



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND
TECHNOLOGY

The Director-General

Brussels, 23rd April 2019
CONNECT/R4

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REGISTERED LETTER WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Your application for access to documents – GestDem 2019/0866

Dear Ms Fiedler,

We refer to your e-mail dated 14/02/2019 in which you make a request for access to documents, registered on the same day under the above-mentioned reference number. We also refer to our email dated 05/03/2019, our reference Ares(2019)1493885, whereby we informed you that the time limit for handling your application was extended by 15 working days pursuant to Article 7(3) of Regulation (EC) No 1049/2001 on public access to documents (hereinafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR APPLICATION

In your application, you requested:

“- all communication sent to and received from Members States and their National Regulatory Authorities to prepare the implementation report of the Regulation (EU) 2015/2120 (Open Internet Regulation) which is due on 30 April 2019

- all communication sent to and received from Member States and National Regulatory Authorities to follow upon annual reporting obligations under the Regulation (EU) 2015/2120 (Open Internet Regulation).”

2. EXPLANATIONS ABOUT THE CONTEXT

As of principle, the national regulatory authorities provide their reports to the Body of European Regulators for Electronic Communications (BEREC). BEREC then sends the country reports to the European Commission for publication on the following website:

<https://ec.europa.eu/digital-single-market/en/news/annual-country-reports-open-international-regulators>

BEREC also published an Opinion on the evaluation of the application of the Open Internet Regulation, which can be accessed through the following link:

https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/8317berec-opinion-for-the-evaluation-of-the-application-of-regulation-eu-20152120-and-theberec-net-neutrality-guidelines

Please note that these documents were made available to the Commission by BEREC. They are disclosed for information only. They do not reflect the position of the Commission and cannot be quoted as such.

Follow-up discussions concerning ongoing investigations/proceedings take place in the framework of BEREC Open Internet Expert Working Group. Therefore, we would kindly invite you to contact BEREC for any further information:

https://berec.europa.eu/eng/document_register/request_a_document/

3. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

Nevertheless, we have identified 82 documents, which are email exchanges between national regulatory authorities and an external contractor in the context of the preparation of a study report on the implementation of the Open Internet Regulation. The contractor wrote one chapter on each country and shared them with each national regulatory authority, asking them to check the facts. The European Commission was in copy of these email exchanges.

4. ASSESSMENT UNDER REGULATION 1049/2001

(i) Protection of the ongoing decision-making process

The first subparagraph of Article 4(3) of Regulation 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 institutions’ decision-making process, unless there is an overriding public interest in disclosure’.

The identified emails were sent and received in the context of the preparatory work for a study, which is not finalised yet but is supposed to be published by the end of the month. They relate to a matter where a decision has not been taken, pursuant to the first subparagraph of Article 4(3).

The study falls within the purely administrative functions of the Commission. Consequently, the interest of the public in obtaining access to a document pursuant to the principle of transparency, does not carry the same weight in the case of a document drawn up in an administrative procedure intended to establish an informative document, as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator¹.

¹ For a similar case, see Judgment of the Court of first Instance of 9 September 2008 in case T-403/05, MyTravel v Commission, para. 49

Disclosing parts of the non-finalised study could be misleading for the public, since the current conclusions of the study are not definitive.

Furthermore, disclosing the study before the publication of implementation report of the Regulation (EU) 2015/2120 (Open Internet Regulation) and so close to the due date, which is 30 April 2019, would have the effect of sending out confusing information. The content of the study could be perceived as reflecting the official position of the European Commission on the implementation of the Open Internet Directive, even though the Commission will express its position only in the implementation report due on 30 April 2019.

(ii) Protection of the privacy and integrity of the individual

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document has to be refused if its disclosure would undermine ‘the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data’.

The applicable EU legislation in this field is Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (‘Regulation 2018/1725’).

Parts of the identified documents contain personal data (names, contact details and comments) of Commission staff and third parties.

Article 3(1) of Regulation 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data².

In its judgment in Case C-28/08 P (Bavarian Lager), the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation 2018/1725 becomes fully applicable.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first

² Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, Peter Nowak v Data Protection Commissioner, request for a preliminary ruling, paragraphs 33-35

condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest.

In your request, you explicitly mention that you request access to anonymised information. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

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We have considered whether partial access could be granted to the documents requested. However, the remaining parts of the emails after having expunged the confidential information would be meaningless.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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

Insofar as the study is expected to be published soon, we have not been able to identify such an overriding public interest in disclosing the identified documents at this stage.

6. POSSIBILITY OF CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review the above positions.

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, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

(e-signed)

Roberto Viola