



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

The Director-General

Brussels,
CNECT/R4

Mr. Mathias Schindler
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REGISTERED MAIL WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Your application for access to documents – GestDem 2019/5319

Dear Mr Schindler,

We refer to your application for access to documents submitted under Article 2(1) of Regulation 1049/2001 on public access to documents (hereinafter, 'Regulation 1049/2001') received on 17/09/2019 and registered on the same day under the above-mentioned reference number. We also refer to our email dated 08/10/2019 (our reference, [Ares\(2019\)6226183](#)) whereby we, *inter alia*, informed you that the time limit for handling your application was extended by 15 working days pursuant to Article 7(3) of Regulation 1049/2001.

1. SCOPE OF YOUR APPLICATION

In your application, you requested access to the following documents:

*“*all information (including but not limited to letters, emails, email drafts, documents, notes, memoranda, studies, remarks, copies, data, files, facsimiles, drafts and records) about the notification under Directive 98/34/EC related to the German Presseverlegerleistungsschutzrecht (Achttes Gesetz zur Änderung des Urheberrechtsgesetzes dated May 7, 2013 (BGBl 2013 I Nr. 23 ,pg 1161)*

** any information (see above) related to the interpretation of Directive 98/34/EC with regards to the notification requirements in the field of copyright.*

** any information within the Commission and their staff regarding the ancillary copyright law ("Leistungsschutzrecht für Presseverleger")*

** any information concerning the recently closed ECJ case on the notification of the German Leistungsschutzrecht.”*

In your request you also refer to similar requests you filed in 2015 and in 2017 (GestDem 2015/3352 and GestDem 2019/0859) and in this regard you request that any document that was fully released in the context of these requests is excluded from the scope of the present request. You also request the full release of any document, which was not disclosed or only partially disclosed in the context of these requests given that the reasons for non-disclosure are no longer applicable.

Note that due to the wide scope of your request, covering also areas falling under the responsibility of other services and Directorates-General, parts of your request have been attributed to another service within the European Commission and to another Directorate-General¹. This reply relates only to the documents held by DG CONNECT. You have received or will receive the reply from the other service and Directorate-General in due course.

As you have been informed, DG CONNECT handles point 3 and part of point 4 of your request. In this regard, given the large number of documents falling within the scope of these parts of your request, on 08/10/2019 we contacted you with a view to finding a fair solution based on Article 6(3) of Regulation 1049/2001 (our reference, [Ares\(2019\)6226183](#)). By means of our fair solution proposal, we informed you that around 100 documents were identified as falling within the scope of your application, the majority of which have been partially disclosed to you in the context of two past access to documents requests which you have launched (GestDem 2016/0411 and GestDem 2018/0811).

Given the wide temporal and material scope of your request, you were asked to reduce it in such a way that would enable its treatment within the extended deadline of 15+15 working days by specifying the objective of your request and your specific interest in the requested documents. In case you were not in a position to specify such interest, we also proposed to restrict the scope to 24 documents ((i) 14 most recent documents and (ii) 10 documents which would need to be chosen by you from the non-disclosed or partially released documents in the context of GestDem 2016/0411 and GestDem 2018/0811 for re-assessment for possible disclosure or wider disclosure).

By means of your email of 09/10/2019, you informed us that you would like to receive the 14 most recent documents and a list of all the non-disclosed or partially disclosed documents in the context of the past requests, with an indication of the documents which can now be released. By means of an email dated 11/10/2019 (our reference, [Ares\(2019\)6298065](#)) we informed that providing an indication of the documents which can be disclosed from the earlier requests would require a re-assessment of a large number of documents and the possible need to consult third parties. We therefore invited you again to indicate the documents which are of most interest to you from the earlier requests.

Given that we did not receive a reply to our fair solution proposal, as we indicated in our email, we proceeded to unilaterally restrict the scope of your application to those parts which can be dealt with within the extended deadline.

¹ GestDem 2019/5565, DG-GROW (point 1, 2 and part of point 4 of your request); GestDem 2019/5977, Legal Service (part of point 4 of your request).

2. DOCUMENTS FALLING WITHIN THE SCOPE OF YOUR REQUESTS

As aforementioned, in the fair solution proposal we indicated that we will be identifying 24 documents within the scope of your application, as restricted. Please note that the figure of the documents identified below is slightly lower given that some of the recent documents identified for point 4 of your application will be handled by the Legal Service in the context of Gest Dem 2019/5977.

Within the statutory time limits foreseen by Regulation 1049/2001, DG CONNECT has been able to identify the following documents falling within the scope of your application:

Recent documents:

- **Document 1:** Email correspondence with stakeholder concerning ancillary copyright law in Germany dated 01/05/2018;
- **Document 2:** Email received from VG media on 18/10/2019 concerning their press release on publishers rights (including attachment);
- **Document 3:** Email correspondence with stakeholder concerning ancillary copyright law in Germany dated 04/05/2019;
- **Document 4:** DG CNECT note to Legal Service in preparation of oral hearing in case C-299/17 dated 27/09/2018;
- **Document 5:** DG CNECT note to Legal Service concerning observations in case C-299/17 dated 05/09/2017;
- **Document 6:** Stakeholder letter “Necessary Participation of EU Commission in European Court of Justice (CJEU) – Case C-299/17 dated 06/06/2017;
- **Document 7:** Email received from VG media on 12/09/2019 concerning their press release on press publishers rights (including attachment);
- **Document 8:** Mission report on oral hearing in C-299/17 of 24/10/18

Documents from past requests (GestDem 2016/0441 and GestDem 2018/0811):

- **Document 9:** Back to office report prepared for meeting between Commission Oettinger and Burda of 20/12/2016;
- **Document 10:** Back to office report prepared for meeting with ENPA and EMMA of 08/05/2017;
- **Document 11:** Briefing for meeting between Commissioner Gabriel and EMMA of 08/09/2017;
- **Document 12:** Briefing for meeting of Commissioner Gabriel with ENPA and Les Echos of 13/09/2017;
- **Document 13:** Briefing for meeting with EPC of 06/12/2017;
- **Document 14:** Briefing for meeting of Commissioner Oettinger with EMMA of 29/09/2015;
- **Document 15:** Briefing for meeting of Commissioner Oettinger with Press Publishers of 25/01/2016;
- **Document 16:** Briefing for meeting of Claire Bury with Computer and Communications industry Association of 04/02/2016;
- **Document 17:** Briefing for meeting of Commissioner Oettinger with Publishers of 09/03/2016;
- **Document 18:** Briefing for Vice President Ansip visit to Paris of 22/03/2016 (including two attachments)

3. ASSESSMENT UNDER REGULATION 1049/2001

Having examined the documents requested under the provisions of Regulation 1049/2001 regarding public access to documents and taking into account the third parties' opinion, we have come to the conclusion that some of them may be fully disclosed, some will be partially disclosed and disclosure will be refused for a number of documents.

For the documents which will be partially disclosed, some parts of the documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001. Parts of some documents have been also blanked out as being out of scope.

a) Full disclosure

Following an examination of the attachments to **Documents 2 and 7**, we have come to the conclusion that the disclosure of these documents can be fully granted.

Please note that these documents were received by the Commission from third parties. They are disclosed for information only and cannot be re-used without the agreement of the originator, who holds a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

b) Partial disclosure of documents

(i) Protection of privacy and integrity of individuals

Parts of **Documents 2, 4, 5, 7, 8-18** contain personal data, in particular names, functions, contact details and handwritten signatures of European Commission staff and third parties.

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 Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EU) 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/EC² (hereinafter, 'Regulation 2018/1725').

Indeed, 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 data.³ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff numbers of an institution are to be considered personal data⁴.

² Official Journal L 205 of 21.11.2018, p. 39.

³ 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, [ECLI:EU:C:2017:994](#).

⁴ Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, [ECLI:EU:T:2018:560](#).

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 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. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. 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.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the document, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, we conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned. The above-mentioned parts of **Documents 2, 4, 5, 7, 8-18**, have therefore been blanked out.

Documents 2 and 7 were received by the Commission from third parties. They are disclosed for information only and cannot be re-used without the agreement of the originator, who holds a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

Document 8 was drawn up for internal use under the responsibility of the relevant service of the European Commission. It solely reflects the service’s interpretation of the interventions made and does not set out any official positions of the third parties to which the document refers, which were not consulted on its content. It does not reflect the position of the Commission and cannot be quoted as such.

With regard to documents produced by the Commission, you may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the

documents. Please note that the Commission does not assume liability stemming from the reuse.

(ii) Protection of commercial interests

Article 4(2) first indent of Regulation 1049/2001 provides that the 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.

This provision must be interpreted in light of Article 339 of the Treaty of the Functioning of the European Union (TFEU), which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Some parts of **Documents 9-11, 13-15 and 17** contain non-public positions of BURDA, ENPA (European News Publisher's Association), EMMA (European Magazine Media Association), EPC (European Publisher Council) and other publishers' association regarding the publisher's right issue and the interinstitutional negotiations of the Commission Copyright legislative proposal, which were ongoing at the time.

Disclosure of these non-public positions would undermine the protection of their commercial interests. Consequently, the above-mentioned parts of Documents **9-11, 13-15 and 17** have been blanked out.

Document 9 was drawn up for internal use under the responsibility of the relevant service of DG CONNECT. It solely reflects the service's interpretation of the interventions made and does not set out any official positions of the third parties to which the document refers, which were not consulted on its content. It does not reflect the position of the Commission and cannot be quoted as such.

With regard to documents produced by the Commission, you may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

(iii) Decision-making process

The second subparagraph of Article 4(3) of Regulation 1049/2001 provides that '[a]ccess 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.'

Documents 15 and 17 contain parts which are covered by the aforementioned exception of Article 4(3) second subparagraph. These parts refer to internal deliberations and positions put forward by stakeholders concerning the issue of the publisher's right.

Disclosure of this information would undermine the trust enjoyed by the European Commission to hold free exchange of views with stakeholders concerning the work it

carries out. Moreover, the European Commission's decision-making process would be harmed without the possibility to obtain the industry's point of view. The companies and stakeholders would also be less likely to engage into a constructive dialogue with the European Commission due to risk of their positions being exposed.

The risk of harming the future decision-making process by disclosing the aforementioned parts of these documents is therefore real and non-hypothetical.

Consequently, the above-mentioned parts of **Documents 15 and 17** have been blanked out.

Documents 15 and 17 are documents produced by the Commission, you may reuse them free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the document. Please note that the Commission does not assume liability stemming from the reuse.

c) Non- disclosure of documents

We regret to inform you that access cannot be granted to **Documents 1, 3 and 6** on the basis of the aforementioned exception under Article 4(3), second subparagraph of Regulation 1049/2001.

Documents 1, 3 and 6 contain non-public comments and positions received from a number of stakeholders concerning ancillary copyright law in Germany and the related preliminary ruling (still ongoing at the time) in Case C-299/17 concerning the applicability of such law in light of the obligation to notify such laws in accordance with Directive 98/34/EC (as amended by Directive 98/48/EC).

Disclosure of this information would undermine the trust enjoyed by the European Commission to hold free exchange of views with stakeholders concerning the work it carries out. Moreover, the European Commission's decision-making process would be harmed without the possibility to obtain the industry's point of view. The companies and stakeholders would also be less likely to engage into a constructive dialogue with the European Commission due to risk of their positions being exposed.

The risk of harming the future decision-making process by disclosing the aforementioned parts of these documents is therefore real and non-hypothetical.

Following the redactions made for personal data for the reasons set out in Section 3(b)(i) and the aforementioned parts for which disclosure is being refused on the basis of Article 4(3), second subparagraph, partial access to the remaining parts of these documents has been rendered meaningless. Therefore, access to these documents must be refused.

5. SUMMARY ON RE-ASSESSMENT OF DOCUMENTS FROM PAST REQUESTS

Documents 9-13 were already partially disclosed in the context of a past access to documents request that you launched in **GestDem 2018/0811**. For the reasons explained in Sections 3(b)(i) and (ii), following a reassessment of these documents, the same partial disclosure given in the context of GestDem 2018/0811 is being granted for **Documents 9, 10 and 13** in the present request. On the other hand, wider disclosure is being granted for

Documents 11 and 12. With regard to these documents, all redactions on the ground of Article 4(3) (decision-making process) have been lifted.

Documents 14-18 were already partially disclosed in the context of a past access to documents request that you launched in **GestDem 2016/0411**. For all these documents, following a reassessment of the disclosure assessment provided at the time, wider disclosure is being given. For **Documents 14 and 16**, all redactions on the ground of Article 4(3) (decision making process) are being lifted. In **Document 15**, the redactions on the basis of the same exception are being lifted in pages 3 and 10. In **Document 17**, the redactions on the basis of the same exception are being lifted in pgs. 3, 7, 9-11. In **Document 18**, the redaction on the basis of the same exception in Attachment 2 is also being lifted.

6. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Articles 4(2) and 4(3) of Regulation 1049/2001 apply, unless there is an overriding public interest in the disclosure of documents. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. We have examined whether there could be an overriding public interest in the disclosure of the parts of the document which are being withheld and the documents for which disclosure is being refused entirely, but we have not been able to identify such an interest.

7. 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 this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-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

Enclosures:(19)