



**XXXX/07/EN
WP132**

**Opinion 2/2007 on information to passengers about transfer of PNR data to US
authorities**

Adopted on 15 February 2007

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, Intellectual and Industrial Property, Media 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

Executive summary

This opinion and its annexes (frequently asked questions and model notices) are aimed at travel agents, airlines, and any other organisations providing travel services to passengers flying to and from the United States of America. This opinion and the annexes update and replace the previous opinion of 30 September 2004 (WP97).

The current legal framework for transferring PNR information to the US authorities is covered by the interim agreement of 16 October 2006. Negotiations for a new agreement are expected to start in 2007.

There remain obligations on travel agents, airlines and other organisations to provide information to passengers about the processing of their personal information, and this opinion aims to give advice and guidance on who needs to provide what information, how and when.

Information should be provided to passengers when they agree to buy a flight ticket, and when they receive confirmation of this ticket.

The opinion gives advice on providing information by phone, in person and on the internet.

The Art. 29 Working Party has established the model information notices (the annexes to this opinion) to make providing this information easier for organisations, and to make sure the information provided is consistent across the European Union.

The shorter information notice gives passengers summary information about transfers of their data to the US authorities, and how to find out more information.

The longer notice is in the form of frequently asked questions and has more details about the processing. It explains passenger data more widely, before focusing on PNR data. It also includes links to the interim agreement and other relevant documents.

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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 1995¹,

having regard to Articles 29 and 30 paragraphs 1 (a) and 3 of that Directive,

having regard to its Rules of Procedure and in particular to articles 12 and 14 thereof,

has adopted the present Opinion:

INTRODUCTION

Following the 11 September 2001 attacks, the United States adopted a number of laws and regulations requiring airlines flying into their territory to transfer to the US administration personal data relating to passengers and crew members flying to, from or through the United States of America. In particular, US authorities imposed on airlines the obligation to give the US Department of Homeland Security (DHS) electronic access to passenger data contained in the Passenger Name Record (PNR) for flights to, from, or through the US. Airlines not complying with these requests may face heavy fines and even lose landing rights, as well as seeing their passengers subject to delays on arrival in the United States of America.

A European legal framework allowing airlines to transfer passengers' PNR was put in place by a European Commission Decision of 14 May 2004, accompanied by the International Agreement concluded between the European Union and the United States of America on 28 May 2004. Following the annulment of these two instruments by the European Court of Justice in 2006, this framework has been replaced by the International Agreement between the European Union and the United States of America of 16 October 2006².

The International Agreement is not intended to derogate from or amend legislation of the European Union or its Member States. In particular, Articles 10 and 11 of the Directive impose on Member States an obligation to make sure that the data controller provides the data subject with information regarding the data processing envisaged. The obligation on the controller to inform the data subject results thus from national legislation adopted

¹ OJ L 281 of 23/11/1995, p. 31, available at:
http://europa.eu.int/comm/internal_market/en/media/dataprot/index.htm

² All documents are available at:
http://ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm

pursuant to the Directive. The Working Party is aware that the obligation to inform the data subject is a responsibility of data controllers, and that it should be carried out in accordance with the national legislation they are subject to.

As the US requests for transfers of PNR data affect all airlines in a similar way, the Working Party considers that there is a real need for coherence in the content of the information that should be provided to passengers and in the time and way in which that information is delivered. For that purpose, the Working Party adopted standard information notices in its Opinion of 30 September 2004 (WP 97), to serve as guidance as regards the information that should be provided to passengers flying between the EU and the USA.

The Working Party now considers it appropriate to address again the issue of information to passengers for two reasons. Firstly, the 2004 passenger notices need to be updated to take account of changes that have occurred since then. Secondly, airlines, travel agents and Computer Reservation Systems are still not providing information to passengers on transatlantic flights about the collection and transfer of their PNR in a consistent and satisfactory way. To tackle this, the Working Party is also providing guidance in this opinion about the way in which this information should be provided.

WHO SHOULD PROVIDE THE INFORMATION?

According to the Directive, the obligation to inform data subjects is placed on the data controller. In the case of PNR this may be an airline or several airlines. The obligation to inform passengers also extends to travel agents or computer reservation systems, as explained below.

Airlines

Passenger data are collected and processed to allow airlines to fulfil their obligation to the passenger to get them to their destination. The airline determines how and why the personal data are processed, and as such is the controller of the data processing. The Working Party therefore considers that the information should be provided primarily by the airline selling the flight ticket.

A particular case where several airlines may be involved is that of code-sharing, where a flight bought with one company is actually operated by a different one. In that case, from a data protection point of view, the Working Party considers that it is the airline that made the reservation and sold the flight ticket that can be considered as determining how and why the data are processed. As such, it should be considered as a data controller and so has a duty to inform the passenger.

Travel agents

According to Member States' commercial legislation, travel agents are not always considered to be acting as representatives of the airlines, but rather as intermediaries between the passenger and the airline. However, that activity of intermediation requires in any case that the passenger should be provided with accurate, clear, and complete information on the conditions of the contract. That includes information on the processing of the passenger's data by US authorities. For the purposes of applying the data protection rules, information from the data controller should be provided before the purchase of the ticket. Where the ticket is bought from a travel agent, they have an obligation to inform

passengers as they are considered to be acting on behalf of the airline in allowing that airline to comply with the obligation it is subject to. The Working Party therefore considers that the information should be provided by the travel agent in those cases where the ticket is bought through them.

Computer reservation systems

It is not generally possible for a passenger to book flights directly via Computer Reservation Systems (CRS), such as Amadeus. However, if this does happen, the same reasoning explained above for travel agents applies to CRSs. They would therefore be under an obligation to inform passengers booking transatlantic flights through them about the collection and transfer of their PNR data.

WHEN SHOULD THE INFORMATION BE PROVIDED?

The Working Party considers that information should be provided to passengers no later than the moment when the passenger gives their agreement to buy the flight ticket.

This is in line with the general principle set out in Article 6 of the Directive, according to which data should be processed fairly and lawfully. The same requirement for fairness is recalled in Article 10 and 11, when referring to information that is necessary, "*having regard to the specific circumstances in which the data are [collected or processed], to guarantee fair processing in respect of the data subject.* "

Even if the transfer of PNR data has become in practice a condition for travelling to the US, passengers are only aware of what that means in terms of the processing of their personal data if the information is given to them before they buy the ticket. The fact that those data will be transferred to US authorities, used and disclosed for purposes different from the original ones and stored for long periods, is a relevant element of the contract of air transport, especially because it entails an interference in passengers' fundamental right to privacy. Making passengers aware of that fact in advance of the conclusion of the contract derives also from the general principle of contractual good faith.

In addition, the information should also be provided after the ticket has been bought, for instance by including it in the confirmation message of the flight reservation or including a leaflet with the ticket when it is delivered. This is necessary to make sure the passenger receives the information in those cases where the booking was made by a third person in their name (for instance, by a secretary).

WHAT INFORMATION SHOULD BE PROVIDED?

The content of the information to be provided includes, in accordance line Articles 10 and 11 of the Directive, the identity of the controller, the purposes of the processing and any further information "[...] in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject".

Determining the content of the information is, like the duty of information itself, the primary responsibility of the airlines as data controller, without prejudice to national legislation that implements Articles 10 and 11 of the Directive, and to powers delegated to Data Protection Supervisory Authorities to fine-tune the requirements of the duty of information.

However, for the sake of coherence on a Europe-wide basis, the Working Party has established the model information notices to passengers, which are attached as an annex to this opinion. They are intended to provide guidance to airlines on the information they should provide to passengers in line with the obligations imposed by national legislation that implements the Directive. This new version updates and replaces the information notices adopted by the Working Party in its Opinion WP 97 of 30 September 2004.

The information notice to passengers exists in two versions.

The shorter version is intended to give passengers summary information about the fact that transfers to US authorities take place, and to offer them the possibility to find out more about the conditions of processing. It could be used, for instance, where bookings are made by telephone.

The longer version takes the form of frequently asked questions (FAQs) and contains more details about the conditions of processing. This version would be appropriate where bookings are made on the internet or at an office (of the airline or of a travel agent). Where passengers wish to know more about the transfer of their data to US authorities, the note provides them with a link to the Undertakings and international agreement. It also advises them to contact the airlines for more general information about how they handle personal data.

The content of both notices has been determined on the basis of the information made available to the Working Party and to the European Commission by US authorities, and in particular is based on the US Undertakings of 11 May 2004³. The International Agreement of 16 October 2006 relies on US authorities' continued implementation of these Undertakings. The aim of the notices is therefore to draw as complete and accurate a picture as possible about the processing of PNR data by US authorities. The notices may need to be subsequently updated on the basis of changes in the information provided to the Working Party and the European Commission by the US authorities on the way they process PNR. The existence of these model notices does not relieve airlines of the obligation to provide passengers with more accurate and complete information, should they possess it.

HOW SHOULD THE INFORMATION BE PROVIDED?

The decision on how the information is provided is the responsibility of those who have the obligation to provide it, namely airlines and travel agents. At any rate, the information must be provided in a way that ensures that passengers are fully aware of the collection and transfer of their PNR data.

To help comply with the obligations under national legislation, the Working Party would like to provide some guidance in this regard.

If the booking is made at a travel agency

Travel agents should provide passengers with a paper version of at least the short passenger notice. If passengers request more information about the transfer of PNR, the agents should provide them with a paper version of the longer passenger notice.

If the booking is made by telephone

The short notice should be read out for the passengers. If they request further information, the airline, travel agent or other organisation should indicate how passengers may access the longer notice (for instance, by visiting a website, or by having it delivered at home).

If the booking is made on the internet.

Here, a number of possibilities are available. The short notice should be presented to passengers automatically, without requiring them to look for it. This can be done by posting it on top of the webpage where the personal details of travellers are collected, or by other means, such as pop-up windows. Just making it available on a page that may only be accessed if the passenger performs a positive action (such as clicking at a web link) or including the notice in a general "privacy" section would not satisfy the requirements of national data protection legislation.

On the other hand, the longer notice may be accessed by the passenger performing positive actions, such as clicking on a web link. This web link should be offered in the short notice. At the very least, on a website, the longer notice should have the same level of visibility and accessibility for passengers as general fare and travel conditions.

In line with the provisions of Article 30.1 (a) of the Directive, and to contribute to the uniform application of national data protection legislation adopted to implement the Directive, national data protection supervisory authorities will encourage the use of the passenger notices. They will also monitor compliance by airlines, travel agents and CRSs with their obligation to inform passengers on transatlantic flights about the collection and processing of their PNR data.

Done at Brussels, on 15 February 2007

For the Working Party
The Chairman
Mr. Schaar