



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary-General

Brussels,
SG.B4/VD/bb - sg.dsg2.b.4(2015)1194102

By registered mail:

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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2014/5135**

Dear Mr McIntyre,

I refer to your letter of 18 November 2014, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (Regulation 1049/2001).

I refer also to the Commission's holding letter of 10 December 2014 and of 8 January 2015, extending the time-limit for handling your confirmatory application. I apologise for the delay in handling the present request, which was partly due to the consultations carried out with the Dutch and the UK authorities.

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

1. SCOPE OF YOUR REQUEST

In your initial application of 31 October 2014, addressed to the Directorate-General for Home Affairs (DG HOME), you requested access to:

- 1. All documents relating to the ministerial dinner on 8 October 2014 with IT firms including Google, Facebook, Twitter and Microsoft.*
- 2. Any agenda, briefing document, presentation, correspondence or other document prepared in advance of the dinner, including any correspondence with the firms in question;*
- 3. Any document or presentation circulated or presented at the dinner itself;*
- 4. Any document recording details of the discussion at the dinner itself, including any report or summary of the discussion, list of agreed actions or follow up items."*

In its initial reply of 10 November 2014, DG HOME informed you that the meeting was an informal ministerial dinner, which brought together EU Member States' Ministers of Home Affairs and senior representatives of Google, Facebook, Twitter and Microsoft. Being an informal meeting, no specific document was prepared for the event. However, DG HOME provided you with a link to the press release statement following the dinner.

Through your confirmatory application you request a review of this position. You argue that there must have been some paperwork surrounding the event, such as preparatory documents for the event, a list of attendees, a note of the discussions and of the agreed actions.

Following a further search of the Commission documents, I am pleased to inform you that in addition to the press release, which was disclosed to you at the initial level, the Commission has identified the following documents, which fall within the scope of your access-to-documents request:

1. The invitation letter for the event, signed by Commissioner Cecilia Malmström and Minister Angelino Alfano together with the accompanying cover note signed by Director-General of DG HOME Mr Matthias Ruete, dated 23 September 2014 (**document 1**);
2. The list of participants for the event (**document 2**), not dated;
3. The briefing for the Commissioner (speaking points and background information) with 4 annexes, prepared by DG HOME prior to the dinner (**document 3**);
4. The internal report prepared by DG HOME, following the event, dated 14 October 2014 (**document 4**).

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I am pleased to inform you that:

- full access is granted to document 1;
- partial access is granted to documents 2 (subject to redaction of personal data, based on the exception of Article 4(1)(b) of Regulation 1049/2001);
- partial access is granted to documents 3 and 4.

The non-disclosure of the (parts of) the document(s) is justified on the basis of the exceptions of Article 4(1)(a) (protection of the public interest as regards public security), Article 4(3) (protection of the decision-making process) and Article 4(1)(b) (protection of personal data) of Regulation 1049/2001, for the reasons set out below.

2.1. The content of the requested documents

The documents to which you request access concern one of the latest initiatives taken in this field by Commissioner Cecilia Malmström in her capacity of (then) Commissioner for Home Affairs: the informal ministerial dinner with industry on the spread of terrorist propaganda online. This dinner took place on 8 October 2014, on the invitation of Commissioner Cecilia Malmström and the Italian Minister for Home Affairs Angelino Alfano (the letter of invitation forms **document 1**).

The dinner was attended by representatives of the Member States and of the EU institutions, and by representatives of four private companies (**document 2**).

Document 3 is a briefing prepared by DG HOME for Commissioner Malmström in view of the dinner. It contains background information, speaking points, as well as some possible defensive notes for the Commissioner. Four annexes are enclosed to document 3, namely:

- Annexes 1 is the draft invitation letter and annex 2 is the list of confirmed participants on the part of the Commission, the Internet Industry and the EU Counter-Terrorism Coordinator;
- Annex 3 constitutes Draft guiding principles developed within the framework of the European Joint Initiative on Internet Counter Terrorism (EJI-ITC). This annex is a draft document elaborated by the Dutch authorities in cooperation with the UK authorities. In accordance with Article 4 (4) and (5) of Regulation 1049/2001, the Commission has decided to consult the authors of the document as to its possible disclosure.
- Annex 4 is the draft statement to the press, which was provided to you already by DG HOME in the initial reply to your access-to-documents request.

Document 4 is an internal report, prepared by DG HOME, following the event. The report contains a summary of the interventions of the participants at the dinner and some reflections concerning the questions of how to best counteract the spread of terrorist propaganda: what measures have been taken and what efforts are still to be made to address the increased use of Internet for extremism narratives. In that context, document 4 contains references to specific measures, programmes and activities undertaken so far, as well as the areas of (possible) cooperation between the private and the public sector.

2.2. Assessment of the documents originating from the Commission (documents 2, 3 and 4, excluding annex 3 of document 3)

2.2.1. Protection of the privacy and integrity of the individual

According to Article 4(1)(b) of Regulation 1049/2001, access to documents is refused where disclosure would *undermine the protection of [...] privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

Documents 2, 3 and 4 contain names and contact details of Commission staff, national experts and representatives of the four companies (Google, Facebook, Twitter and Microsoft) present at the dinner.

All personal data have been redacted from documents 3 and 4. As for document 2, some of the names have been redacted, excluding the ones that are publicly known, such as the names of the high-level officials of the EU institutions or Member States.

Pursuant to Article 4(1)(b) of Regulation 1049/2001, the Commission cannot give access to the names of representatives of the relevant national authorities, Internet companies, nor to those of its own staff. These names undoubtedly constitute personal data in the meaning of Article 2(a) of Regulation 45/2001³ (*the Data Protection Regulation*) as they reveal information about identified or identifiable persons. The Commission, however, did not redact the names of the high-level officials, such as Ministers and Ambassadors from the list of participants at the dinner (document 2), as these high-level officials are publicly known.

I would like to point out that Article 2(a) of Data Protection Regulation provides that *personal data shall mean any information relating to an identified or identifiable person [...]*. As the Court of Justice confirmed in Case C-465/00⁴ (*Rechnungshof*) , *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life.*

³ 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, Official Journal L 8 of 12.1.2001.

⁴ Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between Rechnungshof and Österreichischer Rundfunk, paragraph 73.

Furthermore, according to Article 8(b) of the Data Protection Regulation, which is fully applicable in this case, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative⁵.

In your confirmatory application, you do not demonstrate the need for, nor any particular interest in obtaining the personal data concerned. The necessity of disclosing the personal data of these individuals has therefore not been established in the present case.

Therefore, I conclude that certain personal data contained in the said documents should be protected pursuant to Article 4(1)(b) of Regulation 1049/2001.

2.2.2. Protection of the public interest as regards public security

Article 4(1)(a) of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of public security.*

The limited redactions maintained in documents 3 and 4 reflect certain positions or reflections expressed by the representatives of the Member States, Commission and internet companies on the sensitive issue of how to respond to terrorist use of the Internet and the possible ways of addressing the online terrorist propaganda. I take the view that revealing specific details, such as references to concrete projects, practices or follow-up actions on such a sensitive topic would undermine the protection of public security. There is a real and non-hypothetical risk that counter-measures could be undertaken by the terrorist organisations in order to by-pass the (planned) response of the law-enforcement authorities and the major internet companies in this regard.

Moreover, in order to identify, support and finance the most adequate response to the increased terrorist use of internet, the Commission is relying heavily on the cooperation with the law-enforcement authorities of the EU Member States and the private sector (companies such as Google, Facebook, Twitter and Microsoft). Building such cooperation is only possible if the Commission is able to base it on a mutual trust and dialogue. Therefore, the names of the persons that have made comments and interventions during the ministerial dinner and the references to the organisations or companies they represent have been redacted from document 4.

Full disclosure of the relevant parts of document 3 and 4 would result in the public release of the position expressed by the said stakeholders that has shared important information with the Commission and with EU Member States in confidence. Such public disclosure would clearly undermine the climate of mutual trust with the stakeholders concerned. There is thus a real and non-hypothetical risk that industry representatives will no longer be willing to cooperate with the Commission and the EU

⁵ Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 77-78.

Member States in this field, which would in turn greatly jeopardise the success of the Commission's response to the terrorist use of the Internet.

Against this background and in the aftermath of the widely publicised *Charlie Hebdo* attack, I take the view that keeping such sensitive and limited data confidential is essential for the public security of EU citizens and for ensuring the viability and integrity of the cooperation with the relevant stakeholders. Consequently, I conclude that the redactions maintained in document 3 and 4 are justified on the basis of Article 4(1)(a) of Regulation 1049/2001.

2.2.3. Protection of the decision-making process

Article 4 (3), first subparagraph of Regulation 1049/2001 provides that:

[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Release of the redacted parts of documents 3 and 4 would seriously undermine the decision-making process protected by Article 4(3), first subparagraph of Regulation 1049/2001, as explained below.

The (parts of) documents 3 and 4 reflect policy options discussed within the Commission or between the Commission, national authorities and stakeholders about the highly sensitive issue of the ways to reduce terrorist use of the Internet and the possible public-private cooperation in this field. Both documents (the briefing for the Commissioner and the minutes following the ministerial dinner) are documents drafted by the Commission and are "*internal documents*" within the terms of Article 4(3) of Regulation 1049/2001.

As explained above, full disclosure of these documents would seriously undermine the serenity of the future discussions concerning this matter. Indeed, all the stakeholders have legitimate expectations that their preliminary ideas, plans and reflections on the possible follow-up actions are not disclosed. Public release of these elements would seriously undermine the capacity of the Internet companies, Member States and the Commission to freely exchange views concerning the terrorist use of Internet in the future and to define the scope of the public-private partnership in this field. The Commission is reflecting on this file and the decision on what follow-up actions or initiatives to be undertaken is still on-going at present.

In light of the above, I conclude that access has to be refused to the redacted parts of documents 3 and 4, as their disclosure would seriously undermine the decision-making process protected by Article 4(3), first subparagraph of Regulation 1049/2001.

2.3. Assessment of annex 3 of document 3 originating from the Dutch and the UK authorities

As part of its review, the Commission has, in accordance with Article 4(4) and (5) of Regulation 1049/2001 and Article 4(3) of the Treaty on the Functioning of the European Union, consulted the Dutch and the UK authorities at confirmatory stage on the possible disclosure of the annex 3 of document 3, of which they were the author.

In their responses of 13 February and 17 February 2015 to the Commission's consultation, both the Dutch and the UK authorities opposed the disclosure of the document in full, as the disclosure of the draft guiding principles would undermine the protection of the commercial interest of the social media companies, notably in relation to staff numbers/training required within the social media companies. The Dutch authorities argued that the disclosure of the document would undermine the public security, as it might reveal weaknesses in the current arrangements. Full disclosure would also undermine the decision-making process protected under Article 4(3) of Regulation 1049/2001 as the disclosure of the draft guiding principles would jeopardise the further engagements with the social media companies in this field or in other cases. Finally, both the Dutch and the UK authorities argued that there is no overriding public interest in disclosure in this case due to the sensitivity of the nature of the subject matter of the guiding principles.

The Dutch and the UK authorities have thus opposed disclosure of the abovementioned document and have provided reasons put forward in terms of exceptions set out in Article 4 of Regulation 1049/2001, namely the protection of public security, the protection of the decision-making process and the protection of commercial interest.

The Commission, following a *prima facie* assessment of the Dutch and the UK authorities' reasons for refusal in accordance with the findings of the Court of Justice in Case C-135/10 P⁶, considers these reasons to be *prima facie* applicable, at least in so far as the exception pertaining to the protection of public security is concerned. The considerations put forward in section 2.2 of the present decision apply to this document as well. Indeed, revealing the content of the on-going dialogue between the governments and the social media companies as regards the response to the terrorist use of their platforms is premature at present and there is a real and non-hypothetical risk that the social media companies will no longer be willing to cooperate with the governments in order to finalise the possible response to the terrorists' and extremists' use of their platforms, which would in turn greatly undermine attempts to limit the terrorist use of the Internet and jeopardise public security at large.

Consequently, the Commission has to refuse access to annex 3 of document 3 at this point in time.

⁶ Judgment of 21 June 2012 in Case C-135/11 P, *IFAW v Commission*, not yet reported, at paras. 62-65.

This position is also in line with the judgment of 18 December 2007⁷ of the Court of Justice, which states that if a Member State opposes disclosure of a document originating from that State and provides reasons put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation 1049/2001, the Commission is obliged to refuse disclosure.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(a), first hyphen and Article 4(1)(b) and of Regulation 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

The exception laid down in Article 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

I have carefully assessed the public interest in obtaining full access to the documents concerned. I reiterate in this regard that a wide partial access to documents 3 and 4 has been granted. I recall further that in the interest of transparency, a press-release was issued after the event and provided to you in reply to your initial request. This press-released specified that:

The participants discussed various possible ways of addressing the challenge. It was agreed to organise a series of joint training and awareness raising workshops for the representatives of the law enforcement authorities, Internet industry and civil society.

I do not consider that the interest in granting full access to the concerned documents is such that it justifies disregarding the harm to the decision-making process that would be caused, as explained above. The public interest in this case is rather to protect the on-going decision-making process. I note that you have also not put forward any arguments justifying the existence of an overriding public interest in disclosure in this particular case.

In these circumstances, I have to conclude that there is no evidence of an overriding public interest in disclosure, in the sense of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, partial access is granted to document 2 (subject to redaction of certain personal data only) and to documents 3 and 4.

⁷ Judgment of 18 December 2007 in Case C-64/05 P, *Sweden v Commission*, ECR I-11389, at para. 90.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a stylized flourish at the end.

Catherine Day

Enclosures: Document 1 (full access), documents 2-4 (partial access).