



EUROPEAN COMMISSION

Brussels, 25.5.2018
C(2018) 3372 final

Ms Julia Reda
Parlement européen
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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) NO 1049/2001¹

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - Gestdem 2018/793**

Dear Ms Reda,

I am writing in reference to your email of 20 March 2018, registered on 21 March 2018, by which you lodge a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter: 'Regulation 1049/2001').

1. SCOPE OF YOUR APPLICATION

Through your initial application of 6 February 2018, addressed to the Directorate-General for Communications Networks, Content and Technology, you requested access to the documents containing '[a]ll information concerning content ID technology, especially the kind of content ID technology (also referred to as "content recognition" or similar) that is referenced in article 13 of the proposed directive on Copyright in the Digital Single Market.'

In your application you explained that your application covered 'information such as correspondence, meeting protocols, briefings, notes, drafts, emails and recordings about meetings with, on behalf or about the companies Google, Alphabet or Youtube.' You also

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

² Official Journal L 145, 31.05.2001 p.43

specified that '[t]he wording "on behalf of" should include companies that consult for any of these companies or associations in which any of these companies are a member.'

Finally you underlined that, when handling your application, the European Commission should not 'discard from [your] request information that is currently not registered, filed or archived or information that is currently not considered "important" for registration, filing and archiving and specified that intra-Commission information [is] to be included in [your] request.'

The European Commission has identified the following documents, as falling under the scope of your application:

- *Powerpoint* Presentation by Audible Magic dated 11 July 2016, reference: Ares(2017)4595074 (hereafter: 'document 1').
- Presentation by Audible Magic: Content Recognition Technology, reference: Ares(2017)312988 (hereafter: 'document 2').
- Document - Audible Magic Services Description, reference: Ares(2017)4595115 (hereafter: 'document 3').
- Email from Mike Edwards to the Directorate-General for Communications Networks, Content and Technology, dated 7 April 2016 and attachment (PowerPoint Presentation), reference: Ares(2017)4053880 (hereafter: 'document 4').
- Email from Mike Edwards to the Directorate-General for Communications Networks, Content and Technology, dated 7 April 2016 and attachment (Reply to the Copyright office), reference: Ares(2017)4053919 (hereafter: 'document 5').
- Email from Mike Edwards to the Directorate-General for Communications Networks, Content and Technology, dated 12 January 2017, reference: Ares(2017)4054021 (hereafter: 'document 6').
- Email from Mike Edwards to the Cabinet of Commissioner Ansip dated 29 June 2017 and attachments (Presentation on Content Recognition Technology; Audible Magic-content recognition technology), reference: Ares(2017)3257224 (hereafter: 'document 7').
- Document provided by Google – Comments on the development of the joint strategic plan on intellectual property enforcement, reference: Ares(2018)1381117 (hereafter: 'document 8').
- Document provided by Google entitled 'How Google fights piracy 2016', reference: Ares(2018)1381255 (hereafter: 'document 9').
- Document provided by Google during presentation held in 2015, reference: Ares(2018)1381336 (hereafter: 'document 10').
- Presentation of Blue Efficiency at the European Parliament on 29 November 2016, reference: Ares(2018)1373424 (hereafter: 'document 11').

- Mission report, Mission to Silicon Valley, United States of 19-23 June 2017, reference: Ares(2017)4594818 (hereafter: 'document 12').
- Email sent by 'Institute National de l'Audiovisuel' to the Directorate-General for Communications Networks, Content and Technology, dated 29 June 2016 and attachments, reference: Ares(2018)1363857 (hereafter: 'document 13').
- Report from the meeting with Soundcloud on 8 February 2017, reference: Ares(2018)1363792 (hereafter: 'document 14').
- Report from the meeting with Youtube on 22 September 2015, reference: Ares(2018)1363810 (hereafter: 'document 15').
- Report from the meeting with Google - Cabinet Gabriel on 24 November 2017, reference: Ares(2018)1363816 (hereafter: 'document 16').
- Report from the meeting with Facebook on 27 September 2017, reference: Ares(2018)1363826 (hereafter: 'document 17').
- Report from the meeting with Facebook on 12 May 2016, reference: Ares(2018)1371708 (hereafter: 'document 18').
- Email from Mike Edwards to the Directorate-General for Communications Networks, Content and Technology, dated 18 July 2016 and attachment (Audible Magic follow-up notes on meeting with Cabinet of Commissioner Ansip), reference: Ares(2017)4053973 (hereafter: 'document 19').

In its initial reply of 20 March 2018, the Directorate-General for Communications Networks, Content and Technology granted wide partial access to documents 1 – 11, with personal data redacted on the basis of the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001.

It also granted partial access to documents 12 – 18 with the following information withheld:

- information constituting personal data was redacted on the basis of the above-mentioned exception in Article 4(1)(b) of Regulation 1049/2001;
- the relevant parts of documents 12, 13 and 16 were redacted based on the exception protecting commercial interests provided for in the first indent of Article 4(2) of the said Regulation;
- information in documents 14 - 18 unrelated to the subject matter of your initial application and therefore it was redacted as falling outside its scope.

With regard to document 19, the Directorate-General for Communications Networks, Content and Technology refused access to it, based on the exception protecting commercial interests provided for in the first indent of Article 4(2) of Regulation 1049/2001.

In its assessment of the case, the Directorate-General for Communications Networks, Content and Technology took into account the position of third parties from which the

documents concerned originate, which it had consulted, in line with the provisions of Article 4(4) of Regulation 1049/2001.

Through your confirmatory application, you request a review of this position.

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 my review, I am pleased to inform you that further partial access is granted to document 13, partially disclosed at the initial stage. The parts of the above-mentioned document which remain withheld contain sensitive business information and require protection under the exception provided for in first indent of Article 4(2) of Regulation 1049/2001 (protection of commercial interests of a natural or legal person).

In the above-mentioned assessment, I took into account the opinion of the originator of the document concerned, who was re-consulted at confirmatory stage in line with the provisions of Article 4(4) of Regulation 1049/2001.

With regard to the remaining documents, I have to confirm the decision of the Directorate-General for Communications Networks, Content and Technology to withhold access from the relevant parts of documents 1 – 18 and to refuse access to document 19, based on the exceptions protecting:

- privacy and the integrity of the individual (Article 4(1)(b) of Regulation 1049/2001), in so far as the relevant parts of documents 1 – 19 are concerned,
- commercial interests of a natural or a legal person (Article 4(2), first indent of Regulation 1049/2001), in so far as the relevant parts of documents 12, 13 and 16, as well as the entirety of document 19 are concerned.

The detailed reasons are set out below.

Additionally, the relevant parts of documents 14 – 18, containing information unrelated to the subject matter of your initial application, were redacted as falling outside its scope.

2.1 Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

The relevant undisclosed parts of documents 1 – 18 and document 19 contain the names, surnames and contact details (email address) of staff members of the European Commission

not holding any senior management position. They also contain the names, surnames and descriptions of the functions of third-party representatives.

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, which defines it as ‘any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity’.

It follows that public disclosure of all above-mentioned personal information, would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling³, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, 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 cumulative⁴.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁵. Indeed, in the recent judgment in the *ClientEarth* case, the Court of Justice ruled that ‘whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access’⁶. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data⁷.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data included in documents 1 - 19.

³ Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraph 63.

⁴ Ibid, paragraphs 77-78.

⁵ Ibid.

⁶ Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

⁷ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in documents 1 - 19 cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

2.2 Protection of commercial interests of a natural or legal person

Article 4(2), first indent of Regulation 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...], unless there is an overriding public interest in disclosure'.

Although in your confirmatory application, as mentioned in part 1 of this decision, you do not provide any argumentation to question the applicability of the above-mentioned exception to undisclosed parts of document 12, 13 and 16 and withheld document 19, I would like to provide additional explanations on how the disclosure of the (parts of) documents in question would undermine the interests protected by this exception.

Document 12 is a mission report regarding a meeting with the representative of the company Audible Magic. The undisclosed parts of that document include contain information regarding price profiles and types of clients to which the above-mentioned company applies them. It also includes the names of clients, together with the geographical area in which they operate.

Document 13 is a presentation concerning products (services) offered by 'Institut National de l'Audiovisuel'. The undisclosed information included therein relate to prices of the products (services), profiles and names of the clients, as well as the components of the business planning.

Document 16 is a 'back to the office'⁸ report from a meeting with Google. The information redacted includes the name of an economic operator together with the description of its business behaviour and tactics.

Document 19 contains summary notes from a meeting of the representatives of the company Audible Magic with the Cabinet of Vice-President Ansip. The document includes information similar to (but more detailed than) that included in the undisclosed parts of document 12, as well as information relating to the technology developed and offered by Audible Magic and considerations concerning future development of this technology in the context of the policy changes.

The above-mentioned information has to be considered as commercially sensitive business information of the economic operators in question (Audible Magic and 'Institut National de l'Audiovisuel').

⁸ Document containing short notes from the meeting.

Its disclosure, through the public release of document 19 and the undisclosed parts of documents 12, 13 and 16 under Regulation 1049/2001, would clearly undermine the commercial interests of the economic operators in question. It can be presumed that the latter provided the commercially sensitive information contained in the documents under the legitimate expectation that it would not be publically released. Furthermore, Audible Magic provided its document (document 19) to the European Commission with the explicit confidentiality clause.

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators in question. I conclude, therefore, that access to document 19 and the undisclosed parts of documents 12 and 13, must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

3. PARTIAL ACCESS

The Directorate-General for Communications Networks, Content and Technology granted partial access to documents 12, 13 and 16. Further partial access is herewith granted to document 13

I have also examined the possibility of granting partial access to documents 19 in accordance with Article 4(6) of Regulation 1049/2001. However, partial access is not possible, given that the document concerned is covered in its entirety by the exception provided for in the first indent of Article 4(2) of Regulation 1049/2001, in the sense that even the minimum meaningful partial access would risk to reveal commercially sensitive business information.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) 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.

In your confirmatory application, you do not refer to any particular overriding public interest that would warrant public disclosure of documents 19 and the withheld parts of documents 12 and 13.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial interests of the economic operators grounded in the first indent of Article 4(2) of Regulation 1049/2001.

The fact that the document requested was not drafted in the framework of the European Commission's legislative activities, for which the Court of Justice has acknowledged the existence of wider openness⁹, provides further support to this conclusion.

5. MEANS OF REDRESS

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,



For the Commission
Martin SELMAYR
Secretary-General

⁹ Judgment of 29 June 2010, in Case *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, (ECLI: EU:C:2010:376), paragraph 60.