

Un-official translation of final decision on the complaint presented by Access Info Europe to the Portuguese Commission on Access to Administrative Documents (CADA)

Thanks to Miguel Coelho for the translation.

Process no. 521/2011

Complaint from: Access Info Europe

Requested entity: National Civil Aviation Institute, IP

I – Facts and request

1. Access Info Europe requested the National Civil Aviation Institute, IP (INAC) access to information and documents related to the transit of aircraft in the Portuguese airspace, its origin and destination and any landings in Portuguese airports, in the range of dates specified for each one.
2. INAC informed that the aircraft in question “were used in the operation of private flights, and since these are not linked to regular international air services, there was no authorization or approval from this Institute, in accordance with article 5 of the Convention on International Civil Aviation”. It added that “the aircrafts used in the operation of private flights have the right, under the condition that the dispositions of the Chicago Convention are observed, of flying over a participating State, to land in it or to cross it without landing, and to perform non-commercial stops, without prior approval from that State.”
3. Given this negative response, Access Info Europe presented a complaint to the Commission on Access to Administrative Documents (CADA), stating the following:
 - INAC had already provided the same type of information, regarding some of the aircraft mentioned in the request, including “air traffic forms with the INAC logo inscribed” and lists with summaries of the information stated on the forms, prepared by INAC, that appeared to be in possession of the required information;
 - INAC, which is subject to Law no. 46/2007, dated 24th of August, having provided in the past information identical to that requested, “is able to provide this information”;
 - The aircraft in question were contracted by state authorities.
4. Asked to pronounce itself, INAC reaffirmed the negative response given to the petitioner, informed that “it does not officially possess the requested elements” and that the fact that the flights were of a private nature implies that they are out of their jurisdiction.

Regarding the mention that INAC had already provided the same type of information in 2006, it states that it “does not know to which document the petitioner refers since it was not attached to the [original request] process”. About the air traffic forms it stated that “these are approved by INAC, I.P., the logo naturally being inscribed on all of them since they are official documents, however the Institute is not responsible for filling them out. [...] they are filled out by the operating airlines or handling agents contracted for the operation in question and the filling out is their responsibility”. It added that it “suspects the flights in question are the so-called “CIA flights”, which if true, classifies them as state flights, in this case under the responsibility of the United States of America, a matter which is completely outside the jurisdiction of this Institute”.

It added that “in Portugal, if such a matter was processed it would have been coordinated by the Ministry of Foreign Affairs and, as such, requests for any information or documents should be requested to this entity, since they could eventually be elements that are related to no. 1 of article 6 [...] Law no. 46/2007, of 24th August, evaluation it [...] cannot perform”.

Furthermore, it added that “it does not possess the requested information

and documents and thus has no way of providing such elements since there was no authorization issued by this Institute regarding the flights in question and therefore it does not hold [...] any elements related to the flights in question, as it has [...] communicated to the petitioning entity".
[Square brackets added in previous sentence by the INAC]

II – Legal appraisal

1. The petitioned entity is subject to Law no. 46/2007, of the 24th of August, Access to Administrative Documents Law (LADA), article 14, no. 1, paragraph c).

The normative precepts mentioned herein are solely from this legal document, without additional references.

2. The general regime of access to administrative documents is stated in article 5, which prescribes that “all, without having to mention any interest, have the right to access administrative documents, which comprises the rights of consultation, reproduction and information about their existence and contents.”

LADA considers an administrative document any information medium in written, visual, audio, electronic or other material form, in possession of the bodies and entities mentioned in article 4, or held in their name, article 3, no. 1, paragraph a).

In these terms, access to that type of documents is free and generalized, without any need to present justification or statement of grounds.

Article 6 stipulates some restrictions to the right of free access:

- When nominative documents [specifically related to one individual] are concerned (no. 5);
- When they contain corporate secrets (no. 6);
- When there are reasons to grant or refuse access (nos. 1, 2, 3 and 4).

In the terms of article 6, no. 1, “[the] documents which contain information whose diffusion is evaluated as potentially putting at risk or damaging the internal and external security of the State will be subject to interdicted access or access under authorization, for the strictly required amount of time, through the classification in the terms of specific legislation. The right of access to information is also subject to limitations or restrictions, to safeguard other constitutionally protected assets and rights that it may conflict with, namely referring to the dignity of persons, personal rights to moral integrity, good name and reputation, freedom of expression, image, privacy, restrictions imposed by judicial reporting restrictions or state secret².

3. The petitioner requested INAC information and documents regarding the transit of specific aircraft through Portuguese airspace, on the dates mentioned in the request.

INAC informed the petitioner and CADA that, since there was not, in the terms of the Convention on International Civil Aviation, previous (INAC-emitted) authorization for the transit of private flights in Portuguese airspace, being the so-called “CIA flights” state flights (matter which is outside their jurisdiction), does not possess or withhold “any elements related to the flights in question”.

It additionally informed CADA that it believes that the subject matter of the so-called “CIA flights”, if considered, must be coordinated by the Ministry of Foreign Affairs, and thus any related information or documents should be requested to this entity.

In the terms of article 14, no. 1, paragraph d), the entity to whom the request for access to an administrative document was sent should, within a period of 10 days, inform “that it does not possess the document and, if it knows which entity has it, transfer the request to this entity, while informing the petitioner”.

4. From the responses given, it is not clear whether INAC does not hold any information or documents [at all] concerning the flights in question, or merely whether it does not hold any information or documents concerning possible authorization for the passage of such flights through Portuguese airspace.

Thus, in the response provided to CADA, INAC stated that it “does not officially hold the requested elements” (CADA underlining); that (referring to the air traffic forms) “does not know which document the petitioner refers to since it was not attached to the process”; and that, given the fact that the subject related to the “CIA flights” was coordinated by the Ministry of Foreign Affairs “it cannot” evaluate if the documents in question are or not subject to the restriction of access stated on article 6, no. 1.

³ In the same sense, see CADA ruling no. 109/2006, available at www.cada.pt.

LADA does not exclude from its scope information or documents withheld even if "not officially" (paragraph a), no. 1, article 3).

Not possessing the information or document related to the flights in question (and not just related to the previous authorization), INAC should, without further ado, have informed the petitioner of that fact.

It is thus not understandable the affirmation that it could not evaluate the documents since they were linked to a subject handled by the Ministry of Foreign Affairs.

5. The right of access to archives and administrative documents, that the CRP states on its article 268, no. 2, and of which LADA is a normative development, is a right of constitutional matter, a material right and formally constitutional, a right valued in itself.

Being a fundamental right of nature analogous to other rights, freedoms and guarantees, their regime also applies to it (article 17 of the CRP) and the restrictions can only operate through law of the Republican Assembly or by authorized law-decree (article 165, no. 1, paragraph b), of the CRP) and in "cases specifically mentioned in the Constitution limited to the necessary to safeguard other rights or interests which are constitutionally protected"(article 18, no. 2, of the CRP), should "possess general and abstract character, not being allowed retroactive effects or diminishment of the extension and scope of the essential content of the constitutional precepts" (article 18, no. 3, of the CRP).

The fact that a particular document can be in possession of more than one public entity does not entitle any of them to refuse access based on justification that another can provide it, since all of them are obliged to service the access requests that they are asked to provide. That is, should the petitioned entity have the document the petitioned requests access to, it must provide it, being irrelevant that another public entity also holds it (paragraph a) of no. 1 of article 3).

The Judgment of the General Court (Second Section), dictated on the 19th January 2010, pronounced in that sense. In that Judgment (nos. 80 to 82, the Court considered that "the [EU] community legislators, with adoption of the Ruling no. 1049/2001, abolished specifically the rule of the author which prevailed until then. In this context, it must be admitted that interpreting article 4, no. 5, of Ruling 1049/2001, which states that a Member State can request an institution not to divulge a document which is emitted by that State without its previous agreement, in the sense that it allows the Member State a general and unconditional veto right and therefore its opposition, in a purely discretionary way and without having to justify its decision, to the diffusion of any document in possession of a [EU] community institution by the simple fact that such document is emitted by that Member State is not compatible with the objectives of Ruling no. 1049/2001 (ruling of Justice Court IFAW no. 58)."

6. **Given the above, not having been requested any information or documents regarding the previous authorization of flights, it is understood that therefore should INAC be in possession** of any information or documents related to the traffic of specific aircraft in national airspace in the dates specified by the petitioner access should be granted to them.

Should they exist, the requested documents are, in principle, non-nominative, of free and generalized access.

Should there exist in possession of INAC they shall only be inaccessible if they are subject to restrictions of access, circumstance which INAC shall clarify, namely, with the Ministry of Foreign Affairs.

INAC mentioned to CADA the possibility that documents related to the "CIA flights" were subject to the access restriction stated in article 6, no.

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³ In the same sense, see CADA ruling no. 109/2006, available at www.cada.pt.

For this restriction to come into play it is not sufficient that the withholding entity believes that granting access to these documents involves a risk to the internal or external security of the [Portuguese] State.

For the documents to really be under restricted access it is necessary that they are previously classified, in the legal terms, by an entity with competence to do this and under duly justified dispatch – articles 1 to 6 of Law no. 6/94, of the 7th of April (State Secret Law)³.

Furthermore, classification is always temporary – the period of duration of the classification or its revision cannot be longer than four years (no. 2 of article 6 of the State Secret Law). In addition, classification expires in the course of this period (no. 3 of article 6 of the State Secret Law).

7. In the terms of article 11, no. 1, it is up to the petitioner to choose the form of access to the administrative documents among the ones stated there: consultation (free of charge), reproduction by photocopy or other technical media (namely visual, audio or electronic) and certificate.

III- Conclusion

In face of the exposed, INAC should provide the petitioner the requested documents that it may hold or have withheld.

Let it be communicated.

Lisbon 20th December 2011

³ In the same sense, see CADA ruling no. 109/2006, available at www.cada.pt.