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WP 103

**Opinion 1/2005 on the level of protection ensured in Canada for the transmission of
Passenger Name Record and Advance Passenger Information from airlines**

Adopted on 19 January 2005

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 14 of Directive 97/66/EC.

The secretariat is provided by Directorate E (Services, Copyright, Industrial Property and Data Protection) of the European Commission, Internal Market Directorate-General, B-1049 Brussels, Belgium, Office No C100-6/136.

Website: www.europa.eu.int/comm/privacy

**OPINION 1/2005 OF THE WORKING PARTY ON THE PROTECTION OF
INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA
set up by Directive 95/46/EC of the European Parliament and of the Council of 24
October 1995**

**On the level of protection ensured in Canada for the transmission of Passenger
Name Record (PNR) and Advance Passenger Information (API) from airlines**

THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹, and in particular Articles 29 and 30 paragraph 1 (b) thereof,

Having regard to the Rules of Procedure of the Working Party², and in particular Article 12 and 14 thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION

On 11th February 2004 the Working Party adopted an opinion on the level of protection ensured in Canada for the transmission of Passenger Name Record (PNR) and Advance Passenger Information (API) from airlines³. In that opinion, the Working Party reached the conclusion that compliance with the then Canadian requirements by the airlines raised concerns in respect of Directive 95/46/EC on data protection.

The Working Party called on the Commission to continue negotiations with Canada to address the problems identified by the Working Party with an aim to find the best possible solutions. The subsequent negotiations between the European Commission and Canada focused in particular on a push system for transferring the data, purpose limitation, PNR data elements, data retention periods, onward transfers, data subject rights and the bindingness of the commitments to be applied by the Canada Border Services Agency (hereafter “the CBSA”). The Commission has updated the Working Party regularly on these talks which were conducted by the Commission in order to establish the conditions that would allow it to adopt a decision recognising the adequate protection ensured in Canada for the transfer of passengers’ data on the basis of Article 25(6) of Directive 95/46/EC.

¹ OJ L 281, 23.11.1995, p. 31, available at:

http://europa.eu.int/comm/internal_market/en/media/dataprot/index.htm

² Adopted by the Working Party at its third meeting held on 11.9.1996

³ Opinion 3/2004.

In particular, the Working Party has received from the Commission a document dated 18 January 2005 containing the Commitments by the Canada Border Services Agency in relation to the Application of its PNR Program (hereafter “the Commitments”). It understands that these Commitments are the result of the negotiations between the European Commission and Canada.

2. SCOPE OF THE OPINION

The present Opinion is issued in the light of the Commitments. The Working Party notes that the negotiations have led to substantial and important changes in the Canadian PNR program as reflected by the Commitments. The Working Party also notes that the relevant Canadian law on the transmission of API and PNR data has remained unchanged (see section 1 of the Commitments) and refers in this respect to its analysis thereof in its Opinion 3/2004.

The present Opinion is issued with reference to the level of protection ensured by Canada once airlines have transmitted API and PNR data relating to their passengers and crewmembers to the CBSA, on the basis of Canadian law and the Commitments. In its assessment of the adequacy of protection afforded by Canadian law, the Working Party has been guided by the general criteria set forth in previous documents⁴ as well as in its Opinions on the subject of API/PNR data required by the United States⁵.

3. OPERATION AND FEATURES OF THE CANADIAN API/PNR ACCESS ARRANGEMENTS AS SPECIFIED IN THE COMMITMENTS

• *Processing of API/PNR data*

The Working Party requested that a system pushing the API and PNR data to the relevant Canadian authority be installed since data pulled from the airlines raises problems under the Directive as described in Opinion 4/2003⁶. Section 7 of the Commitments clearly states that the Canadian Passenger Information System PAXIS has been configured to receive API and PNR data pushed from a carrier. No other means of transferring the data, such as a pull system, has been provided for in the Commitments. The Working Party welcomes this result.

• *Purposes for processing API/PNR data*

The Working Party requested in particular that a clear and limited list of serious offences directly related to terrorism should be provided by the Canadian authorities, without prejudice to the possibility of performing additional specific and individual data exchanges on a case by case basis within the framework of judicial and police co-operation.

⁴ Working Document on "Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive", WP 12 of the Working Party, issued 24 July 1998.

The Working Party also refers to its Opinion 2/2001 on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act.

⁵ Opinion 6/2002 of the Working Party on "transmission of Passenger Manifest Information and other data from Airlines to the United States", WP 66 of the Working Party, issued 24 October 2002. Opinion 4/2003 on the Level of protection ensured in the US for the Transfer of Passengers' Data, adopted 13 June 2003.

⁶ Heading 5, page 7.

The Working Party notes that the purpose mentioned in section 2 of the Commitments is much more narrowly defined and also bears a clear relationship with fighting acts of terrorism. The Working Party welcomes the more balanced approach on this issue.

- ***Transferable Personal Data***

In its previous opinion on the Canadian PNR system the Working Party considered that the 38 data elements to be transferred to the Canadian authorities went well beyond what could be considered adequate, relevant and not excessive within the meaning of Article 6 (1) (c) of the Directive. The Working Party welcomes the considerable effort made by the Canadian authorities to reduce the number of data elements. Although not all the data elements correspond with those identified as legitimate and not excessive by the Working Party in its Opinion 4/2003, the Working Party observes that sensitive data within the meaning of Article 8(1) of the Directive and all 'open text' or 'general remarks' fields are excluded within the 25 data elements. The Working Party therefore considers that the Commitments present a balanced approach on this issue. An annex to the Commitments will list the 25 data elements requested.

- ***Data Retention Time***

In its Opinion 3/2004 the Working Party raised a number of observations with regard to the data retention period of 6 years and the anonymization of the data concerned.

Sections 8 and 9 of the Commitments contain two data retention periods each clearly linked to the purpose for which the data are processed. In most cases the data retention period of 3.5 years, mentioned in section 8, will be applied, i.e. for data related to a person who is not the subject to an investigation in Canada. During the 3.5 year period, the information will be increasingly de-personalized as described in detail in section 8. In particular, the Working Party observes that during the third data retention period (from 2 years until the end of the 3.5 year period) the President of the CBSA has to approve access to data elements enabling to identify the person to whom the information relates. The Working Party sees this safeguard as a considerable improvement even though no full anonymization of the data takes place as it still remains possible to identify the passenger concerned. The Working Party also welcomes the reduction of the data retention period from 6 years to 3.5 years.

- ***Data Disclosure/Onward Transfers***

The Working Party expressed rather serious doubts in respect of the initial Canadian proposal regarding the disclosure of data to third parties. In particular the Working Party observed that it was not clear in what concrete cases, under what circumstances and subject to what safeguards a disclosure to other agencies could take place.

The Working Party observes that the relevant sections of the Commitments (sections 2-15 on onward transfers to other Canadian agencies and sections 16-19 on onward transfers to other countries) have been completely redrafted. In particular, the Commitments only allow for transfers of a minimum amount of data in specific cases directly related to terrorism or terrorism-related crimes. Moreover, the Working Party notes that in case of transfers to other countries, the level of data protection granted by the receiving country figures as one of the criteria to be taken into account.

In this respect the Working Party welcomes in particular the fact that only countries having received an adequacy finding under the Directive, as well as the EU Member States, are eligible to receive API and PNR data retained in PAXIS (data held on passengers not being the subject of an investigation in Canada).

- ***Rights of the data subjects and enforcement***

1. Passenger's right to information

Section 21 of the Commitments states that the CBSA will provide information to the travelling public, including information regarding the collecting authority, the data to be collected, the purpose for the collection, procedures for receiving more detailed information and information on redress. The Working Party notes that this Commitment is in line with the Working Party's request to provide for a more specific notification of passengers.

2. Passenger's right of access, correction and notation

The Canadian Privacy Act provides individuals with the rights of access, correction and notation with regard to any personal information relating to them, under the control of the independent Canadian Privacy Commissioner. However, the Privacy Act currently requires that individuals be present in Canada in order to avail themselves of these rights. The Working Party welcomes CBSA's commitment to administratively extend these rights to citizens who are not present in Canada, as set out in section 30 of the Commitments. The Working Party also welcomes the Canadian authorities' position to examine ways in which this commitment could be legally recognized in the Privacy Act so as to give rise to formal third party rights to citizens, as currently reflected in section 29 (the section in brackets) of the Commitments. The Working Party underlines the importance of non-discriminatory treatment of EU citizens in this respect and requests that the Privacy Act be amended accordingly, as soon as possible. With regard to the enforcement of these rights, the Working Party notes that section 31 of the Commitments sets out several mechanisms in order to ensure that the individuals' rights of access, correction and notation are upheld should a data controller refuse to cooperate.

- ***Joint Review***

Joint review of the implementation is foreseen in Section 26 of the Commitments and will be provided for also in the international agreement between the Community and Canada which forms part of the PNR package. The Working Party is of the opinion that joint review is a very important instrument allowing to evaluate the impact of the PNR package on data protection. The Working Party, therefore, expresses its interest in assisting the Commission on this issue.

4. CONCLUSION

On the basis of the above-mentioned findings the Working Party assumes that Canada ensures an adequate level of protection within the meaning of Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of Advance Passenger Information and Passenger Name Record transferred from airlines to the Canada Border Services Agency in relation to those flights defined in section 107.1 of the Customs Act, i.e. concerning any person on board a conveyance arriving in Canada.

Done in Brussels, on 19 January 2005

For the Working Party

The Chairman

Peter SCHAAR