



EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION and HOME AFFAIRS

The Director-General

Brussels,

By registered letter with acknowledgment of receipt

Joe McNamee
European Digital Rights
Rue Belliard 20
1040 Bruxelles
Belgium

Advance copy by email: joe@mcnamee.eu

Subject: Your application for access to documents – Ref GestDem No 2018/435

Dear Mr McNamee,

We refer to your e-mail dated 18/01/2018 in which you make a request for access to documents, registered on 19/01/2018 under the above mentioned reference number.

You request access to the following documents [numbering added for easier reference]:

[1]- all communications (including emails) exchanged in October, November and December 2017 between DG HOME Unit D4 (Cybercrime) and the EU Delegation to the Council of Europe regarding the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries;

[2]- the comments sent by DG HOME to the EU Delegation to the Council of Europe on the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries;

[3]- the invitation sent to Member States to the meeting at 15h on Tuesday, 22nd November to discuss comments received from DG HOME;

[4]- any notes / minutes from the above-mentioned meeting on 22nd November prepared by the European Commission as well as input received from Member States following this meeting;

[5]- all communications in the period October to December (inclusive) between European Commission officials and Member States (individually or collectively) regarding the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries;

[6]- communications between Commission officials agreeing that the view of the Commission was that the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries was, as was apparently asserted in the invitation to the 22nd November meeting, “in stark contrast with the EU acquis”.

I note that you lodged a request for access to documents with the EEAS¹ on this same topic. I inform you that this reply relates to the documents held by the Commission, Directorate General Home Affairs and Migration (DG HOME) and does not deal with the documents originating from the EEAS on this matter. You will receive a separate reply from the EEAS pertaining to your request lodged with the EEAS.

Your application concerns the following documents:

[1]- all communications (including emails) exchanged in October, November and December 2017 between DG HOME Unit D4 (Cybercrime) and the EU Delegation to the Council of Europe regarding the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries;

A list of the documents originating from the Commission (DG HOME Unit D4) is included in the Annex. Document 1.2 contains document 2.1 as an attachment. Document 1.6 contains document 2.2 as an attachment. Access to documents 2.1 and 2.2 is dealt with under a different section.

With regard to the Commission's own documents, having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I come to the following conclusions:

Full disclosure, taking account of the protection of personal data

Disclosure of document 1.3 can be granted. As you agreed in your request to any necessary redactions for the protection of privacy according to Art. 4 (1)(b) of Regulation (EC) No 1049/2001, those redactions have been made, in line with the applicable legislation in this field (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)².

Partial access

Having examined the documents No. 1.1, 1.2, 1.5 and 1.6, requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the conclusion that they may be partially disclosed. As you agreed to any necessary redactions for the protection of privacy according to Art. 4 (1)(b) of Regulation (EC) No 1049/2001, those redactions have been made, in the same way as for document 1.3.

Some parts of these documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

The redacted parts of these documents contain informal sharing of information and views by officials of the European Commission (DG HOME) with officials of the EEAS (EU Delegation in Strasbourg) on the content of the draft recommendation, its impact on the Union's legislation and policies in the areas of fighting child sexual exploitation and

¹ EEAS reference number of case: 2018/027

² Official Journal L 8 of 12.1.2001, p. 1

terrorist propaganda online and on strategy and steps to take in order to coordinate the positions of Member States in the Council of Europe, taking into account the process leading to its adoption.

Disclosure of the redacted parts of these documents would seriously undermine the protection of the decision-making process of the Commission. In fact, it would reveal preliminary views and strategy options which were being considered. Commission officials must be free to exchange information and share views in order to explore all possible options in preparation of a policy decision free from external pressure. The possibility of expressing views independently and to gather information with a view to contributing to the smooth running of the decision-making process must be protected. Disclosure of such exchanges of information and views of staff, even after a decision has been taken, would seriously undermine the institutions' decision-making process, as it would deter staff from making such remarks independently and without being unduly influenced by the prospect of wide disclosure exposing the institution and services to which the civil servants belong. This reasoning extends to working contacts between officials in the Commission and in the EEAS with regard to a file that is being handled jointly and in full sincere cooperation. Discussions among colleagues from the two institutions and informal exchanges and updates on developments are of the essence for a proper exercise of the Union's external action. Therefore the exception laid down in Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 applies to these documents.

The exceptions laid down in Article 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents.

We have examined whether there could be an overriding public interest in disclosure, but we have not been able to identify such an interest, for the same reasons as above explained.

Disclosure of redacted parts of document No. 1.2 would also undermine the protection of the public interest as regards public security. This document contains information about sensitive issues which could undermine the effectiveness of the EU policies in the fight against child sexual abuse and terrorist propaganda online. The public dissemination of those elements and the underlying analysis may be used by certain actors whose cooperation is key in those policies to adopt positions that would be detrimental to achieving effective results. Therefore the exception laid down in Article 4(1) first subparagraph of Regulation (EC) No 1049/2001 applies to this document.

Refusal

Having examined the document No. 1.4 requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I regret to inform you that your application cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

The document which you seek to obtain is a message containing informal sharing of information and views by officials of the European Commission (DG HOME) with officials of the EEAS (EU Delegation in Strasbourg) on the strategy and steps adopted in order to coordinate the positions of Member States in the Council of Europe on the draft recommendation, taking into account the process leading to its adoption.

For similar reasons as explained above for documents 1.1, 1.2, 1.5 and 1.6, disclosure of this document requested would seriously undermine the protection of the decision-making

process of the Commission. Therefore the exception laid down in Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 applies to this document.

The exceptions laid down in Article 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents.

We have examined whether there could be an overriding public interest in disclosure, but we have not been able to identify such an interest, for the same reasons as above explained.

We have considered whether partial access could be granted to the document. However, our assessment is that it is not possible to grant access to an expunged version of the document, as the remaining parts after expunging the confidential information might be meaningless or illegible.

[2]- the comments sent by DG HOME to the EU Delegation to the Council of Europe on the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries;

A list of the documents is included in the Annex (No. 2.1 and 2.2).

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I regret to inform you that your application cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

Document No. 2.1 contains the analysis and views of a Commission official on the text of the Recommendation. Document No. 2.2 contains the position of Commission's DG HOME on the text of the Recommendation, commenting the text and including suggestions for possible changes. Both documents refer to the impact of the draft Recommendation of the Committee of Ministers of the Council of Europe to Member States on the roles and responsibilities of internet intermediaries, especially on the Union's legislation and policies in the areas of fighting child sexual exploitation and terrorist propaganda online.

Document 2.1 has been included as an attachment to document 1.2 and document 3.1, and a document substantially identical to it has been included as an attachment to document 3.8. Document 2.2 has been included as an attachment to document 1.6.

For similar reasons as explained for redacted parts of documents No. 1.1, 1.2, 1.5, 1.6 and 3.1, as well as for the refusal to access documents 1.4 and 3.8, disclosure of the documents 2.1 and 2.2 requested would seriously undermine the protection of the decision-making process of the Commission.

Therefore the exception laid down in Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 applies to these documents.

The exceptions laid down in Article 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents.

We have examined whether there could be an overriding public interest in disclosure, but we have not been able to identify such an interest, for the same reasons as above explained.

Disclosure of these documents requested would also undermine the protection of the public interest as regards public security. For similar reasons as explained for redacted parts of documents No. 1.2, and 3.1 and for document No. 3.8, the exception laid down in Article

4(1) (a) first subparagraph of Regulation (EC) No 1049/2001 therefore applies to these documents.

We have considered whether partial access could be granted to the documents requested. However, our assessment is that it is not possible to grant access to an expunged version of the documents. The remaining parts after expunging the confidential information would consist in the Council of Europe's draft recommendation, and it would be pointless to provide it to you since you participated in person in the work of the Council of Europe Committee of Experts that drafted it and therefore can be considered to be fully aware of the document³.

[3]- the invitation sent to Member States to the meeting at 15h on Tuesday, 22nd November to discuss comments received from DG HOME; and

[4]- any notes / minutes from the above-mentioned meeting on 22nd November prepared by the European Commission as well as input received from Member States following this meeting;

DG HOME did not organise that meeting nor participated in it. It did not receive input from Member States. We therefore regret to inform you that the Commission does not hold any documents that would correspond to the description given in your application.

As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

Given that no such documents, corresponding to the description given in your application, are held by the Commission, the Commission is not in a position to handle points 3 and 4 of your request.

[5]- all communications in the period October to December (inclusive) between European Commission officials and Member States (individually or collectively) regarding the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries;

A list of the documents is included in the Annex. Document 3.1 and document 3.8 contain document 2.1 as an attachment. Access to document 2.1 is dealt with under a different section.

Documents 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 3.7, which you seek to obtain, are messages containing informal sharing of information and views between officials of the Estonia Presidency of the Council of the EU and officials of the European Commission (DG HOME) on the content of the draft recommendation, its impact on the Union's legislation and policies in the areas of fighting child sexual exploitation and terrorist propaganda online, on the process leading to its adoption at the relevant committee of the Council of Europe and on the actions to be taken to help EU Member States coordinate their positions. Document No. 3.8 contains the analysis and views of a Commission official in the context of an exchange of information between a member of the Board and the secretariat of the *WeProtect Global Alliance to End Child Sexual Exploitation online*. It refers to the impact

³ Committee of experts on Internet Intermediaries; Meeting report of 2nd meeting (29-30 September 2016), <https://rm.coe.int/16806f6ec1>; Meeting report of 3rd meeting (27-28 March 2017), <https://rm.coe.int/168070b74f>; Meeting report of 3rd meeting (6 October 2017), <https://rm.coe.int/msi-net-4th-meeting-18-19-september-2017/168075f8e9>.

of the draft Recommendation of the Council of Europe on the *WeProtect Global Alliance*'s activities and goals to promote national and global action to end the sexual exploitation of children online, and to possible course of action.

Documents originating from the Estonia Presidency

Since documents No. 3.2, 3.4 and 3.5 originate from an official at the Estonia Presidency of the Council, that Member State as originator of the documents has been consulted and accepted to disclose the documents.

Disclosure of these documents can be granted. As you agreed in your request to any necessary redactions for the protection of privacy according to Art. 4 (1)(b) of Regulation (EC) No 1049/2001, those redactions have been made, in the same way as for documents referred to above for which a similar reasoning applies.

Commission Documents

With regard to the Commission's own documents, having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I come to the following conclusions:

Full disclosure, taking account of the protection of personal data

Disclosure of documents 3.3 and 3.6 can be granted. As you agreed to any necessary redactions for the protection of privacy according to Art. 4 (1)(b) of Regulation (EC) No 1049/2001, those redactions have been made, in the same way as for documents referred to above for which a similar reasoning applies.

Partial access

Having examined the documents No. 3.1 and 3.7, requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the conclusion that they may be partially disclosed.

As you agreed to any necessary redactions for the protection of privacy according to Art. 4 (1)(b) of Regulation (EC) No 1049/2001, those redactions have been made, in the same way as for documents referred to above for which a similar reasoning applies.

Some parts of these documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

The redacted parts of the documents which you seek to containing informal sharing of information and views by officials of the European Commission (DG HOME) with officials of the Estonian Presidency of the Council of the EU on the content of the draft recommendation, its impact on the Union's legislation and policies in the areas of fighting child sexual exploitation and terrorist propaganda online and on strategy and steps to take in order to coordinate the positions of Member States in the Council of Europe, taking into account the process leading to its adoption.

Disclosure of the redacted parts in the documents requested would seriously undermine the protection of the decision-making process of the Commission. The reasons explained above for documents 1.1, 1.2, 1.5 and 1.6 extend to working contacts between officials in the Commission and in the Presidency of the Council with regard to a file that is being handled in cooperation and where discussions among officials involved and informal exchanges and

updates on developments are of the essence for the proper exercise of the Union's internal and external competencies. Therefore, the exception laid down in Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 applies to these documents.

The exceptions laid down in Article 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents.

We have examined whether there could be an overriding public interest in disclosure, but we have not been able to identify such an interest, for the same reasons as above explained.

Disclosure of redacted parts of document requested No. 3.1 would also undermine the protection of the public interest as regards public security. For similar reasons as explained for redacted parts of documents No. 1.2, 3.1, 3.8, and for documents 2.1 and 2.2, the exception laid down in Article 4(1) (a) first subparagraph of Regulation (EC) No 1049/2001 therefore applies to these documents.

Disclosure of redacted parts in document No. 3.7 would also undermine the protection of the public interest as regards international relations. The message contains information that reveal the behaviour and views of EU Member States in their coordination at the Council of Europe, involving negotiations in the framework of an international organisation. Establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise. The disclosure of such information would undermine the mutual trust among Member States and the Commission to explore different possibilities to ensure the protection of the interests of the EU and its Member States..

Therefore the exception laid down in Article 4(1) third subparagraph of Regulation (EC) No 1049/2001 applies to redacted parts of these documents.

Refusal

Having examined the document No. 3.8 requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I regret to inform you that your application cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

Disclosure of document No. 3.8 would undermine the protection of the public interest as regards international relations. The Commission supports the activities of the *WeProtect Global Alliance* as the entity successor to the *Global Alliance Against Child Sexual Abuse Online*, which the European Commission itself set up. The *WeProtect Global Alliance*, rallying more than 80 countries, industry and civil society organisations towards a common set of aims, is an essential element in the international dimension of EU policies to fight child sexual abuse online. The Commission participates in the activities of its Board as a member. It is essential for the proper functioning of the *WeProtect Global Alliance* work that members of the board, observers and the secretariat may exchange information and share views in matters that have an impact on the initiative's objectives in an atmosphere of trust and confidentiality. Disclosure of such exchanges of information and views would breach the expectations of confidentiality among members and would deter members from making contributions to the *WeProtect Global Alliance* discussions without being unduly influenced by the prospect of wide disclosure. This would result in a less effective functioning of the initiative, and it would harm the external relations of the EU in the pursuit of the EU's policy objectives.

Therefore the exception laid down in Article 4(1) (a) third subparagraph of Regulation (EC) No 1049/2001 applies to this document.

Disclosure of document No. 3.8 would also undermine the protection of the public interest as regards public security. The document contains information about sensitive issues which could undermine the effectiveness of the EU policies in the fight against child sexual abuse online. The activities of the *WeProtect Global Alliance* contribute to the EU's policy goals in this area. The public dissemination of those elements and the underlying analysis may be used by certain actors whose cooperation is key in those policies to adopt positions that would be detrimental to achieving effective results.

Therefore the exception laid down in Article 4(1) (a) first subparagraph of Regulation (EC) No 1049/2001 applies to this document.

We have considered whether partial access could be granted to the document/documents requested. However, our assessment is that it is not possible to grant access to an expunged version of the documents, as the remaining parts after expunging the confidential information might be meaningless or illegible.

[6]- communications between Commission officials agreeing that the view of the Commission was that the draft Recommendation of the Council of Europe on the roles and responsibilities of internet intermediaries was, as was apparently asserted in the invitation to the 22nd November meeting, “in stark contrast with the EU acquis”.

It is our understanding that you seek access to communications where Commission officials claim that 1) there was a view officially adopted by the Commission as an institution on this matter and 2) that such view of the Commission was that the draft Recommendation was ‘*in stark contrast with the EU acquis*’.

The communications retrieved between Commission officials express the views of individual officials in or the position of specific Commission services and make clear that they do not constitute a formally adopted position of the Commission. We therefore regret to inform you that the Commission does not hold any documents that would correspond to the description given in your application.

As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

Given that no such documents corresponding to the description given in your application are held by the Commission, the Commission is not in a position to handle point 6 of your request.

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,

E-signed
Paraskevi Michou