



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Director-General

Brussels,
DG JUST/C4/JOO/Ares(2017)

By registered letter with acknowledgment of receipt

To the attention of:
Ms Rachael TACKETT

Sent by email:

ractack@mail.com

ask+request-4007-086ee9a6@asktheeu.org

ask+request-4171-027f864b@asktheeu.org

Subject: Your applications for access to documents:

Ref. GestDem No 2017/1085 and Ref. GestDem No 2017/2277

Dear Ms Tackett,

We refer to your two applications for access to documents pursuant to Regulation 1049/2001¹, registered on 22 February and 13 April 2017 under the above-mentioned reference numbers. Due to the very wide scope of your two applications, which also concerned many documents received from third country authorities (that we needed to consult in advance), we are able to answer your request only now.

1. IDENTIFICATION OF RELEVANT DOCUMENTS

In your first application you requested *"all reports, correspondence, and memorandum on the Privacy Shield framework"* from 1 October 2015 to 17 February 2017. In your second application, you requested *"all emails held by the European Commission*

¹ 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 1049/2001").

containing any of the following keywords in the subject line or text of the message: 1) "Safe Harbour", 2) "Safe Harbor", 3) "Privacy Shield", 4) "transatlantic data flows" from 8 October 2016 to 8 April 2017.

I have determined that the following documents respond to the terms of your two requests:

1	November 28, 2015	(2016)1758889	DG JUST email to the U.S. authorities quoting and commenting U.S. text proposals
2	December 1, 2015	(2016)1769684	U.S. authorities email with a U.S. document attached
3	December 09, 2015	(2016)1758941	DG JUST email to the U.S. authorities with an attached document building on a U.S. document
4	December 21, 2015	(2016)1705820	Email to the U.S. authorities
5	January 8, 2016	(2016)1770372	Email from DG JUST containing U.S. documents with DG JUST track changes
6	January 26, 2016	(2016)1707707	U.S. authorities email with a U.S. document attached
7	January 26, 2016	(2016)1707842	DG JUST email referring to and quoting U.S. documents
8	January 27, 2016	(2016)1708147	DG JUST email to the U.S. authorities with DG JUST proposals
9	January 30, 2016	(2016)1708462	U.S. authorities email with a U.S. document attached
10	January 30, 2016	(2016)1767253	U.S. authorities email with a U.S. document attached
11	January 30, 2016	(2016)1700893	DG JUST email to the U.S. authorities with a U.S. document containing DG JUST track changes attached
12	January 31, 2016	(2016)1709436	DG JUST email to the U.S. authorities with a U.S. document containing DG JUST track changes attached
13	January 31, 2016	(2016)1709659	U.S. authorities email and a U.S. document attached
14	January 31, 2016	(2016)1718338	U.S. authorities email with a U.S.

15	January 31, 2016	(2016)1718386	U.S. authorities email with a U.S. document attached
16	February 1, 2016	(2016)1718496	DG JUST email to the U.S. authorities with a U.S. document containing DG JUST mark-up attached
17	February 1, 2016	(2016)1718555	DG JUST email to the U.S. authorities with a U.S. document containing DG JUST mark-up attached
18	February 1, 2016	(2016)1718599	DG JUST email to the U.S. authorities with a U.S. document containing DG JUST track changes attached
19	February 2, 2016	(2016)1718833	DG JUST email to the U.S. authorities with a U.S. document containing DG JUST track changes attached
20	February 13, 2016	(2016)1718981	U.S. authorities email with U.S. documents attached
21	February 14, 2016	(2016)1719081	U.S. authorities email with U.S. documents attached
22	February 15, 2016	(2016)1719322	DG JUST email to the U.S. authorities with U.S. documents containing DG JUST mark-up attached
23	February 16, 2016	(2016)1719418	DG JUST email to the U.S. authorities with U.S. documents containing DG JUST mark-up attached
24	February 16, 2016	(2016)1721097	DG JUST email to the U.S. authorities with U.S. documents containing DG JUST mark-up attached
25	February 18, 2016	(2016)1767492	U.S. authorities email with U.S. documents attached
26	February 18, 2016	(2016)1772787	U.S. authorities email with a U.S. document attached
27	February 18, 2016	(2016)1721373	U.S. authorities email with U.S. documents attached
28	February 19, 2016	(2016)1772883	U.S. authorities email with a U.S. document attached
29	February 19, 2016	(2016)1772969	U.S. authorities email with a U.S. document attached
30	February 19, 2016	(2016)1721668	U.S. authorities email with a U.S. document attached

31	February 20, 2016	(2016)1721890	DG JUST email to the U.S. authorities
32	February 20, 2016	(2016)1722013	DG JUST email to the U.S. authorities with U.S. documents containing DG JUST mark-up attached
33	February 20, 2016	(2016)1722127	DG JUST email to the U.S. authorities
34	February 20, 2016	(2016)1722228	DG JUST email to the U.S. authorities with U.S. documents containing DG JUST mark-up attached
35	February 20, 2016	(2016)1722398	Email chain between the U.S. authorities and DG JUST
36	February 20, 2016	(2016)1722485	DG JUST email to the U.S. authorities
37	February 21, 2016	(2016)1722594	U.S. authorities email to DG JUST
38	February 22, 2016	(2016)1724555	U.S. authorities email to DG JUST with U.S. documents attached
39	February 22, 2016	(2016)1726466	Email chain between the U.S. authorities and DG JUST
40	February 22, 2016	(2016)1726524	Email chain between the U.S. authorities and DG JUST
41	February 22, 2016	(2016)1726984	Email chain between the U.S. authorities and DG JUST
42	February 22, 2016	(2016)1727118	Email chain between the U.S. authorities and DG JUST
43	February 22, 2016	(2016)1727211	Email chain between the U.S. authorities and DG JUST
44	February 22, 2016	(2016)1727352	U.S. authorities email to DG JUST with U.S. documents attached
45	February 22, 2016	(2016)1727655	U.S. authorities email to DG JUST
46	February 22, 2016	(2016)1728996	U.S. authorities email to DG JUST
47	February 23, 2016	(2016)1729571	U.S. authorities email to DG JUST with a U.S. document attached
48	February 23, 2016	(2016)1729705	U.S. authorities email to DG JUST with a U.S. document attached
49	February 23, 2016	(2016)1729874	Email chain between the U.S. authorities and DG JUST
50	February 23, 2016	(2016)1729974	U.S. authorities email to DG JUST with

			U.S. document attached
51	February 23, 2016	(2016)1773468	Email chain between the U.S. authorities and DG JUST
52	February 23, 2016	(2016)1773811	U.S. authorities email to DG JUST
53	February 23, 2016	(2016)1730400	DG JUST email to the U.S. authorities
54	February 23, 2016	(2016)1730560	Exchange of emails U.S. authorities - DG JUST
55	February 23, 2016	(2016)1730673	U.S. authorities email with U.S. documents attached
56	February 24, 2016	(2016)1730742	DG JUST email to the U.S. authorities
57	February 24, 2016	(2016)1731142	Email from the U.S. authorities to DG JUST
58	February 24, 2016	(2016)1731228	Email from the U.S. authorities to DG JUST
59	February 25, 2016	(2016)1773811	Email from the U.S. authorities to DG JUST
60	February 28, 2016	(2017)1790252	Exchange of emails U.S. authorities – DG JUST
61	April 28, 2016	(2017)1801033	DG JUST email to the U.S. authorities
62	May 6, 2016	(2017)1675794	DG JUST email to the U.S. authorities
63	May 12, 2016	(2017)1676192	Email from the U.S. authorities to DG JUST
64	May 13, 2016	(2017)1676501	Email from the U.S. authorities to DG JUST
65	May 13, 2016	(2017)1800890	Email from the U.S. authorities to DG JUST
66	May 26, 2016	(2017)1676743	DG JUST email to the U.S. authorities
67	June 1, 2016	(2017)1676915	DG JUST email to the U.S. authorities
68	June 2, 2016	(2017)1800829	Email from the U.S. authorities to DG JUST
69	June 3, 2016	(2017)1677174	DG JUST email to the U.S. authorities
70	June 3, 2016	(2017)1789980	Exchange of emails U.S. authorities – DG JUST

71	June 6, 2016	(2017)1867784	Email U.S. authorities to DG JUST
72	June 8, 2016	(2017)1800771	DG JUST email to the U.S. authorities
73	June 9, 2016	(2017)1800692	DG JUST email to the U.S. authorities
74	June 9, 2016	(2017)1941640	Exchange of emails U.S. authorities – DG JUST
75	June 10, 2016	(2017)1678492	DG JUST email to the U.S. authorities
76	June 10, 2016	(2017)1678710	DG JUST email to the U.S. authorities
77	June 11, 2016	(2017)1678822	DG JUST email to the U.S. authorities
78	June 11, 2016	(2017)1800514	DG JUST email to the U.S. authorities
79	June 12, 2016	(2017)1800455	DG JUST email to the U.S. authorities
80	June 13, 2016	(2017)1678943	Exchange of emails U.S. authorities – DG JUST
81	June 13, 2016	(2017)1679113	DG JUST email to the U.S. authorities
82	June 13, 2016	(2017)1800411	Exchange of emails U.S. authorities – DG JUST
83	June 13, 2016	(2017)1800259	DG JUST email to the U.S. authorities
84	June 13, 2016	(2017)1681974	DG JUST email to the U.S. authorities
85	June 14, 2016	(2017)1799434	DG JUST email to the U.S. authorities
86	June 14, 2016	(2017)1800112	Exchange of emails U.S. authorities – DG JUST
87	June 15, 2016	(2017)1798962	DG JUST email to the U.S. authorities
88	June 15, 2016	(2017)1799380	DG JUST email from the U.S. authorities
89	June 15, 2016	(2017)1799297	DG JUST email to the U.S. authorities
90	June 17, 2016	(2017)1682846	DG JUST email to the U.S. authorities
91	June 17, 2016	(2017)1798266	Email from the U.S. authorities to DG JUST
92	June 17, 2016	(2017)1798852	Exchange of emails U.S. authorities – DG JUST
93	June 17, 2016	(2017)1798516	DG JUST email to the U.S. authorities
94	June 18, 2016	(2017)1682939	Email from the U.S. authorities to DG

			JUST
95	June 19, 2016	(2017)1817958	Email from the U.S. authorities to DG JUST
96	June 19, 2016	(2017)1789275	Email from the U.S. authorities to DG JUST
97	June 21, 2016	(2017)1683362	Email from the U.S. authorities to DG JUST
98	June 21, 2016	(2017)1683456	DG JUST email to the U.S. authorities
99	June 22, 2016	(2017)1684519	DG JUST email to the U.S. authorities
100	June 22, 2016	(2017)1797150	DG JUST email to the U.S. authorities
101	June 22, 2016	(2017)1797486	Email from the U.S. authorities to DG JUST
102	June 23, 2016	(2017)1796165	Exchange of emails U.S. authorities – DG JUST
103	June 23, 2016	(2017)1797067	DG JUST email to the U.S. authorities
104	June 23, 2016	(2017)1817718	Email from the U.S. authorities to DG JUST
105	June 24, 2016	(2017)1796035	DG JUST email to the U.S. authorities
106	June 24, 2016	(2017)1796113	DG JUST email to the U.S. authorities
107	June 25, 2016	(2017)1817591	Email from the U.S. authorities to DG JUST
108	June 25, 2016	(2017)1788651	DG JUST email to the U.S. authorities
109	June 25, 2016	(2017)1794732	Email from the U.S. authorities to DG JUST
110	June 25, 2016	(2017)1794979	DG JUST email to the U.S. authorities
111	June 27, 2016	(2017)1793997	DG JUST email to the U.S. authorities
112	June 28, 2016	(2017)1793958	DG JUST email to the U.S. authorities
113	June 28, 2016	(2017)1816778	Email from the U.S. authorities to DG JUST
114	June 28, 2016	(2017)1817115	Email from the U.S. authorities to DG JUST
115	June 30, 2016	(2017)1788202	Email from the U.S. authorities to DG JUST

116	July 4, 2016	(2017)1802077	DG JUST email to the U.S. authorities
117	July 4, 2016	(2017)1816511	DG JUST email to the U.S. authorities
118	July 6, 2016	(2017)1802033	Email from the U.S. authorities to DG JUST
119	July 7, 2016	(2017)1801936	Email from the U.S. authorities to DG JUST
120	July 22, 2016	(2017)1793920	Email from the U.S. authorities to DG JUST
121	August 8, 2016	(2017)3229093	Letter from Commerce Secretary Pritzker to Commissioner Jourová
122	September 12, 2016	(2017)1787946	Exchange of emails U.S. authorities – DG JUST
123	September 22, 2016	(2016)5498641	Letter from Commissioner Jourová to Commerce Secretary Pritzker
124	October 19, 2016	(2017)1867919	Letter from Director General Astola to DoC Under Secretary Hyatt
125	October 27, 2016	(2017)1868137	Letter from Commerce Secretary Pritzker to Commissioner Jourová
126	November 30, 2016	(2017)1793876	Letter from the U.S. sent by email
127	December 9, 2016	(2017)1793848	Email from the U.S. authorities to DG JUST
128	December 14, 2016	(2017)1791601	Exchange of emails U.S. authorities – DG JUST
129	December 28, 2016	(2017)1868308	Letter from ODNI General Counsel Litt to Director General Astola
130	January 18, 2017	(2017)1791522	Email from the U.S. authorities to DG JUST
131	January 24, 2017	(2017)1791447	Email from the U.S. authorities to DG JUST
132	February 18, 2017	(2017)1791358	Exchange of emails U.S. authorities – DG JUST
133	February 22, 2017	(2017)2123233 :	Letter from DoJ Deputy Assistant Attorney General Swartz to Director General Astola – sent by email
134	February 27,	(2017)1791264	Exchange of emails U.S. authorities –

	2017		DG JUST
135	March 1, 2017	(2017)1790370	Exchange of emails U.S. authorities – DG JUST
136	April 3, 2017	(2017)243913	Letter from the U.S. authorities (ODNI) to DG JUST – sent by email
137	February 29, 2016	(2016)1010378	Letter from Commissioner Jourová to C. Moraes, LIBE Chairman
138	February 29, 2016	(2016)1010378	Letter from Commissioner Jourová to A. van Steur, Dutch Minister (EU Presidency)
139	February 29, 2016	(2016)1010378	Letter from Commissioner Jourová to I. Falque-Pierrotin, Chairwoman, Article 29 Working Party
140	March 11, 2016	(2016)1305722	Letter from Commissioner Jourová to Giovanni Butarelli, EDPS
141	April 11, 2016	(2016)1703000	Letter from Commissioner Jourová to Emily O'Reilly, Ombudsperson
142	June 28, 2016	(2016)2994645	Letter from C. Moraes, LIBE Chairman, to Commissioner Jourová
143	June 30, 2016	(2016)3133254	Letter from Commissioner Jourová to C. Moraes, LIBE Chairman
144	July 7, 2016	(2017)1790613	Letter from Commerce Secretary Pritzker to Commissioner Jourová - published as an annex to the Privacy Shield decision
145	July 8, 2016	(2017)1790861	Letters from the U.S. authorities - published as annexes to the Privacy Shield decision
146	August 9, 2016	(2016)4258981	Letter from Commissioner Jourová to C. Bartolone (Président de l'Assemblée nationale, France)
147	September 9, 2016	(2016)5135809	Letter from Commissioner Jourová to C. Moraes, LIBE Chairman
148	September 9, 2016	(2016)5135809	Letter from Commissioner Jourová to L. Zitnaska (EU Presidency)
149	November 11, 2015	(2017)1136020	Article 31 Committee, Minutes 62nd meeting

150	January 15, 2016	(2017)1136097	Article 31 Committee Minutes 63rd meeting
151	April 7, 2016	(2017)1136143	Article 31 Committee Minutes 64th meeting
152	April, 29 2016	(2017)1136198	Article 31 Committee Minutes 65th meeting
153	May 19, 2016	(2017)1136241	Article 31 Committee Minutes 66th meeting
154	June 6, 2016	(2017)1136295	Article 31 Committee Minutes 67th meeting
155	June 20, 2016	(2017)1136338	Article 31 Committee Minutes 68th meeting
156	June 29, 2016	(2017)1136394	Article 31 Committee Minutes 69th meeting
157	July 4, 2016	(2017)1136494	Article 31 Committee Minutes 70th meeting
158	July 8, 2016	(2017)1136533	Article 31 Committee Minutes 71st meeting
159	July 8, 2016	(2016)3282595	Article 31 Committee Overall voting result
160	February 28, 2017	(2017)1091684	Letter from ACLU

2. ASSESSMENT OF DOCUMENTS No 1 – 119

Documents No 1 – 119 cover the correspondence between the European Commission services (DG JUST) and the U.S. authorities in relation to the Privacy Shield prior to the adoption of the Privacy Shield decision on 12 July 2016.

Having carefully examined documents No 1 – 119 under the applicable rules, I regret to inform you that your application concerning this part of the documents (email exchanges with the U.S. authorities in relation to the EU-US Privacy Shield prior to the adoption of

the Commission decision) cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4(1), third indent, of Regulation 1049/2001 regarding public access to documents.

Article 4(1)(a), third indent, of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations."

Documents No 1 – 119 are either (i) documents authored by the U.S. authorities and received from them during negotiations of the Privacy Shield or (ii) sent to the U.S. authorities with comments or mark-ups against U.S. text proposals. Certain documents also contain email chains incorporating both emails from the U.S. authorities and reactions by DG JUST. The common characteristic of these documents is that they all disclose positions expressed by the United States during the course of negotiations.

In line with Article 4(4) of Regulation 1049/2001, DG JUST has consulted the U.S. government with a view to assessing whether an exception pursuant to Article 4(1)(a) of Regulation 1049/2001 with respect to the public interest as regards international relations would be applicable. In particular, DG JUST invited its U.S. counterparts to indicate whether they agree with disclosure of the documents originating from the U.S. authorities. In its response of 22 May 2017, the U.S. government informed DG JUST that *"the substance of documents sent to the Commission by the U.S. regarding the Privacy Shield negotiations should not be subject to disclosure in light of the interest of international relations."* Moreover, the U.S. government stressed that the bilateral negotiations regarding the Privacy Shield (and previously the Safe Harbour) *"involved a number of complex, sensitive issues, including issues relating to our transatlantic commercial relationship and national security"* and that *"the ability to engage frankly with a select group on each side was important to building the mutual trust that enabled the development of the Privacy Shield"*.

Taking these comments into account, we have carried out our own assessment and come to the conclusion that access to documents No 1 – 119 would undermine the protection of the public interest as regards international relations. We consider that making those documents available, in whole or in parts, to the public would seriously prejudice the mutual trust between the European Union and the United States both as regards the specific arrangement that the two sides have been negotiating (the Privacy Shield) and other transatlantic files.

While the negotiations have been finalised and the adequacy decision has been adopted, the framework is built on continuous cooperation between the EU (with the Commission being tasked to continuously monitor the level of protection) and the U.S. (with a commitment from the U.S. authorities to report on any relevant legal developments that could negatively affect those protections). In particular, the functioning of the new framework will undergo careful scrutiny in the annual joint reviews, the first of which is scheduled for later this year. Depending on the outcome of this monitoring and review exercise, the EU and the U.S. sides might have to enter into further negotiations on individual aspects of the Privacy Shield. It therefore remains important to protect the

credibility of the Commission as a negotiating partner that does not make public the negotiating position(s) of a third country.

In addition, the Commission has a legitimate interest in not revealing its tactical considerations and other strategic elements of the past discussions as this could negatively affect its position in any future negotiations. This relates to those emails that disclose positions expressed by the European Commission during the Privacy Shield discussions as their disclosure would weaken the EU's position in future negotiations with third countries that have expressed an interest in an adequacy finding or other data transfer arrangement. As expressed in the Commission's Communication on "*Exchanging and Protecting Personal Data in a Globalised World*" of 10 January 2017², the Commission is intensifying its work on adequacy findings with other important international partners, and has for example entered into a dialogue with Japan and South Korea with this objective. In this context, the disclosure of the exchanges with the U.S. would harm the Commission's goal and ambition to achieve the highest level of data protection possible as a result of such negotiations and negatively affect the Commission's negotiation margin. In this respect, it should be noted that the Commission's starting point in the negotiations will at least on certain points go beyond what is strictly necessary (and can ultimately be achieved in the talks with the third party), with the objective to achieve the best possible result in any such arrangements. Disclosing these strategic elements would thus reveal its willingness to compromise (with the legal limits).

3. ASSESSMENT OF DOCUMENTS No 120 – 136

These documents cover the correspondence with the U.S. authorities following the adoption of the Privacy Shield decision, i.e. from the period July 2016 to April 2017.

Most of the redactions concern personal data covered by the exception in Article 4(1)(b) of Regulation No 1049/2001. As regards data protection, the applicable legislation is Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by Union institutions and bodies. We have applied the Commission's standard practice that access is limited to names and functions of Commissioners, their cabinet members and staff in senior management positions.

Necessary redactions were made in document (2017)1787946 (first paragraph) and document No (2017)1790370 (parts of the second and fourth paragraphs) on the basis of Article 4(1)(a), third indent, of Regulation 1049/2001, which provides that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations.*"

The disclosure of the redacted part in document (2017)1787946 would weaken the EU position in future negotiations with third countries that have requested an adequacy finding or other data transfer arrangement (see already above).

As regards the redacted part in document (2017)1790370, the Commission considers at this point that its disclosure would undermine the protection of the public interest as regards

² COM(2017) 7 final.

international relations since it concerns the preparation of the procurement process for selecting a contractor in the U.S. Department of Commerce (DoC). As explained below, we are still waiting for the DoC's official position as to whether this part of their correspondence could be made public.

You will notice that annexes to five of the above listed email exchanges are missing in the attached documents. This is because as of today we have not yet received a reply from the DoC to our request to express the view of the U.S. government on these annexes which contain DoC *drafts* regarding the procurement procedure for the "administrator" and fund manager for the Privacy Shield arbitration mechanism (documents (2017)1793876, (2017)1793848, (2017)1791522) and the call for interest to be selected for inclusion in the list of arbitrators (documents (2017)1791358, (2017)1791264). While awaiting the official position from the DoC on a possible disclosure of these drafts, we would like to point out that the *final* versions of these documents have in the meantime been published by the DoC on www.privacyshield.gov.

4. ASSESSMENT OF DOCUMENTS No 137 – 148

These documents cover the correspondence of Commissioner Jourová with various third parties on the Privacy Shield. They are transmitted to you in full, without redactions.

5. ASSESSMENT OF DOCUMENTS No 149 – 159

Necessary redactions were made in the minutes of the so-called Article 31 Committee (the committee of Member States representatives to be consulted in comitology proceedings). Disclosure of the redacted parts of these documents is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001. The redacted parts concern passages the disclosure of which would undermine (1) the protection of the public interest as regards international relations or (2) the protection of court proceedings.

As pointed above, Article 4(1)(a), third indent, of Regulation 1049/2001 provides that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations.*"

Disclosure of certain redacted passages in the attached documents would weaken the EU's position in future negotiations with third countries that have requested an adequacy finding and/or on other data transfer arrangements (see already above).

In addition, the disclosure of the views and reflections by Member States in the Article 31 Committee, which were expressed with an expectation that they would be kept confidential³, would jeopardise the climate of mutual trust that needs to be preserved between the U.S. and the EU and its Member States and would limit the prospects of future cooperation in all areas involving the exchange of personal data. Moreover, these considerations as conveyed throughout the negotiating process were neither exhaustive nor definitive (i.e. did not necessarily reflect the final position of Member States and

³ Article 13, paragraph 2, of the Rules of Procedure of the Committee on the Protection of Individuals with Regard to the Processing of Personal Data.

consequently should not be revealed to third parties as this would negatively impact future negotiations).

Furthermore, even if the Privacy Shield decision has in the meantime been adopted and become effective, a dialogue with the U.S. government as regards the monitoring of the implementation of the Privacy Shield continues, in particular through the instrument of the annual reviews (see above). Establishing and protecting an atmosphere of mutual trust with such a close and important partner as the United States is a very delicate exercise and any breach of that trust cannot easily be repaired and thus can have a serious adverse effect on any ongoing dialogue as well as future cooperation.

Except as indicated below, all redactions in the minutes of the Article 31 Committee are covered by Article 4(1)(a), third indent, of Regulation 1049/2001. The exception under Article 4(1)(a), 3rd indent, is an absolute exception that does not need to be balanced against any overriding public interest.

A number of passages in the minutes of the Article 31 Committee needed to be redacted because their disclosure would undermine the protection of on-going and reasonably foreseeable future court proceedings in that it would negatively affect the Commission's ability to defend its position in Court on an equal footing with the respective applicant, contrary to the principle of equality of arms. The legal basis for redactions is Article 4(2), second indent, of Regulation 1049/2001 which provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in the disclosure."

The Privacy Shield framework is currently litigated before the General Court in two annulment actions brought against the Commission's adequacy decision on the Privacy Shield.⁴ In addition, it is reasonably foreseeable that the validity of the adequacy decision will in the future be the object of litigation before the Court of Justice of the European Union (by way of preliminary references from a national court⁵).

Likewise, the Irish Data Protection Commissioner has challenged the use of another Commission instrument – so-called Standard Contractual Clauses ("SCCs") approved by a Commission decision – for data transfers to the United States before the Irish High Court⁶ and invited the Court, if it shares the DPC's doubts as to the validity of the Commission's SCC decision, to make a reference for a preliminary ruling to the Court of Justice. This challenge concerns again the level of data protection ensured in the United States, in particular the safeguards concerning government access to data for national security purposes. In this respect, it should be recalled that the commitments undertaken by the U.S. authorities under the Privacy Shield as regards government access to data also apply to data transfers carried out under SCCs. Disclosure of documents related to the Privacy Shield negotiations is thus directly relevant for the SCC litigation.

The redacted parts in the minutes of the Article 31 Committee, covered by the protection of the public interest as regards court proceedings, are the following:

⁴ Case T-670/16, *Digital Rights Ireland v Commission*, and Case T-738/16, *La Quadrature du Net v Commission*.

⁵ See judgment of 6 October 2015 in Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*, EU:C:2015:650, paragraphs 51 et seq., 65.

⁶ Case 2016 No. 4809P, *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems*.

- 62nd meeting, page 1, second paragraph from the bottom,
- 70th meeting, page 2, third paragraph from the bottom (also covered by international relations exception),
- 71st meeting, page 2, sixth paragraph from the top.

Redactions not included in the above list are covered by the exception for the protection of the public interest as regards international relations.

In your request, you do not mention any overriding public interest in disclosure that would outweigh the public interest in the protection of the ongoing and likely future court proceedings. Given that the redacted passages directly relate to the core of the litigation, and that their disclosure would thus risk significantly affecting the Commission's position as a defendant, I consider that there is no overriding public interest in obtaining access.

6. ASSESSMENT OF DOCUMENT No 160

The letter from the American Civil Liberties Union is disclosed in full.

7. RIGHT TO MAKE A CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Tiina ASTOLA

Annex: Disclosed documents on EU-US Privacy Shield (93 pages)