



EUROPEAN COMMISSION

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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 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2018/1767**

Dear Ms Reda,

I refer to your e-mail of 24 May 2018, by 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 documents ('Regulation (EC) No 1049/2001')<sup>2</sup>.

**1. SCOPE OF YOUR REQUEST**

In your initial application of 23 March 2018, dealt with by the Legal Service, you requested access to 'the opinion written by the Legal Service on the Commission proposal for a directive on Copyright in the Digital Single Market and in particular Article 11 of this Directive'.

At the initial stage, the European Commission identified the following documents as falling under the scope of your request:

- 1) Note of the Legal Service to the Head of Cabinet of the Vice-President of the European Commission of 21 June 2016: Legal concerns with 'clarifying' the

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

notion of communication to the public (registered under Ares(2018)2882089, document 1);

- 2) Note of the Legal Service to the Director General of the Directorate-General for Communications Networks, Content and Technology of 30 August 2016: Copyright Reform - Fast-Track Consultation ĪSC/2016/04250 from the Directorate-General for Communications Networks, Content and Technology [registered under Ares(2016)4876233, document 2] and
- 3) Legal Service comments of 21 June 2016 on the Draft Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (document 3).

In its initial reply of 24 May 2018, the Legal Service refused access to document 1 and to parts of documents 2 and 3, based on the exceptions provided for in Article 4(2), second indent (protection of court proceedings and legal advice), Article 4(3), first and second subparagraphs (protection of the decision-making process) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

Through your confirmatory application you ask for a review of the initial position.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 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 or service concerned at the initial stage.

Having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I regret to inform you that the refusal to grant access to document 1 has to be confirmed and no further access is granted to documents 2 and 3. The withheld (parts of the) documents fall under the exceptions of Article 4(3), first and second subparagraphs (protection of the decision-making process), Article 4(2), second indent (protection of the legal advice) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

### **2.1. Protection of legal advice and of the decision-making process**

Article 4(2), second indent of Regulation (EC) No 1049/2001 provides that ‘the institutions shall refuse access to a document where disclosure would undermine the protection of: [...] legal advice [...] unless there is an overriding public interest in disclosure.’

Article 4(3) of Regulation (EC) No 1049/2001 provides that ‘access 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.

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.'

In its judgment in Case T-84/03, the Court of First Instance<sup>3</sup> underlined that the exception provided for in Article 4(2), second indent, protects two distinct interests: court proceedings and legal advice<sup>4</sup>. In the case at hand, the refusal of access to the documents concerned is based on a need to protect legal advice.

It needs to be recalled that the concept of 'legal advice', as well as the applicability of the exception protecting it, was interpreted by the case law of EU Court. Indeed, in its judgment in Case T-755/14, the General Court took the position that legal advice is 'advice relating to a legal issue, regardless of the way in which that advice is given'<sup>5</sup>.

In the above-mentioned judgment, the General Court also explicitly underlined that 'it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late or final stage of the decision-making process'<sup>6</sup>. Furthermore, according to the General Court's reasoning 'there is nothing in the wording of the second indent of Article 4(2) of Regulation (EC) No 1049/2001 to support the conclusion that that provision concerns only advice provided or received internally by an institution'<sup>7</sup>.

Document 1 is a Note of the Legal Service containing a legal opinion on the notion of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC<sup>8</sup>. More specifically, the note contains an analysis of legal issues arising from the relationship between copyright holders and online platforms, in view of the pending proposal, thereby revealing the position of the Legal Service on the relevant suggested provision. The notion of communication to the public is extremely delicate, having been formed through international agreements and extensive case law. In view of the suggested provision concerning the notion of communication, the Legal Service has assessed the possible consequences of that specific provision, an analysis which will have to be taken into account in the course of the pending discussions.

Document 2 is a Note of the Legal Service which contains a concrete assessment by the Legal Service of various aspects of the draft Directive, in the light of the possible legal basis of the Directive and taking also into account the established principles on the Union copyright law. More specifically, several provisions are analysed in detail as to their

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<sup>3</sup> Currently: the General Court.

<sup>4</sup> Judgment of 23 November 2004, *Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

<sup>5</sup> Judgment of 15 September 2016, *Herbert Smith Freehills v European Commission*, T-755/14, EU:T:2016:482, paragraph 47.

<sup>6</sup> *Idem*.

<sup>7</sup> *Idem*, paragraph 48.

<sup>8</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167/10 of 22.6.2001, p. 10.

possible meaning and consequences within the framework of European Union copyright law, and suggestions are made for consideration when deciding on the adoption of the Directive.

Document 3 is an attachment to document 2, reflecting Legal Service comments in the form of ‘track changes’ on the Draft Proposal for a Directive.

The Digital Single Market Strategy<sup>9</sup>, adopted by the European Commission on 6 May 2015, sets out the main elements of the modernisation of the EU copyright rules. On 9 December 2015, the European Commission adopted, on the one hand, a Communication towards a modern, more European copyright framework<sup>10</sup>, which details the next steps in this regard, including possible legislative proposals and timelines. On the other hand, the European Commission adopted on the same day a proposal for a Regulation on cross-border portability of online content services, adopted by the co-legislators on 14 June 2017<sup>11</sup>.

In the framework of the Digital Single Market Strategy, the European Commission adopted on 14 September 2016 a set of proposals for legislative measures, called the ‘copyright second legislative package’, including the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market<sup>12</sup>.

Full disclosure of the requested documents would prejudice the capacity of the Legal Service to impartially assist the European Commission, depriving, thereby, the institution of an essential element in the process of taking sound decisions. It would also harm the ongoing decision-making process regarding the adoption of the Commission's proposed Directive for the modernisation of EU copyright rules, more specifically by revealing the different preliminary assessments considered before tabling the legislative proposal.

Furthermore, the above-mentioned documents contain purely internal legal opinions in matters of a sensitive nature, drafted under the responsibility of the Legal Service. Disclosure of (the redacted parts of) the requested documents would undermine the protection of legal advice provided for under article 4(2), second indent, of Regulation (EC) No 1049/2001. As recognised by the Court of Justice, the latter exception must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice<sup>13</sup>. Document 1 and the redacted parts of documents 2 and 3 relate to sensitive issues like the introduction of a new related right in favour of press publishers and the adaptation of certain exceptions and limitations in the copyright *acquis*.

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<sup>9</sup> <http://ec.europa.eu/priorities/digital-single-market/>.

<sup>10</sup> [http://europa.eu/rapid/press-release\\_IP-15-6261\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6261_en.htm).

<sup>11</sup> Regulation (EU) No 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Official Journal L 168, 30.06.2017, p. 1).

<sup>12</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)0593 final.

<sup>13</sup> Judgment of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.

Therefore, their disclosure would prejudice the Legal Service's capacity to impartially assist the European Commission and its services on this sensitive subject as well as the European Commission's interest in seeking and receiving frank, objective and comprehensive legal advice depriving, thereby, the institution of an essential element in the process of taking sound decisions.

The European Court, in its *ClientEarth*<sup>14</sup> and *AccessEuropeInfo*<sup>15</sup> judgments, acknowledged that there may be a need for the European Commission to protect internal reflections on the possible policy options available to the institutions in the phase preceding the (interinstitutional) legislative procedure. There is a concrete risk that disclosing the information at this stage would affect the European Commission's ability to defend its proposals during the ongoing negotiations with the European Parliament and the Council.

In the alternative, even if one were to consider that Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 no longer applies as the European Commission has put forward its proposals and, hence, the decision-making process has been closed (which is not the case), I take the view that for the reasons explained below, the opinions which are reflected in the documents requested are covered by the exception of Article 4(3), second subparagraph of Regulation (EC) No 1049/2001, as their disclosure would seriously harm the decision-making process of the European Commission even after these proposals have been adopted.

Given the sensitivity of the subject matter and the various interests involved (e.g. those of right holders and information society service providers), the European Commission would be deprived of its ability to defend its proposal throughout the legislative procedure if these documents were to be released. The European Commission might indeed be called upon to adapt certain aspect of its proposals in the current legislative negotiations and take into account options which were considered but not retained in its proposals.

Premature disclosure, at this stage, of the documents forming part of the ongoing decision-making process would prejudice the institution's margin of manoeuvre and severely reduce its capacity to foster compromises, which is essential in an area by which several important Commission policies and competences are affected (for example information and communication policies, internal market, competition policy and other similar areas).

Furthermore, the dissemination of preliminary and obsolete positions of the European Commission preceding the interinstitutional decision-making process would risk confusing the public and stakeholders rather than providing clarity on the options available. Such preliminary options which were not retained in the European Commission's proposals might indeed be subject to further interinstitutional negotiations.

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<sup>14</sup> Judgment of 13 November 2015, *ClientEarth v European Commission*, T-424/14 and T-425/14, EU:T:2015:848, paragraphs 100 to 105.

<sup>15</sup> Judgment of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671.

The European Commission would also be exposed to undue external pressure in case of premature disclosure. A complete release of the documents at this stage would indeed disseminate preliminary, internal conclusions into the public domain. The risk of such external pressure is real and non-hypothetical, given the specific and fundamental interest of right holders associations of the different content sectors as well as information society service providers involved in the issue to obtain an outcome which is favourable to them. This could create unjustified and disproportionate reactions which would render the negotiations more difficult.

The sensitive nature of the matters at stake, such as the introduction measures for the use of protected content by information society service providers, provides further support to the conclusion that certain preliminary assessments and positions must be protected in order to shield the institutions' internal assessment against any outside pressure and premature conclusions, by the public, until the final decisions are taken on the copyright legislative package, including the adoption of the Directive<sup>16</sup>.

In light of the foregoing, access to the redacted (parts of the) requested documents is refused based on the exception of Article 4(3), first and second subparagraphs (protection of the decision-making process) and of Article 4(2), second indent (protection of legal advice) of Regulation (EC) No 1049/2001.

## **2.2. Protection of privacy and the integrity of the individual**

According to Article 4(1)(b) of Regulation (EC) No 1049/2001 'the institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.'

In accordance with this exception, the names and personal details of the Commission's officials not having a senior management position, as well as all handwritten signatures have been redacted from documents 1 and 2.

These data undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation (EC) No 45/2001<sup>17</sup>, which defines personal data 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.'

In consequence, public disclosure of these data in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation (EC) No 45/2001.

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<sup>16</sup> Judgment of 1 July 2008, *Kingdom of Sweden & Maurizio Turco v Council of the European Union*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69; judgment of 15 September 2016, *Philip Morris v European Commission*, T-796/14 and T-800/14, EU:T:2016:487.

<sup>17</sup> 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, p. 1.

In accordance with the *Bavarian Lager* ruling<sup>18</sup>, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable<sup>19</sup>. According to the Court of Justice, ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of “private life”’<sup>20</sup>. The names<sup>21</sup> of the persons concerned, as well as information from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation (EC) No 45/2001. 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 cumulative<sup>22</sup>.

Only if both conditions are fulfilled and the processing is lawful in accordance with the requirements of Article 5 of Regulation (EC) No 45/2001, can the processing (transfer) of personal data occur.

I would also like to bring to your attention the recent judgment in the *ClientEarth* Case, where 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’<sup>23</sup>.

I also refer 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 data<sup>24</sup>.

In this regard, I would like to stress that neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Therefore, I have to conclude that the transfer of personal data through the wider disclosure of the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 of Regulation (EC) No 45/2001.

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<sup>18</sup> Judgment of 29 June 2010, *European Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378.

<sup>19</sup> *Idem*, paragraph 63.

<sup>20</sup> Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>21</sup> Judgment in Case *European Commission v Bavarian Lager*, cited above, paragraph 68.

<sup>22</sup> *Idem*, paragraphs 77 to 78.

<sup>23</sup> Judgment of 16 July 2015, *ClientEarth and PAN Europe v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

<sup>24</sup> Judgment of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

Consequently, the use of the exception under Article 4(1)(b) of Regulation (EC) No 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.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2), second indent of Regulation (EC) No 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 put forward any reasoning pointing to an overriding public interest in disclosing the requested documents. Nor have I been able to identify any elements capable of demonstrating the existence of any possible overriding public interest in disclosing the refused elements that would outweigh the interests protected by the first and second subparagraphs of Article 4(3) (protection of the decision-making process) and Article 4(2), second indent (protection of the legal advice) of Regulation (EC) No 1049/2001.

To the contrary, as explained above the interinstitutional decision-making process is ongoing. Full disclosure of the requested documents would affect the European Commission's ability to act freely from external pressure in effectively defending the European Commission's proposal for Directive on a Digital Single Market. I therefore consider that such disclosure would be contrary to the public interest in protecting the European Commission decision-making process. Furthermore, I assure you that the European Commission interpreted and applied the exceptions of Article 4 of Regulation (EC) No 1049/2001 strictly, which results in partial access to the requested documents at the initial stage.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the protection of the decision-making process and the legal advice, based on Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001 and Article 4(2), second indent of Regulation (EC) No 1049/2001

Please note that the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting wider partial access to documents 2 and 3. However, for the reasons explained above, no meaningful wider access is possible without undermining the interests described above.



With regards to the remaining document 1, partial access is not possible without undermining the interests described above.

Consequently, I have come to the conclusion that (parts of) the documents requested are covered by the invoked exceptions to the right of public access.

## **5. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision. You may either bring proceedings before the General Court or file a complaint with the European 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*