the preparatory documents related to guidelines 02/2020, even if anonymised, outweighs any public interest in this specific case.** Therefore, **the EDPB has decided to uphold its assessment** and all its arguments previously expressed to the complainant<sup>7</sup> and to the Ombudsman, **and to refuse access to the abovementioned preparatory documents to the complainant.**

#### Concluding remarks

The EDPB would like to once again thank the European Ombudsman for the opportunity to present its views regarding the present complaint.

Please note that this reply may be shared with the applicant.

Yours sincerely,



Andrea Jelinek

---

<sup>5</sup> Case 386/2021/AMF in relation to EDPB guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects.

<sup>6</sup> Judgment of 14 November 2013 in Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, para 42.

<sup>7</sup> Letter of 13 December 2021 from the EDPB Vice-Chair to the complainant on his initial access to documents request (ref. No 2021-33), and letter of 14 January 2022 from the EDPB Chair to the complainant on his confirmatory access to documents application (ref. No. 2021-33-C).