



Council of the European Union
General Secretariat

Directorate-General Communication and Information
Knowledge Management
Transparency
Head of Unit

Brussels, 12 January 2018

Ref. 17/2424/ld-ws/nb

Request made on: 22.11.2017

Deadline extension: 13.12.2017

Thank you for your request for access to documents of the Council of the European Union.¹

Please find attached documents **9558/17, 8798/17, 6726/1/17REV1, WK5206/17, WK 5206/1/17 REV1, WK 5206/2/17 REV2, WK 3596/17 and WK 3570/17** you requested.

Please find also attached partially accessible versions of documents **11110/17, 11107/17, 10098/17, 9802/17, 7579/17, WK 11127/17, WK 9957/17, WK 9380/17 and WK 5380/17**.²

However, I regret to inform you that full access cannot be given for the reasons set out below.

Document **11107/17** is a Note of 12 July 2017 from the Presidency to Delegations on the Processing and storage of data in the context of the draft e-Privacy Regulation which contains an examination of all legislative and non-legislative options to address the data retention issue, including in the context of the proposed e-Privacy Regulation. It includes questions to delegations and options that the relevant Working Party group should evaluate taking into account the advantages and disadvantages for different stakeholders of any solution.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

² Article 4(6) of Regulation (EC) No 1049/2001.

Document **11110/17** is a Note of 12 July 2017 from the Presidency to Delegations on the Requirements of the Tele 2 judgment regarding data retention which contains a summary of the main aspects of the Tele 2 judgment with indication of some of the initial reflections on the various aspects of the issue which is still under discussion in the preparatory bodies of the Council.

Document **9802/17** is a Note of 31 May 2017 from the Presidency to the Permanent Representatives Committee/Council containing a progress report on the Common reflection process on data retention.

Document **7597/17** is a Note of 5 April 2017 from the Presidency to delegations on issues to be discussed in the Reflection Process on data retention.

Document **WK 9380/17** is a working document from the Presidency to delegations concerning the issue of *Ensuring the availability of data for the purposes of prevention and prosecution of crime = Presentation of options and exchange of views*.

The documents give in certain parts details of the on-going discussion and identify sensitive issues that need to be addressed before the Council can reach an agreement. Full release to the public of the information contained in these documents would affect the discussions and negotiating processes and diminish the chances of the Council reaching an agreement as it may put delegations under additional pressure of stakeholders.

The General Secretariat has weighed your interest in being informed of progress in this area against the general interest that progress be made in an area that is still the subject of negotiations. It considers that, at this stage, full disclosure of the documents would be premature in that it would impede the proper conduct of the negotiations and compromise the conclusion of an agreement on these subjects.

Full disclosure of documents **11107/17, 11110/17, 9802/17 and 7579/17** would therefore seriously undermine the decision making-process of the Council. As a consequence, the General Secretariat has to refuse full access to the documents at this stage.³ You may however have access to those parts of the documents which are not protected by this exception.

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their full disclosure.

You may however have access to those parts of the documents which are not protected by this exception.

³ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

Document **10098/17** is a Note of 6 November 2017 from EUROJUST to delegations, containing in its Annex a Report on Data Retention Regimes in Europa in light of the CJEU ruling of 21 December 2016 in Joined Cases C-203/15 and C-698/15.

WK 3596/17 is a Working Document of 4 April 2017 from the General Secretariat of the Council to DAPIX on the European Judicial Cybercrime Network (EJCN) on the effects of the CJEU judgement.

Certain parts of these documents contain information that if disclosed to the public, could undermine the principle of mutual trust between Eurojust and the Member States and thus the protection of public security. As a consequence, the General Secretariat has to refuse full access to documents **10098/17** and **WK 3596/17** ⁴. Likewise some other parts could potentially affect court proceeding and investigations. As a consequence, the General Secretariat has also for this reason to refuse full access to these documents.⁵

You may however have access to those parts of the documents which are not protected by these exceptions.

WK 9957/17 is a Working Document of 21 September 2017 from EUROPOL to DAPIX on Proportionate data retention for law enforcement purposes.

This document is a presentation by EUROPOL and contains on its first and last slide the name and contact details of a Europol official.

The data protection rules at EU level⁶ provide that when the personal data collected is to be used for a different purpose, including disclosure to the public, a balance needs to be established between the public interest in having access to such data and the legitimate right of individuals to protect their personal data.⁷

After carefully considering all the principles related to this request, on balance the General Secretariat has concluded that disclosure of the personal data contained in the document would undermine the protection of privacy and the integrity of the identified individuals. As a consequence, the General Secretariat has to refuse full access to this document.⁸

You may however have access to the rest of the document.

⁴ Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001.

⁵ Article 4(2), second and third indent of Regulation (EC) No 1049/2001

⁶ 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 Article 8 of Regulation (EC) No 45/2001.

⁸ Article 4(1)(b) of Regulation (EC) No 1049/2001

WK 5380/17 is a Working Document of 11 May 2017 of EUROPOL to DAPIX on Data categories to be retained for law enforcement purposes.

The document contains in certain of its parts operational information on investigations by law enforcement authorities. Disclosure of this information to the public may have a negative impact on present and future investigations and operational activities of the Member States in their fight against terrorism and cybercrime which may undermine the protection of public security. As a consequence, the General Secretariat has to refuse full access to this document⁹.

You may however have access to those parts of the document which are not protected by this exception.

I regret to inform you that access to documents **13845/17, WK 12156/17, WK 12153/17, WK 9956/17, WK 9699/17, WK 9374/17, WK 9374/1/17 REV1, WK 8177/17, WK 6120/17, WK 5870/17, WK 5827/17, WK5360/17, WK 5296/17 and WK 4012/17** cannot be given for the reasons set out below.

Document **13845/17** is a Note of 30 October 2017 from the Presidency to Delegations on the Retention of communication data for the purpose of prevention and prosecution of crime-specific elements in light of the ECJ case-law-exchange of views.

This document sets out certain options of which the disclosure would restrict the Presidency in its choice on how to organise the debates in the Council's preparatory bodies on a sensitive issue. This in turn would have negative consequences for the effective handling and successful outcome of those discussions.

The General Secretariat has weighed your interest in being informed of progress in this area against the general interest that progress be made in an area that is still the subject of negotiations. It considers that, at this stage, disclosure of the document would be premature in that it would impede the proper conduct of the negotiations and compromise the conclusion of an agreement on these subjects.

Disclosure of document **13845/17** would therefore seriously undermine the decision making-process of the Council. As a consequence, the General Secretariat has to refuse access to the document at this stage.¹⁰

Having examined the context in which the document was drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in its full disclosure.

⁹ Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001.

¹⁰ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

We have also looked into the possibility of releasing parts of this document¹¹. However, as the exception to the right of access applies to its entire content, the General Secretariat is unable to give partial access at this stage.

Finally documents **WK 12156/17, WK 12153/17, WK 9956/17,, WK 9374/17, WK 9374/1/17 REV1, WK 8177/17, WK 6120/17, WK 5870/17, WK, 5827/17, WK5360/17, WK 4012/17 and WK 5296/17** are contributions from Delegations on data retention issues. Document **WK 9699/17** is a contribution from the EU Counter Terrorism coordinator.

These documents contain information that if disclosed to the public could be used by terrorists/criminals or terrorist/criminal organisations to circumvent and hamper EU and Member States' efforts to combat this type of activities. Their release would therefore undermine the protection of public security. As a consequence, the General Secretariat has to refuse access to these¹².

The documents give also details of the on-going discussion and identify sensitive issues that need to be addressed before the Council can reach an agreement. Release to the public of this information would affect the discussions and negotiating processes and diminish the chances of the Council reaching an agreement as it may put delegations under additional pressure of stakeholders.

The General Secretariat has weighed your interest in being informed of progress in this area against the general interest that progress be made in an area that is still the subject of negotiations. It considers that, at this stage, disclosure of these documents would be premature in that it would impede the proper conduct of the negotiations and compromise the conclusion of an agreement on these subjects.

Disclosure of documents **WK 12156/17, WK 12153/17, WK 9956/17,, WK 9374/17, WK 9374/1/17 REV1, WK 8177/17, WK 6120/17, WK 5870/17, WK, 5827/17, WK5360/17, WK 4012/17, WK 5296/17 and WK 9699/17** would therefore seriously undermine the decision making-process of the Council. As a consequence, the General Secretariat has to refuse access to the documents at this stage.¹³

We have also looked into the possibility of releasing parts of these documents¹⁴. However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access at this stage.

¹¹ Article 4(6) of Regulation (EC) No 1049/2001.

¹² Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001.

¹³ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

¹⁴ Article 4(6) of Regulation (EC) No 1049/2001.

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their full disclosure.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).¹⁵

Yours sincerely,

Ramón CHISMOL IBÁÑEZ

Enclosures: 17

¹⁵ Article 7(2) of Regulation (EC) No 1049/2001.
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.