Subject: Request for Access to documents under Regulation No 1049/2001\(^1\) regarding public access to the European Parliament, Council and Commission documents

Dear Mr Smithson,

Thank you for your e-mails of 18 October 2011\(^2\), 2 November 2011 and 8 November 2011 requesting access to documents under Regulation No 1049/2001. You have requested access to the first draft and the most recent draft of the report from Helios produced under the draft Commission study on "Support for the preparation of an Impact Assessment to accompany and analyse the impact of Commission's Decision on the 2 GHz band".

I regret to inform you that the first of the requested documents cannot be made available to you. Having examined the nature and the content of that document, it appears that it falls within the exceptions set out in Article 4, paragraph (3) of the Regulation No 1049/2001, concerning the refusal of access to documents received by an institution which relate to a matter where the decision has not been taken by the institution and where disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. Please find attached the list of exceptions provided for by Regulation 1049/2001, to which you have already made reference in your emails.

The text of the study report has been subject to changes and, during its preliminary stages, there may have been contradictory versions of the study report. Disclosing the different drafts would seriously interfere with the decision making process of the Commission for two principal reasons.

\(^1\) L145, 31.05.2001, page 43.
\(^2\) Gestdem Ref. 2011/5353
Disclosure of the earlier drafts would seriously undermine the decision making process of the Commission related to the approval of the study. If different drafts of the study report were to be disclosed and made available to the public, the possible reactions, commentaries and discussions in the public domain related to the draft versions of the report would impede the unfettered view of the reviewers charged with the approval of the study report and would therefore seriously undermine the decision making process of the Commission related to the approval of the final version of the study report.

Furthermore, the study report is prepared as a support for the preparation of an impact assessment to accompany and analyse the impact of the planned Commission Decision on the 2 GHz band. The existence in the public domain of different and possibly contradictory versions of the study report – which would be discussed, commented on and further referred to by the public – would not only create confusion but would seriously undermine the decision making process of the Commission related to the above mentioned impact assessment and the final Commission Decision, as the study report is an important element in these decision making processes.

According to paragraph 2 of Article 4 (3) of the Regulation No 1049/2001 access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. This provision applies in this case as well, as the draft versions of the report are prepared for internal use as part of the internal deliberations and preliminary consultations in the Commission with the contractor preparing the study report. The content of those drafts should remain confidential in order to ensure that the contractor can prepare preliminary draft versions of the report for internal discussion free from outside pressure and criticism related to early, preliminary versions of his work that are not intended for final publication as they are drawn up merely to prepare the final version of the report. In addition, as described above, the existence of different and possibly contradictory versions of the study report in the public domain – which would be discussed, commented on and further referred to by the public – would not only create confusion but would also seriously undermine the decision making process of the Commission related to the above mentioned impact assessment and the final Commission Decision.

Furthermore, after studying your request, there does not appear to be an overriding public interest justifying the disclosure of the earlier draft document in question.

I also regret to inform you that after studying the requested document, it also appeared that permitting a partial access, i.e. access to some parts of the requested document was not possible in this case as a partial disclosure would have the same effect as a full disclosure.

However, as the latest version of the report, which you request, is in fact the final version of the study report, we are hereby sending you a copy of it.

In this context please note that a public consultation is held to validate the results of the final version of the study report and to receive further information and data that are relevant for the preparation of the impact assessment and the planned policy measure itself. At that occasion, you have the full opportunity to express your views and submit comments on the study report.
If you wish the above mentioned position to be nonetheless reconsidered, you are entitled to write to the Secretary-General of the Commission, at the address given below, confirming your initial request. That must be done within 15 working days after receipt of this letter. Once that deadline has passed, your initial request will be considered withdrawn.

The Secretary-General will inform you of the result of the reconsideration within 15 working days from the date of registration of your request, either by granting you access to the document or confirming the refusal. In the latter case, he will also point out the remedies open to you.

All correspondence must be sent to the following address:

The Secretary-General
European Commission
B-1049 BRUSSELS

Yours sincerely,

(eSigned)
Robert Madelin

Encl: Annex I – Exceptions provided for by the policy on access to Commission documents

Annex II – Final version of the study report
b.c.c.: INFSO Management Team, P. O'Donohue, K. Stump (INFSO)