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AAN KLM Koninklijke Luchtvaartmaatschappij NV
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DATUM 17 april 2008
ONS KENMERK z2007-01048
CONTACTPERSOON drs. S. Nas
070- 8888 518

UW BRIEF VAN 21 augustus 2007
UW KENMERK AMSPI280308-01

ONDERWERP Hasbrouck versus KLM

Dear Sir,

As a result of your letter of 2 April 2008, the Dutch Personal Data Protection Authority (College bescherming persoonsgegevens) wishes to conclude this mediation and considers this case closed.

Timetable of the mediation

On 14 August 2007 the Dutch DPA received a mediation request from John Edward Hasbrouck (hereafter: the requestor). You received a copy of this request by e-mail, the same day. The Dutch DPA has asked the requestor by e-mail of 28 September 2007 to send a copy of the PNR-record from Amadeus he had obtained from the US CBP. You received a copy of this file, simultaneously with the Dutch DPA, by e-mail from the requestor of 1 October 2007.

On 5 October 2007 the Dutch DPA sent a letter to you specifying the request for access based on the information the requestor provided, a file containing earlier correspondence between you and the requestor. You responded by letter of 24 October 2007. A copy of this letter was withheld from the requestor for two reasons. First of all because of your claim that the entire content of the letter was confidential. By e-mail of 5 November you confirmed the Dutch DPA could forward this letter to the requestor. The Dutch DPA was not convinced however this letter would provide an adequate answer to the access request, and proceeded to arrange a conference call between the chairman of the Dutch DPA and your responsible vice-president. This conference call took place on 10 December 2007. By letter of 10 December 2007 you agreed to provide more specific answers to the access request, specifically regarding the issue of controllership. On 7 January 2008 the Dutch DPA sent a copy of this letter to the requestor, after it had verified once more that it was allowed to forward the letter in spite of the fact that the letter was marked 'KLM Confidential'.

In between, on 21 December 2007 you had a personal meeting with the requestor. The Dutch DPA was not present during this meeting.

By e-mail of 5 February 2008 to the Dutch DPA and the requestor, you answered a question regarding access to Amadeus logfiles and promised to answer the question about controllership at the end of February 2008. On 10 March 2008 the Dutch DPA sent a reminder by e-mail to you. Another reminder was sent on 25 March 2008, that the answer was due within 1 week. On 2 April 2008, the Dutch DPA received your final answer to the mediation request. On 14 April 2008 the requestor sent his comments on this letter to you and to the Dutch DPA.

Results of the mediation

Based on article
35 of the Dutch
Personal Data
Protection Act

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(Wet bescherming persoonsgegevens, Wbp), data subjects have the right to ask controllers for access to their personal data. In this mediation, it was unclear to the Dutch DPA how North West Airlines and KLM had divided responsibility for the processing of personal data.

From your letter the Dutch DPA understands that you distinguish between the responsibility of a "Validating Carrier" and the responsibility of a "Marketing Carrier". In this specific case, North West Airlines has acted as Validating Carrier, while KLM has acted as Marketing Carrier. As Marketing Carrier, you write "KLM has responsibility for information it receives which is the Operational Information that is required for the performance of the flight." Furthermore, you refer to KLM's General Conditions of Carriage, which describe the purposes for which data may be processed, including the making available of data to Government Authorities.

Based on the information provided by KLM, it is not implausible to assume that KLM is controller for the Operational Information it received from the Validating Carrier, while North West Airlines as Validating Carrier should be considered the general controller. There is a difference however between the definition of controller and the applicability of the Wbp. The CBP is not competent to draw any conclusions about the treatment of personal data by controllers that operate beyond the reach of the Dutch Wbp (or the general European directive on the protection of personal data, 1995/46/EC). These conclusions are therefore limited to the role of KLM.

Thus the CBP concludes that KLM as controller has complied sufficiently with the obligation to provide access to the personal data processed about Mr. Hasbrouck, by providing him with the Operational Information and further information that KLM was responsible for, such as the transfer of the PNR-records to the US CBP and transfer of data to subcontractors.

Information obligation

The CBP notes that KLM considers to clarify and explain the roles of Validating Carrier and Marketing Carrier on its website. The CBP considers such a clarification essential for passengers to understand whom they should address when flights are not directly executed by a single controller in the European Economic Area. Article 10 of the Data Protection Directive (translated into Article 33 of the Wbp) obliges controllers to whom the Directive applies to provide data subjects with at least the following information:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing for which the data are intended;

(c) any further information such as:

-the recipients or categories of recipients of the data,

-whether replies to questions are obligatory or voluntary, as well as the possible consequences of failure to reply,

-the existence of the right of access to and the right to rectify data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

This obligation cannot be met by a reference to General Conditions of Carriage, but should be fulfilled by a clear notice to every passenger that expresses interest to make use of the services of KLM. Such a notice should at least contain the following information:

1. The identity
of KLM as
controller;

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2. A list of specified purposes for which data are being processed;
3. A specification of the hand over of personal data to the relevant Government Authorities, for example in the specific case of a flight to or from the USA, the US CBP, including the mentioning of the right for data subjects to access these records;
4. A specification to which other airlines personal data are transmitted and for which purposes;

The Dutch DPA refers to more detailed guidance from the Article 29 Working Party on the obligations for airlines to provide information, Opinion 8/2004 (WP 97) and Opinion 2/2007 (WP 132), including the model for a layered information notice.

I attach a copy of the letter from the Dutch DPA to the requestor, Edward John Hasbrouck, as sent to him by e-mail of 17 October 2008.

The CBP trusts it has informed you adequately.

Yours sincerely,
On behalf of het College bescherming persoonsgegevens,

mw. drs. S. Nas
senior policy official