

Memorandum of Understanding Between the Canada Border Services Agency and the Swiss Federal Office for Civil Aviation Concerning Advance Passenger Information/Passenger Name Record

Whereas all carriers are required, under the *Customs Act* and the *Immigration and Refugee Protection Act* and regulations made thereunder, to provide the CBSA with API and PNR information relating to all persons on board flights bound for Canada;¹

The Canada Border Services Agency (CBSA) and the Swiss Federal Office for Civil Aviation (FOCA), hereinafter referred to as “the Participants”,

Have reached the following understanding on the implementation of the Advance Passenger Information/Passenger Name Record (API/PNR) program of the CBSA:

1. Purpose

This Memorandum of Understanding (MOU) sets forth the understanding between the Participants as to the way in which API AND PNR information received by the CBSA in circumstances such that the *Swiss Federal Act on Data Protection (DPA)* applies, will be processed by the CBSA.

2. Collection and Use of API and PNR Information

(a) The CBSA will obtain and collect API/PNR information under the authority of section 107.1 of the *Customs Act*², and the *Passenger Information (Customs) Regulations*³ made thereunder, and paragraph 148(1)(d) of the *Immigration and Refugee Protection Act*⁴ and Regulation 269 of the *Immigration and Refugee Protection Regulations*⁵ made thereunder.

(b) The CBSA will collect API and PNR information only in respect of flights arriving in Canada. The CBSA will use API and PNR information collected from air carriers only to identify persons at risk to import goods related to terrorism or terrorism-related crimes, or other serious crimes, including organized crime, that are transnational in nature, or persons who are inadmissible to Canada because of their potential relationship to such crimes.

¹ Note that all references in this MOU to Canadian statutes and regulations reflect the relevant legislation at the time at which this MOU enters into force.

² Statutes of Canada 2001, c. 25, s. 61

³ SOR/2003-219, effective October 4, 2002.

⁴ Statutes of Canada 2001, c. 27.

⁵ SOR/2002-227, effective June 11, 2002.

(c) The CBSA will use API and PNR information to target persons who will be subjected to closer questioning or examination on arrival in Canada, or who require further investigation, for one of the purposes described in paragraph (b). The CBSA and other Canadian law enforcement officials will not take enforcement action only by reason of the automated processing of API and PNR data.

3. API and PNR Information Collected

(a) The list of API data elements that will be collected by the CBSA for the purposes set out in 2(b) is set out in Appendix A. The list of PNR data elements that will be collected by the CBSA for the purposes described in paragraph 2(b) is set out in Appendix B. For greater certainty, “sensitive data elements” described set out in Appendix C and all “open text” or “general remarks” fields, will not be included within these 25 data elements.

(b) The CBSA will not require a carrier to collect PNR information that the carrier does not record for its own purposes, and will not require the carrier to collect any additional information for purposes of making it available to the CBSA. Therefore the CBSA recognizes that it will collect those data elements listed in Appendix B only to the extent that a carrier has chosen to place them in its automated reservation systems and departure control systems (“DCS”).

(c) The Participants may, by mutual consent expressed in writing, revise the 25 required PNR data elements set out in Appendix B, if:

(i) the CBSA becomes aware of any additional PNR data element that may be available and is of the view that the element is required for the purposes set out in paragraph 2(b); or

(ii) if the CBSA at any time becomes aware that a particular PNR data element is no longer required for the purposes set out in paragraph 2(b).

4. Method of Accessing API and PNR Information

The CBSA’s Passenger Information System (PAXIS) has been configured to “pull” API and PNR information from a carrier, or to receive such information “pushed” from a carrier. Air carriers bound by the *Swiss Federal Act on Data Protection*, who operate passenger flights to Canada, will use a system to “push” the data to the CBSA.

5. Retention of, and Access, to API and PNR Information

(a) Where the API and PNR information relates to a person who is not the subject of an investigation in Canada for a purpose described in paragraph 2(b), the CBSA will retain it in the PAXIS system for a maximum of forty two months. During this period, the information will be retained in an increasingly de-personalized manner, as follows:

(i) From initial receipt to 72 hours, all available API and PNR information will be accessible only to a limited number of CBSA targetters and intelligence officers,

who will use the information to identify those who require closer questioning or examination on arrival in Canada, for one of the purposes set out in paragraph 2(b).

(ii) After 72 hours to the end of twenty four months from receipt, a person's PNR information will be retained in the PAXIS system but accessible only by CBSA intelligence officers located at an international airport in Canada or at CBSA national headquarters in Ottawa. The name of the person to whom the information relates will be unavailable for viewing by these officials unless it is required in order to proceed with an investigation in Canada for one of the purposes described in paragraph 2(b). The PNR record will be re-personalized only where the official reasonably believes that the name of the person is required in order to proceed with the investigation. During this period, the depersonalized information will be used by CBSA intelligence analysts for trend analysis and the development of future risk indicators related to the purposes set out in paragraph 2(b).

(iii) After twenty four months from receipt, the PNR record will be retained in the PAXIS system for a further maximum period of eighteen months, but all data elements which could serve to identify the person to whom the information relates will be available for viewing only if approved by the President of the CBSA for a purpose described in paragraph 2(b). During this period, the depersonalized information will be used by CBSA intelligence analysts for trend analysis and the development of future risk indicators related to the purposes set out in paragraph 2(b).

(iv) API information will be stored separately from PNR information in the PAXIS system. It will be retained in the PAXIS system for a maximum of forty two months but during that period, API information relating to a person will not be used to gain access to PNR information about the same person, unless the PNR record is re-personalized in the circumstances described in subparagraph(ii).

- (b) Where the API and PNR information relates to a person who is the subject of an investigation in Canada for a purpose described in paragraph 2(b), the CBSA will place it in one of its enforcement databases. These databases contain only information with respect to persons who have been investigated or subjected to an enforcement action under CBSA legislation. Access to these databases is made available only to those CBSA officials whose duties require such access and is closely monitored. API and PNR information that is transferred to such an enforcement database will be retained in that system for no longer than is necessary, and in any case for a period of no more than 6 years, at which time it will be destroyed unless it is required to be retained for an additional period by virtue of the *Privacy Act* or the *Access to Information Act*, as explained in paragraph (c).
- (c) Where the CBSA uses personal information for purposes of making a decision affecting the interests of the data subject to whom it relates, it must be retained by the CBSA for a period of twenty four months from the date of such use in order that the data subject may access the information upon which such a decision has been made, unless the individual consents to its earlier disposal or where a request for access to

the information has been received, until such time as the individual has had the opportunity to exercise all his rights under the *Privacy Act* or the *Access to Information Act*.

(i) In the case of information retained in the PAXIS database, this twenty four month requirement will be subsumed in the maximum forty two month period for which the information will be retained in that database.

(ii) In the case of information retained in an enforcement database, API and PNR information could be retained where necessary for a period of no more than 6 years for use by the CBSA for the investigative purposes described in paragraph (b), and then a further maximum period of twenty four additional months, during which time it would be available for access by the data subject in accordance with the *Privacy Act* and the *Access to Information Act*, but unavailable for administrative use by the CBSA.

(d) API and PNR information will, at the expiry of the retention periods described in paragraphs (a) through (c), be destroyed in accordance with the provisions of the *National Archives Act*.

6. Disclosures of API and PNR Information to Other Canadian Departments and Agencies

(a) All disclosures of API and PNR information by the CBSA are governed by the *Privacy Act*, the *Access to Information Act*, the *Customs Act* and the *Immigration and Refugee Protection Act* and regulations made thereunder. The relevant Canadian laws and regulations will be published and available for public access on the CBSA website and the CBSA will inform FOIA of any changes to those laws and regulations that may have an impact on this MOU.

(b) The CBSA will not disclose API and PNR information in bulk. The CBSA will only release select API and PNR information on a case-by-case basis and only after assessing the relevance of the specific PNR information to be disclosed. Only those particular API and PNR elements that are clearly demonstrated as being required in the particular circumstances will be provided. In all cases, the minimum amount of information possible will be provided.

(c) The CBSA will only disclose API and PNR information where the proposed recipients accept to afford it the same protections that are afforded to the information by the CBSA. Any Canadian government recipients of PNR information are also bound by the *Privacy Act* and the *Access to Information Act*.

(d) The CBSA requires, as a matter of practice and as a condition precedent to disclosure, that Canadian federal or provincial law enforcement authorities accept not to further disclose the information received, without the permission of the CBSA, unless required by law.

7. Disclosure of API and PNR Information to Other Countries

(a) Under the *Privacy Act*, the *Customs Act* and the *Immigration and Refugee Protection Act* or regulations made thereunder, the CBSA can share API and PNR information with the government of a foreign state, in accordance with an arrangement or agreement.

(b) Such arrangements or agreements could include a memorandum of understanding developed specifically for purposes of the CBSA's PNR Program, or a treaty pursuant to which CBSA authorities are required to provide assistance and information. In either case, the information will only be shared, as described in this MOU, for a purpose consistent with those set out in paragraph 2(b), and only if the receiving country accepts to afford the information with protections consistent with this MOU. In all cases, the minimum amount of information possible will be provided to the other country.

(c) API and PNR information retained in PAXIS will be shared only with a country that has ratified the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS N° 108) or that guarantees an adequate level of protection according to article 2 of the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (ETS N° 181). The information will only be shared as described in this MOU for a purpose consistent with paragraph 2(b) and only if the receiving country guarantees to afford it with protections consistent with this MOU.

(d) API and PNR information retained in an enforcement database described in paragraph 5(b) can be shared in accordance with treaty obligations. In this case, the CBSA will only share API and PNR elements on a case-by-case basis and provided that the CBSA is in possession of evidence that directly links the request to the investigation or prevention of crimes referred to in paragraph 2(b) and only to the extent that the data elements provided are strictly necessary to pursue the specific enquiry in question.

8. Disclosure of API and PNR Information in the Vital Interest of the Data Subject

Notwithstanding anything in this MOU to the contrary, the CBSA may disclose API and PNR information to relevant Canadian or other government departments and agencies, where such disclosure is necessary for the protection of the vital interests of the data subject or of other persons, in particular as regards significant health risks.

9. Notification to Data Subject

The CBSA will provide information to the traveling public regarding the API and PNR requirements and the issues associated with its use, including general information regarding the authority under which the data will be collected, the purpose for the collection, protection that will be afforded to the data, the manner and extent to which the data will be shared, the identity of responsible CBSA officials, procedures available for redress and contact information for persons with questions or concerns.

10. Legal Review Mechanisms of the CBSA's PNR Program

(a) The PNR program may be subject to compliance reviews and investigations by the Privacy Commissioner of Canada and the Office of the Auditor General of Canada, pursuant to the *Privacy Act* and the *Auditor General Act* respectively.

(b) Final copies of the Office of the Privacy Commissioner and Office of the Auditor General reports are made available to the public through annual reports to Parliament and, at their discretion, are readily available on the Internet. The CBSA will provide the Federal Office for Civil Aviation (FOCA) with access to copies of any such reports that relate in any way to the PNR program.

11. Joint Review of the CBSA's PNR Program

In addition to the above review processes which are provided for under Canadian law, the CBSA will participate on an annual basis or as appropriate and as agreed with the FOCA, in a joint review of the PNR program relating to transfers of API and PNR data to the CBSA.

12. Redress

Legal Framework

(a) The Canadian *Charter of Rights and Freedoms*, which is part of the Canadian Constitution, provides the right to be secure against unreasonable search and seizure and protects a reasonable expectation of privacy. It also permits a person whose rights have been infringed to apply to a court of competent jurisdiction for such remedy as the court considers appropriate and just in the circumstances.

(b) The right of a foreign national to access records under the control of a Canadian federal government department, is granted, by virtue of Extension Order Number 1 of the *Access to Information Act*, to anyone present in Canada. A foreign national present in Canada, or alternatively a person present in Canada with the consent of the foreign national not present in Canada, could make a request for records concerning the foreign national and be given access to such records, subject to specific and limited exemptions and exclusions in the *Act*.

(c) Under the *Privacy Act*, the right to access personal information and request corrections or notations is extended, by virtue of Extension Order Number 2, to anyone present in Canada. Therefore subject to exemptions in the *Act*, a foreign national may exercise these rights if they are present in Canada.

Administrative Framework

(a) Any government department who holds personal information about a person may administratively afford access, correction and notation rights to foreign nationals who are not present in Canada. The CBSA will put in place an administrative system to allow

Swiss residents who are not present in Canada to access their API/PNR information, and request correction or notation in respect of incorrect information, provided that the disclosure is otherwise permitted by law.

(b) The Privacy Commissioner may initiate a complaint if the Commissioner is “satisfied that there are reasonable grounds to investigate a matter under the [Privacy] Act” and has broad powers of investigation in respect of any complaint. Additionally, the Privacy Commissioner may address complaints referred to it by the Swiss Federal Data Protection Commissioner (SDPC) on behalf of a Swiss resident, to the extent such resident has authorized the SDPC to act on his or her behalf and believes that his or her data protection complaint regarding API and PNR information has not been satisfactorily dealt with by the CBSA as described above. The Privacy Commissioner will report its conclusions and advise the SDPC regarding actions taken, if any.

(c) The CBSA will also consult with the Office of the Privacy Commissioner of Canada to discuss a process by which the Privacy Commissioner could deal with complaints referred to it by the SDPC on behalf of a Swiss resident, and will advise the FOCA with respect to the outcome of these discussions.

13. Security of Information

(a) The CBSA will afford access to the PAXIS system, only to a restricted number of CBSA targetters or intelligence officers located in passenger targeting units in Canadian regional offices and at the CBSA’s Headquarters in Ottawa, Canada. These officers will access the PAXIS system in secure work locations that are inaccessible to members of the public.

(b) In order to access the PAXIS system, officers will be required to use two separate logins, using a system-generated user ID and password. The first login will provide access to the CBSA’s Local Area Network, while the second will provide access to the Integrated Customs System platform, which in turn provides access to the PAXIS application. Access to the CBSA network and any data contained in the PAXIS system will be strictly controlled and restricted to the selected user group, and every query and review of passenger data in the system is subject to audit. Any audit record generated will contain the user name, the work location of the user, the date and time of access and the PNR file locator number for the information accessed. The CBSA will also restrict access to particular API and PNR data elements within the system on a “need to know” (user type/profile basis.). These access controls will ensure that access to API and PNR information is provided only to authorized persons , for the purposes set out in paragraph 2(b).

(c) Access, use and disclosure of API and PNR information is governed by the *Privacy Act*, the *Access to Information Act*, the *Customs Act* and the *Immigration and Refugee Protection Act* and regulations made thereunder, and by the CBSA policy described in paragraph (d). This legislation also provides for criminal and other sanctions in the event that this policy is not respected.

(d) The CBSA's PNR disclosure policy sets out the procedures which must be followed by all CBSA employees who have access to API and PNR information. The policy of the CBSA is to protect the confidentiality of the information and to manage it in accordance with the authorities in Canadian legislation, as well as CBSA and Canadian Government policies related to the management and security of information, as described in paragraph (f).

(e) The CBSA's PNR disclosure policy provides:

(i) that an official may disclose, allow access to or use API and PNR information only when authorized to do so by law and in accordance with the policy;

(ii) that officials should take all appropriate means to ensure that only essential information is disclosed to third parties;

(iii) that information will only be disclosed for a specific authorized purpose and limited to the minimum amount of information required for that purpose;

(iv) that information will only be provided to or accessed by individuals with an operational requirement to see it; and

(v) that, subject to the *Privacy Act*, the *Access to Information Act* and the *National Archives Act*, any information disclosed will be destroyed or returned once it has been used, in accordance with CBSA and Treasury Board of Canada information management policies.

(f) The CBSA's PNR disclosure policy falls under the umbrella of several CBSA-wide policies for the protection and management of information collected under the various statutes administered by the CBSA. In addition all CBSA employees are bound by Government of Canada security policies in respect of the protection of electronic systems and data protection. All CBSA employees are familiar with these policies and the consequences of non-compliance, and adherence with them is a condition of their employment.

14. Reciprocity

(a) The *Aeronautics Act* allows Canadian air carriers operating flights from any destination, or any carriers operating flights departing from Canada, to provide a foreign state with information concerning persons on board such flights and bound for that state, where the laws of that state require the information to be provided.

(b) In the event that Switzerland decides to adopt an airline passenger identification system and passes legislation which would require all air carriers to provide Swiss authorities with access to API and PNR data for persons whose current travel itinerary includes a flight to Switzerland, the *Aeronautics Act* would permit air carriers to comply with this requirement.

15. Disputes

The Participants, through good faith consultations, will endeavor to resolve any problems or questions arising from the interpretation or application of this MOU.

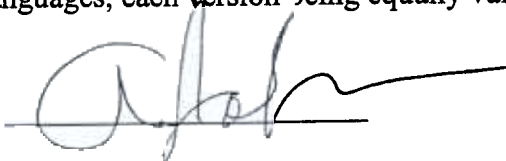
16. Review and Termination of MOU

(a) Subject to paragraph (b), this MOU will take effect on the date of its signature, and will remain in effect for a term of forty two months. After this MOU has been in effect for 30 months, the CBSA will initiate discussions with FOCA and examine the need to amend this MOU and any supporting arrangements, upon mutually acceptable terms. If no mutually acceptable arrangements can be concluded prior to the expiration date of this MOU, the MOU will cease to be in effect. Data collected while this MOU was in force will remain protected by the terms of this MOU until any such data is deleted.

(b) Any Participant may terminate this MOU at any time by giving the other Participant a written notice to that effect. Termination will be effective three months following the date of the notice. Termination will not affect the treatment of the API and PNR information that the Participants will have received prior to termination and the treatment by the Participants of such information will continue to be as set out in this MOU.

Signed at on theday of
In duplicate in the English and French languages, each version being equally valid.

Raymond Cron
Director General
Federal Office for Civil Aviation

A handwritten signature in black ink, appearing to read 'Alain Jolicoeur', written over a horizontal line.

Alain Jolicoeur
President
Canada Border Services Agency

Appendix A

API Data Elements to Be Collected

1. Surname, first name and any middle names
2. Date of Birth
3. Gender
4. Citizenship or nationality
5. Type of travel document that identifies the person, name of the country in which the travel document was issued and the number of the travel document
6. Reservation record locator number, if any, and in the case of a person in charge of the commercial conveyance or any other crew member without a reservation record locator number, notification of their status as a crew member.

Appendix B

PNR Data Elements to be Collected

1. PNR record locator
2. Date of reservation
3. Date(s) of intended travel
4. Name
5. Other names on PNR
6. All forms of payment information
7. Billing address
8. Contact telephone numbers
9. All travel itinerary for specific PNR
10. Frequent flyer information (limited to frequent flyer number)
11. Travel agency
12. Travel agent
13. Split/Divided PNR information
14. Ticketing field information
15. Ticket number
16. Seat number
17. Date of ticket issuance
18. No show history
19. Bag tag numbers
20. Go show information
21. Seat information
22. One-way tickets
23. Any collected API information
24. Standby
25. Order at check-in

Appendix C

Sensitive Personal Data

Data relating to:

1. Religious, philosophical, political or trade union-related opinions or activities;
2. Health, sexuality or racial origin;
3. Social security files; and
4. Criminal or administrative proceedings and penalties.