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February 4, 2016

Michael Toland, Ph.D.
Departmental Freedom of Information Officer
Office of Privacy and Open Government
U.S. Department of Commerce
14th and Constitution Avenue NW
Mail Stop 52010FB
Washington, DC 20230

Dear Mr. Toland:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Commerce.

EPIC seeks the immediate release of the “Privacy Shield,” a framework for transatlantic data flows, announced by Secretary Pritzker on February 2, 2016.¹

Background on the Final Agreement

According to a statement of Secretary Penny Pritzker delivered this week, the Department of Commerce has concluded an agreement that provides “certainty” for data transfers between the European Union and the United States. The Department of Commerce has also published a press statement that provides specific details in connection with the “finalization” of the Privacy Shield.”²

¹ Dept. of Commerce, "Statement From U.S. Secretary of Commerce Penny Pritzker on EU-U.S. Privacy Shield", (Feb. 2, 2016) (Describing a “historic agreement” that provides legal “certainty.”), <https://www.commerce.gov/news/press-releases/2016/02/statement-us-secretary-commerce-penny-pritzker-eu-us-privacy-shield>.

² Dept. of Commerce, “EU - U.S. Privacy Shield” (Feb. 2, 2016) (describing the “finalization” of the Privacy Shield”), <https://www.commerce.gov/news/fact-sheets/2016/02/eu-us-privacy-shield>.

According to the Washington Post, “European and U.S. negotiators on Tuesday agreed on a set of privacy obligations for U.S. firms moving European citizens’ data across the Atlantic”.³ And European Commissioner Vera Jourova and European Commission Vice President Andrus Ansip, the European lead negotiators, confirmed that the “European Commission and the United States have *agreed* on a new framework for transatlantic data flows: the EU-US Privacy Shield.”⁴

Public Concerns About the Secret Agreement

Central to the assessment of this proposal for the future of trans border data flows is whether it complies with the legal requirements of the decision Court of Justice of the European Union in the Schrems case.⁵ Without access to the underlying text, it is not possible to make a final determination.

However, based on the partial disclosures, there is widespread concern that the agreement fails to provide adequate protection. The Trans Atlantic Consumer Dialogue (TACD) said it remained “skeptical of the adequacy of the new system for data transfers being put in place and urge the Authorities to begin data protection enforcement proceedings in due course and without delay”.⁶ BEUC, the European Consumer Organization called “on the European Commission and the European data protection authorities to make sure they comply with the recent European Court of Justice ruling”.⁷ Max Schrems said “we don’t know the exact legal structure yet, but this could amount to obviously disregarding the Court’s judgment”.⁸

EPIC reported that the decision “disregarding a decision of the European Court of Justice, negotiators for the US Commerce Dept., the FTC, and the European Commission have agreed to allow the continued transfer of consumer data without adequate legal

³ Ellen Nakashima, Andrea Peterson, European and U.S. negotiators agree on new ‘Safe Harbor’ data deal, The New York Times (February 2, 2016), https://www.washingtonpost.com/world/national-security/european-and-us-negotiators-agree-on-new-safe-harbor-data-deal/2016/02/02/f576e706-c9e5-11e5-a7b2-5a2f824b02c9_story.html.

⁴ See Press Release, EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield (February 2, 2016), http://europa.eu/rapid/press-release_IP-16-216_en.htm. (emphasis added)

⁵ C-362/14, Maximilian Schrems v Data Protection Commissioner, 2015 <http://curia.europa.eu> (Oct. 6, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=143358>.

⁶ TACD statement, The Safe Harbour is Dead, long live the Not-so-safe Harbour?, TACD (February 3, 2016), <http://tacd.org/the-safe-harbour-is-dead-long-live-the-unsafe-harbour/>.

⁷ BEUC Press Release, Clock is ticking in negotiation on EU-US data transfers, BEUC (January 29, 2016), <http://www.beuc.eu/publications/clock-ticking-negotiation-eu-us-data-transfers/html>.

⁸ Max Schrems, European Commission may be issuing a round-trip to Luxembourg, Europe v Facebook (February 2, 2016), http://europe-v-facebook.org/PS_update.pdf.

protection.”⁹ Consumer organizations, including EPIC, had [urged negotiators](#) to establish strong safeguards for the transfer of personal data.¹⁰

There is widespread concern among consumer organizations, academic experts, and privacy advocates in the United States and Europe that the agreement will simply be annulled.

The Urgency of Public Release of the Secret Agreement

At present there is a secret agreement that provides the basis for the transfer of personal data between the United States and the European Union. The public has a right to know whether this agreement provides adequate legal protection.

Moreover, the EU Article 29 Working Party, composed of privacy officials across Europe, is scheduled to make a final determination as to the adequacy of the data transfer arrangement in March 2016.¹¹ The Working Party has also not received the text of the agreement.

Expedited Processing

This request warrants expedited processing because (1) it is made by “a person primarily engaged in disseminating information” and (2) it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.”¹²

EPIC is “primarily engaged in disseminating information.”¹³ Further, EPIC has published articles and analysis on US-EU data transfers.¹⁴ EPIC has testified before Congress on the consequences of the invalidation of the Safe Harbor arrangement.¹⁵

⁹ EPIC, *Anticipating Annulment, EU-US Negotiators Sign Off on “Privacy Shield”*, EPIC (February 2, 2016), <https://epic.org/2016/02/anticipating-annulment-eu-us-n.html>.

¹⁰ NGO letter to Secretary Pritzker and Commissioner Jourova, *The Public Voice* (November 13, 2015), <http://thepublicvoice.org/EU-US-NGO-letter-Safe-Harbor-11-15.pdf>.

¹¹ *Deal on EU-US Privacy Shield leads EU watchdogs to extend moratorium on data transfers enforcement action*, Pinsent Masons (February 3, 2016), <http://www.out-law.com/en/articles/2016/february/deal-on-eu-us-privacy-shield-leads-eu-watchdogs-to-extend-moratorium-on-data-transfers-enforcement-action/>.

¹² 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

¹³ *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (“[T]he Court concludes that EPIC is indeed “primarily engaged in disseminating information” for the purposes of expediting the request.”).

¹⁴ See Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, 36 Harv. J.L. & Pub. Pol’y 605 (2013).

¹⁵ EPIC, *Testimony and Statement for the Record on Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* before the United States House of Representatives Energy & Commerce Subcommittees on Commerce, Manufacturing, and Trade and

EPIC has advised Congress and government agencies as to proposed changes to the Privacy Act of 1974.¹⁶ And EPIC has recommended specific steps to strengthen protections for data flows between the Europe and the United States.¹⁷

There is an “urgency to inform the public” based on (1) the immediate impact of the agreement on the transborder flow of personal data and (2) the fact that the Working Party, which has authority to make a final determination, is set to discuss and debate the matter at the end of March 2016.¹⁸

Unless the agreement is immediately made public and subject to open debate, the public will be denied the opportunity to have its voice heard on the assessment of the agreement.¹⁹

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.²⁰ Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed.²¹

Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.²² According to the agency’s regulations, a fee waiver should be granted because (i) the subject of the request concerns “the operations or activities of the government”; (ii) disclosure is “likely to contribute” to an understanding of government operations or activities and the information is not already in the public domain; (iii) the

Communications and Technology (November 3, 2015),
<https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

¹⁶ Letter from EPIC to Sen. Daniel Akaka, Chairman of Subcomm. on Oversight Gov’t Mgmt. (May 12, 2012), <https://epic.org/privacy/1974act/EPIC-Supp-S1732-Priv-Act-Modernization.pdf>; Letter from EPIC to Privacy Civ. Liberties Oversight Bd. (Nov. 11, 2014), https://epic.org/open_gov/EPIC-Ltr-PCLOB-Defining-Privacy-Nov-11.pdf.

¹⁷ Marc Rotenberg, *On International Privacy: A Path Forward for the US and Europe*, 35 Harv. Int’l Rev. 24 (2014), <http://hir.harvard.edu/archives/5815>.

¹⁸ Press Release, Statement of the Article 29 Working Party on the Consequences of the Schrems Judgment (February 3, 2016), http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2016/20160203_statement_consequences_schrems_judgement_en.pdf.

¹⁹ See, e.g., Mark Scott, *European Privacy Regulators Want Details on ‘Safe Harbor’ Data Deal*, The New York Times (February 3, 2016), http://www.nytimes.com/2016/02/04/technology/european-privacy-regulators-want-more-details-on-us-safe-harbor-data-deal.html?_r=0; Zoya Sheftalovich, *Safe Harbor deal divides opinion*, Politico (February 2, 2016), <http://www.politico.eu/article/political-handshake-on-safe-harbor-deal/>.

²⁰ *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²² § 552(a)(4)(A)(iii).

disclosure “will contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and EPIC has the “expertise in the subject area and ability and intention to effectively convey information to the public” (As the agency notes, “[i]t shall be presumed that a representative of the news media will satisfy this consideration.”); and, (iv) the disclosure is likely “to contribute ‘significantly’ to public understanding of government operations or activities.”²³

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request within ten business days. For questions regarding this request I can be contacted at 202-483-1140 x104 or FOIA@epic.org.

Respectfully Submitted,

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²³ See 15 C.F.R. § 4.11.