

ARTICLE 29 Data Protection Working Party



US Watch lists : Passenger no-fly lists/ Selectee lists

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PNR subgroup

Factual information

In 2006 the PNR subgroup of the Art. 29 WP carried out an investigation into how passenger data are processed by airlines under the jurisdiction of the EU data protection authorities. A questionnaire was sent to airlines represented by the Association of European Airlines (AEA) and a dialogue was launched with the US Air Transportation Association (US ATA). Upon these activities the following findings emerged:

The US government has established watch lists by law to combat terrorist threats against civil aviation and it mandates all airlines flying to the United States to use these watch lists in their pre-departure processing of passengers.

The Terrorism Screening Center (TSC) is updating watch lists with the information provided by Customs and Border Protection (CBP), the State Department and other US law enforcement agencies. The Transportation Security Agency (TSA) as part of the US Department of Homeland Security (DHS) is responsible for providing air carriers flying into the US on a daily basis with both US **no-fly lists and selectee lists**.

The no-fly and selectee lists are part of the Terrorist Screening Center Database (TSDB) which includes between 30,000 and 60,000 names of people suspected of terrorism or of possible links to terrorist activities. The lists are used for both internal and international passenger screening.

In the past several flights have been either denied landing or re-routed by US authorities due to correct or incorrect matches with the no-fly lists, passengers have been denied boarding, submitted to intensive questioning or have been arrested due to misidentification. Until now it is not clear how data subjects on the lists are informed on the existence of such lists and which data protection rights and redress mechanisms they have in a complaints procedure.

Screening procedures

- All airlines **check** passenger data against the no-fly list and the selectee list in their pre-departure procedures¹. Apart from names, the lists contain other information considered useful for identification such as date of birth, home address and other details. **Persons listed on no-fly lists are prohibited from entering the US, whereas persons on selectee lists may only board a US-bound flight if a further inspection does not yield other negative details and if finally TSA allows boarding.**
- Some airlines do some sort of **pre-screening** by checking reservation data against the lists. As a result a kind of marker (flag) in the reservation system indicates that further clearance is needed for the passenger concerned during the check-in procedure. Other airlines do the **screening** only **during the check-in procedure**. Often members of the airlines or from security services working on behalf of airlines match data from passengers' passports against the lists. Usually this matching is done with laptops while passengers are queuing up for check-in.
- If there is a **match with one of the lists**, airlines are obliged to inform TSA.
- Passengers identified by an airline as being on the no-fly list are referred to the respective US TSA mission and/or the US mission in Europe without being given further information.
- It remains unclear, apart from the situation in the UK, whether local law enforcement agencies are informed in such a case. In France, national law enforcement agencies used to be involved until a recent decision from the French Government means they are no longer involved in the process.
- Only a few airlines quantified **how often** there are **matches** with the lists. It seems realistic to say that big carriers have around 2-5 matches a year with the no-fly list. Smaller carriers have fewer matches, some had no matches at all. Matches with the selectee list haven't been quantified at all.
- **Those airlines with hits pointed out that in most cases the hit was related to a mismatch and their passenger was not identified as the one on the no-fly list.**

¹ During talks to airlines some hints were given that the selectee list might be generated by screening PNR data for specific clues related to so-called high risk passengers. This would be a plausible explanation for the use of PNR data but the information given by airlines remained vague

Applicability of Directive 95/46/EC

The screening of the passenger data against the lists is not comparable to the transfer of PNR-data under the agreement with the US, on which the European Court of Justice decided that Directive 95/46/EC does not apply.

In the first place, the data are not transferred to the US, but transferred from the US to Europe and processed within the territory of the EU. TSA is screening API data against the lists for law enforcement purposes (in EU terms = third pillar), but airlines are doing the same screening primarily for economic reasons and for airline security (in EU terms = first pillar). As a matter of fact, airlines process the data in their very own interest to avoid the costs of returned flights as well as for aviation security for passengers.

In the second place, an international agreement between the EU and the USA on this issue does not exist and airlines are not obliged under EU law to compare the data against the US lists, neither under the first pillar and nor under the third pillar.

In the light of these differences with the PNR-regime there are good reasons to assume that Directive 95/46/EU applies and that this situation is not covered by the judgement of the Court of Justice of 30 May 2006. In any event, the processing is in most Member States covered by the national data protection laws in the first and the third pillar.

- Data subjects are only vaguely **informed** in case they are on the no-fly list and boarding is denied. Airlines argue that they are not required to provide any information about the existence of such lists as the screening is based on a confidential process imposed by TSA.
- Airlines **store** the checked lists for a certain period in their systems to prove to the US authorities that they have behaved correctly in case of complaints. The retention period differs among the airlines (between 2 weeks and no deletion at all).
- Direct answers from US airlines asked by some national DPAs on the managing of the no-fly/selectee lists were not given for reasons of confidentiality imposed by TSA. See SSI Sensitive Security information as classified by TSA in the Electronic Code of Federal Regulation (e-CFR), in art 49 (transportation) part 1520 Only general information was provided for by the ATA (American Transportation Association).
- **Redress mechanisms** are indicated on TSA's website. TSA may remove passengers listed for unjustified reasons from the watch list and put them on a "cleared list" in case further identification documents are provided. This "cleared list" is made available to the airlines.
- Regarding the enforcement of **individual rights** by passengers and in particular listed persons, airlines have no influence on the content of the lists which is provided and updated by the US.
- There is no **legal basis for the processing of data** of the no-fly lists and the selectee lists in the meaning of Art. 6 1 a of the Directive. In addition to that since the criteria for listing

persons are unknown and due to the fact that no solid procedure is in place to verify the accuracy of data, the processing cannot be considered fair in the sense of Art. 6 of the Directive.

- It remains questionable whether the criteria for making data processing legitimate under Art. 7 of the Directive are respected.
- The requirement of Art. 6 1 e of the Directive concerning the **retention period** is not always fulfilled.
- Air carriers do not comply with the **information requirements** of Art. 11 of the Directive.

For that reason the Art. 29 WP has adopted Opinion 132 on February 15, 2007 giving guidance to airlines on how to correctly inform passengers about how their PNR data is used, including some information about the watch lists.