



SGS17/09544

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

Brussels, 06 -11- 2017

Mr Andreas Pavlou
E-mail: ask+request-4469-109dc9af@asktheeu.org

Subject: confirmatory application No 20/c/01/2017.

Dear Sir,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 15 September 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 6 NOVEMBER 2017
TO CONFIRMATORY APPLICATION 20/c/01/17,
made by email on 15 September 2017,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents concerning an informal interinstitutional forum
on the application of Regulation 1049/2001 held on 28 March 2017.**

The Council has considered this confirmatory application under 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") and 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 11 July 2017, the applicant made an initial application for access to documents relating to the GSC initiative for an informal interinstitutional forum on the application of Regulation 1049/2001 held on 28 March 2017.
2. On 25 August 2017, the General Secretariat replied, identifying two documents that were fully released as well as invitation letters, emails confirming participation and the participants list, which were released with the exception of personal data of persons whose consent to this end could not be obtained.

3. On 15 September 2017, the applicant filed a confirmatory application, seeking full access to all identified documents, contending that release of the names of the individuals concerned *"will not undermine their privacy and integrity, as they are public officials, representing the institution in which they work, on public business – that is, the implementation of Regulation 1049/2001, which regulates a fundamental right contained in the EU Treaties. As such, they are accountable to the public, and the public should know who (in particular, those who carry out a public function) attends these meetings. Despite being an 'informal meeting', the individuals were attending not in their private capacity, but as public officials representing their institutions on public business."*

Assessment

4. In his confirmatory application, the applicant appears to suggest that release of personal information relating to a public official can in no circumstance undermine that person's privacy and integrity due to the need to keep public officials accountable to the public.
5. Such an assumption is unwarranted. The status of a person has clearly no bearing on the effect that disclosure of personal data may have on their privacy or integrity. However, the Council suspects that by insisting on participants being "public officials" and "on public business", the applicant wishes to make a point not as regards the effect on data subjects' privacy and integrity as such but as regards the existence of a special public interest in release of the personal data in question.
6. Indeed, Article 4(1)(b) of Regulation No 1049/2001 refers to Union "legislation regarding the protection of personal data" which covers in particular the Data Protection Regulation¹. And the latter does take into account specific interests in transfer of personal data.

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

7. Release of documents containing personal data under Regulation No 1049/2001 has an *erga omnes* effect and therefore must be considered "transfer of personal data to recipients, other than [Union] institutions and bodies, which are not subject to Directive 95/46/EC" in the sense of Article 9 of the Data Protection Regulation. In the present case, this is underscored by the fact that the applicant has used the AsktheEU.org website, which implies that the reply to the application (including any personal data released) becomes immediately available on that website, in other words to any person in the world with internet access, amongst which of course numerous "recipients ... which are not subject to Directive 95/46/EC".
8. Article 9 of the Data Protection Regulation strictly limits transfer of personal data in these cases. Paragraphs (1) to (5) concern transfer to recipients who ensure a certain level of data protection, which is irrelevant in the present case due to the *erga omnes* effect set out above.
9. Paragraph (6) allows transfer of personal data in the following other cases:
- "(a) the data subject has given his or her consent unambiguously to the proposed transfer; or*
 - (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request; or*
 - (c) the transfer is necessary for the conclusion or performance of a contract entered into in the interest of the data subject between the controller and a third party; or*
 - (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or*
 - (e) the transfer is necessary in order to protect the vital interests of the data subject; or*
 - (f) the transfer is made from a register which, according to Community law, is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, to the extent that the conditions laid down in Community law for consultation are fulfilled in the particular case".*

10. The applicant's argument only appears to have a link to point (d) in this list, and the Council also cannot see any other reason why one of the other situations would apply. It should therefore be assessed whether "the transfer is necessary or legally required on important public interest grounds".
11. The applicant seems to imply that public scrutiny of the implementation of Regulation No 1049/2001 represents such important public interest grounds justifying the public release of personal data.
12. The Council fully agrees that Regulation No 1049/2001 implements a fundamental right of European citizens² and that therefore there is an evident legitimate interest in public scrutiny of its implementation.
13. It must however be ascertained, whether this scrutiny really necessitates – and justifies – public release of the personal data sought by the applicant, because protection of personal data likewise is a fundamental human right³.
14. As the applicant rightly points out himself, participants in the meeting were attending in their professional capacity. They were all staff members sent there by their superiors and acting under instructions from their hierarchies. The meeting was an informal gathering between colleagues implementing the same regulation (or equivalent provisions) allowing them to share their experience. No political choices were made or even only prepared in some way. It is therefore perfectly irrelevant for public scrutiny to know which particular employees were exactly sent by the various institutions and bodies.
15. These considerations are all the more relevant in relation to the personal information relating to support staff who merely helped to organise the event and did not actually take part in it.
16. For the avoidance of doubt, the Council further wishes to confirm that no names of persons having a political mandate or of senior management staff have been deleted from the requested documents.

² Article 42 Fundamental Rights Charter.

³ Article 8 Fundamental Rights Charter.

17. It needs to be recalled that it is up to the applicant to establish the necessity of the data transfer⁴. It follows from the explanations set out above that even when read in the most favourable way the confirmatory application does not allow to establish that necessity in the present case.
18. The Council notes that this would even have to be the conclusion if Article 8 (Transfer to recipients subject to Directive 95/46/EC) of Regulation No 45/2001 had to be applied, because it would still be up to the applicant to establish the necessity of the data transfer. As he has failed to do so, the Council is not able to weigh up the various interests of the parties concerned.

Conclusion

19. The Council therefore confirms that no full access and no further partial access than the one given in the initial phase by the General Secretariat can be granted.

⁴ See the ECJ judgment in the Strack case, C-127/13, paragraph 107.