



Council of the European Union
General Secretariat
Directorate-General Communication and Information
The Director-General

86817/03874

Brussels,

11-05-2017

Ms Rachael Tackett
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Subject: confirmatory application No 08/c/02/2017

Dear Madam,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 23 March 2017.

Statutory remedy notice

Pursuant to Article 8(1) of Regulation (EC) No 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court¹ or to make a complaint to the Ombudsman². The conditions for doing so are laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union respectively.

Yours sincerely,



Reijo KEMPPINEN

¹ For deadlines and other procedural requirements concerning the institution of proceedings at the General Court, please refer to the following page: http://curia.europa.eu/jcms/jcms/Jo2_7040/en/

² Any complaint to the Ombudsman must be made within two years of receiving the institution's final position on the matter. The Ombudsman's online complaint form is available at: <https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>

**REPLY ADOPTED BY THE COUNCIL ON 11 MAY 2017
TO CONFIRMATORY APPLICATION 08/c/02/17,
made by email on 23 March 2017,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to an internal GSC note of 21 October 2015
concerning the issue of "safe harbour"**

The Council has considered this confirmatory application under the criteria of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation No 1049/2001") Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 18 February 2017 the applicant filed an initial application with the Council for access to *"all reports, correspondence, and memorandum on the Privacy Shield framework... from October 1, 2015 to the present"*.
2. On 14 March 2017, the General Secretariat (GSC) replied to this application on behalf of the Council, releasing nine documents and withholding an internal GSC note of 21 October 2015¹ (ref. 17/0375-ws/jj).
3. On 23 March 2017, the applicant filed a confirmatory application against this reply, continuing to seek access to the above-mentioned internal GSC note, and in particular point out the public interest in its release.
4. It should be noted that the applicant made an identical application addressed to the European Council, equally on 18 February 2017. The General Secretariat replied to this application on 14 March 2017 on behalf of the European Council as well, informing the applicant that the

¹ In the General Secretariat's reply, the date was erroneously mentioned as 22 October 2015, which was the date on which the note was put on file.

European Council does not hold any relevant documents. (ref. 17/0376-ws/jj). This latter reply is subject to a distinct confirmatory application of 22 March (07/c/01/17), addressed to the European Council. The present reply of the Council of the European Union is not concerned with confirmatory application 07/c/01/17, which is treated separately by the European Council.

5. Based on the applicant's confirmatory application of 23 March 2017, the Council has again thoroughly verified whether the internal GSC note of 21 October 2015 can be released.

The requested note

6. The requested note is an internal briefing from the competent service to the Secretary-General, giving him concise information in view of a contact with a representative of the US government concerning the issue of transfer of personal data between the European Union and the United States of America and the level of data protection necessary for that purpose ("safe harbour"), in light of the judgment of the Court of Justice in case C-362/14, *Schrems v Data Protection Commissioner* of 6 October 2015.
7. It sets out the legal context and points to the sensitivities of the issue and the messages that need to be communicated to the US side. Its release would therefore reveal the way the Secretary-General was prepared internally and in particular allow US authorities to analyse the dynamics of internal EU briefing by comparing its content with the information they have on the actual contact that has taken place.

The relevant exception: protection of the public interest as regards international relations

8. The General Secretariat has based its refusal of access on the exception concerning protection of the public interest as regards international relations (Article 4(1)(a), third indent, of Regulation No 1049/2001).
9. At the outset, the Council recalls that, according to the established case law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4 of that regulation.
10. On the one hand, *"the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"*.²
11. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests"*.³

² Judgment of the Court of Justice of 1 February 2007 in case C-266/05 P, Sison v Council, para 34.

³ Judgment of the Court of Justice of 1 February 2007 in case C-266/05 P, Sison v Council, para 46.

12. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of information on international relations and it is barred from taking into account other legitimate interests in order to override the conclusion that giving access to the information would harm the protected interest.

Assessment of the requested note in regard of the relevant exception

13. The requested note is of a very informal internal nature and its release would allow insight into the way internal briefings for international contacts are handled in general and were handled in this particular case (see above, point 7). Release of this kind of information would weaken the position of the European Union vis-à-vis its negotiating partners by disclosing the Union's internal processes, options and strategic considerations.
14. Additionally, the note concerns a highly sensitive policy area in which the interests and priorities of the negotiating parties (EU and US) differed widely. Furthermore, the prospect that these delicate issues will have to be discussed again in the future between the parties is far from hypothetical. As a matter of fact, the issues discussed into the note have broader implications for other aspects of the EU-US cooperation which remain of great relevance today.
15. The Council therefore comes to the conclusion that release of the note would undermine the public interest as regards international relations.
16. The Council would also like to point out, however, that the requested note does not contain any information on the substance of the EU's position that is not publicly known – as the applicant seems to suspect –, but it does reflect information on the strategic approach to contacts and negotiations between the parties.

Partial access

17. The Council has furthermore considered the possibility of giving partial access to the requested note. It has come to the conclusion that partial access cannot be usefully given, as the note, which is only two pages long, is an inseparable whole and those limited parts which contain factual elements are strictly intertwined with the rest of the note and their disclosure would not provide any meaningful information to the public.

Conclusion

18. The Council therefore can only confirm the General Secretariat's decision to fully refuse access to the requested note.
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