



EUROPEAN COMMISSION

Secretariat-General

The Secretary-General

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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) N° 1049/20011

**Subject: Your confirmatory application for access to documents –
GESTDEM 2015/6363 and 2016/95**

Dear Ms Fiedler,

I am writing in reference to your email, registered on 25 February 2016, 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 REQUEST

Through your initial application GESTDEM 2015/6363, you asked the Commission to provide you with:

- (a) *all relevant documents in relation to the launch of the EU Internet Forum;*
- (b) *the list of participants;*
- (c) *the minutes of the meeting;*

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

² Official Journal L 145 of 31.05.2001 p. 43

- (d) *documents related to the costs involved (travel reimbursements, event costs etc);*
- (e) *the dates of upcoming meetings.*

Through your initial application GESTDEM 2016/95, you requested *access to documents (such as goals, guidelines or codes of conduct etc) that have been proposed, discussed or agreed by the participants during, or in the preparation of the meeting of the EU Internet Forum of 3 December.*

By letter of 19 February 2016, the Directorate-General for Migration and Home Affairs (DG HOME) replied to you. The following documents were identified as falling under the scope of your request:

- Agenda (document 1a);
- Annotated agenda (document 1b);
- Set of objectives and actions to steer discussions based on comments from the different stakeholders (document 1c);
- Explanation of the proposed position on the proposed objectives and actions (document 1d);
- Opening speech for Commissioner Avramopoulos (document 1e);
- Closing speech for Commissioner Avramopoulos (document 1f);
- Paper entitled 'Implementing for European Agenda on Security: The EU Internet Forum, a background paper issued at the meeting (document 1g);
- List of participants;
- Minutes of the meeting of 3 December 2015.

DG HOME:

- granted full access to documents 1a, 1e, 1f, 1g, partial access to the list of participants and the minutes of the meeting of 3 December 2015 and refused access to the remaining documents, based on the exceptions of Article 4(1)(a), first indent (protection of public security), 4(1)(b) (protection of the privacy and integrity of the individual), Article 4(2), first indent (protection of commercial interests), and Article 4(3) (protection of the decision-making process) of Regulation 1049/2001;
- informed you, with regard to the costs of the meeting of 3 December 2015, that the Commission signed a specific contract to receive logistical support for the High Level Launch event for a maximum amount of 28.060 Euro;

- informed you that no list of upcoming meetings existed and that dates of further meetings have not been agreed.

By your confirmatory application you contest the initial decision of DG HOME by requesting full access to the following documents:

- a) Summary of the meeting of 3 December 2015 (ARES (2016)1158809);*
- b) Annotated agenda (ARES (2016)1159808);*
- c) Set of objectives and actions to steer discussions based on comments from the different stakeholders (ARES (2016)1160160);*
- d) Explanation of the proposed position on the proposed objectives and actions (ARES (2016)1160371).*

Therefore, the review in this confirmatory decision will concern only these documents.

You provide several arguments in support of your confirmatory application which will be addressed below.

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 this review, I am pleased to inform you that wider partial access is granted to documents a), b) and c) identified above.

The initial decision to refuse access is confirmed as regards document d).

2.1. Protection of the decision-making process and protection of the public interest as regards public security

Article 4(3) of Regulation 1049/2001 provides that:

[a]ccess 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.

Article 4(1)(a) of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of public security.*

Public disclosure of the redacted parts of documents a), b) and c) and of document d) would seriously undermine the decision-making process protected by Article 4(3), first subparagraph of Regulation 1049/2001, as explained below.

The EU Internet Forum focuses on deploying the best tools to counter terrorist propaganda on the internet and in social media. Work within the EU Internet Forum builds on voluntary engagement with the industry and better collaboration between the different stakeholders. The EU Internet Forum provides a platform to develop cooperation between the different stakeholders, to steer further discussions at a strategic level, and to agree on concrete deliverables in terms of exchange of practices and operational cooperation³.

As regards, more specifically, the redactions made in documents a), b) and c), I would like to add the following:

- Document a) contains informal meeting minutes, drawn up for internal use under the responsibility of DG HOME staff members. It contains factual information on the meeting, which was disclosed at initial level. Wider partial access to this summary is now granted at confirmatory level. The limited redacted parts reflect preliminary reflections and positions of stakeholders and Member States' representatives concerning the challenges and possible solutions, as well as views expressed by the Commission staff members who drafted the minutes. It was drafted for purely internal use. Nor was it approved by the external meeting participants or shared with them;
- As regards document b), this agenda is an internal document drafted for the purpose of providing suggestions on how to steer the discussion. Partial access to this document is now granted.

The redacted parts reflect tactical suggestions of the Commission staff members concerned on how to steer the discussion, possible alternatives to consider depending on the dynamic evolution of the discussion, and other strategic considerations to take into account. These purely internal considerations reflect only the opinions of the Commission staff members who annotated the agenda. The latter were not necessarily all taken up by the Commission official chairing the meeting.

Their disclosure would therefore also risk creating confusion to the public in relation to the Commission's official position as expressed by Commissioner Avramopoulos during the meeting of 3 December 2015.

- Documents c) (the set of objectives and actions) and d) (the explanation of the proposed action) are also documents prepared by Commission staff for internal use. Partial access is now granted to document c).

³ http://europa.eu/rapid/press-release_IP-15-6243_en.htm

The redacted parts of document c) and document d) contain information about the challenges, the proposed strategy on how to face these, the tactical considerations on the handling, and the proposed methodology in order to achieve the objectives of the EU Internet Forum. There is a real and non-hypothetical risk that public disclosure of the withheld (parts of the) document(s) would seriously undermine the Commission's decision making process and the collaboration on which the EU Internet Forum is based.

Public disclosure of the withheld parts of documents a), b), c) and document d), which were drafted purely for internal use, would therefore have a negative impact on the Commission's decision making process in the framework of the EU Internet Forum.

The Commission's preparatory work in the framework EU Internet Forum is continuous and ongoing. In this context, public disclosure of the withheld parts described above would seriously undermine the Commission's margin of manoeuvre in exploring, in the framework of the ongoing decision-making process, all possible options free from external pressure.

Public disclosure of these (parts of the) documents would therefore seriously undermine the serenity of the ongoing discussions and hence, the decision-making process within the Commission in relation to the EU Internet Forum. The Commission and its staff members should be able to explore all possible options free from external pressure.

In addition, some of the withheld (parts of the) document(s) reflect internal considerations, as well as references to views and positions expressed by Member States and external stakeholders. The EU Internet Forum has as its primary purpose to facilitate and enhance cooperation. Therefore, good collaboration with internet industry and the Member States are paramount. The engagement with different stakeholders and in particular with the industry is based on a relationship of mutual trust among all stakeholders involved. Public disclosure of the positions or proposals of stakeholders or Member States would undermine that necessary climate of mutual trust.

In addition, public disclosure of the above-mentioned (parts of the) document(s) would entail a real and non-hypothetical risk of seriously undermining the Commission's decision making process, as it would reveal its strategy and its tactical considerations, undermine its relation of trust with stakeholders and Member States, thereby harming its power to fully contribute to the success of the EU Internet Forum.

Finally, issues to be dealt with by the EU Internet Forum are closely linked to matters of public security within the meaning of Article 4(1)(a) of Regulation 1049/2001. Indeed, the public dissemination of documents revealing concerns to be addressed and exploring possibilities to overcome challenges to tackle terrorist propaganda online is to be handled with extreme care.

The continued engagement of all stakeholders and the success of further action to be developed within the Forum depend on mutual trust among stakeholders. This implies protecting the content of discussions and concrete actions targeted at disrupting terrorist activities on the internet and social media.

Identifying companies and revealing their views and action taken against terrorist content on the internet would seriously undermine the effectiveness and success of the measures implemented. Similarly, Member States' concerns and expectations are part of the continuous dialogue to explore the most effective measures in countering terrorist activities on the internet and social media. Public disclosure of such considerations and concerns expressed during this dialogue would reveal vulnerabilities that terrorists could further exploit. It is therefore of utmost importance that ongoing discussions and the further elaboration of concrete action in this field are not exposed to public disclosure, at least at this stage.

References to specific initiatives, open issues to be discussed and concrete steps to implement would therefore undermine the protection of public security and the Commission's on-going efforts to prevent and combat radicalisation, terrorism and violent extremism.

In light of the above, the Commission concludes that access has to be refused to the (redacted parts) of the above-mentioned document(s) (namely, the withheld parts of documents a, b and c and document d), as their disclosure would seriously undermine the decision-making process protected by Article 4(3), first subparagraph of Regulation 1049/2001 and the public interest as regards public security protected under Article 4(1)(a) of Regulation 1049/2001.

2.2. Protection of the privacy and integrity of the individual and of the commercial interests of a natural or legal person, including intellectual property

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.*

Article 4(2), first indent of Regulation No. 1049/2001 stipulates 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.*

The Court of Justice has confirmed that *where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof*.⁴ Pursuant to Regulation 45/2001, personal data must be processed fairly and lawfully. Any processing must be necessary for a specific purpose and proportionate to this purpose.

Several of the withheld parts in documents a), b), c) and d allow for the identification of companies and reveal their views and actions taken against terrorist content on the internet. Public disclosure of these parts would undermine the protection of their commercial interests in a reasonably foreseeable and not purely hypothetical way, because it would expose them to terrorist threats and possible attacks. This has already been the case for some of the companies as reported in the press⁵. At the same time, public disclosure of the withheld parts described above would risk undermining the integrity of the companies' managers, as they can personally become the targets of threats and possible attacks of terrorist groups. This has already been the case, as reported in the press⁶.

In light of the above, the Commission concludes that access to parts of the documents a, b, c and d shall be refused as their disclosure would undermine the protection of the commercial interests of the companies involved in the EU Internet Forum and jeopardise the protection of integrity of their managers according to Article 4(2), first indent and Article 4(1)(b) of 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and 4(3) 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.

By your confirmatory application, you object *to the application of the exceptions under Article 4* because you consider that there is an overriding public interest in disclosure of the requested documents. In your view, *[a]ctions taken by private companies to remove or block access to communications directly affect the right to freedom of expression of over 500 million European citizens. In your view, encouraging private companies to impose restrictions on communications in order to achieve various political or public policy goals (like the fight against terrorism or hate speech online) bears the risk of undermining basic human rights principles. You argue that [a]ccording to Article 52 of*

⁴ Judgment of the Court of Justice of 29 June 2010 in case - C-28/08 P, Commission v Bavarian Lager, para. 63.

⁵ See e.g. article in the Independent about Isis hackers threatening Facebook and Twitter founders for shutting accounts: <http://www.independent.co.uk/news/people/isis-hackers-threaten-facebook-and-twitter-founders-for-shutting-accounts-a6894921.html>, <http://money.cnn.com/2016/02/29/technology/mark-zuckerberg-threat-isis/>

⁶ See e.g. <http://www.theguardian.com/technology/2016/feb/24/isis-video-targets-twitter-and-facebook-ceos-over-suspended-accounts>, <http://money.cnn.com/2016/02/24/technology/isis-mark-zuckerberg/?iid=EL>

the Charter of Fundamental Rights, whenever a state or a public body acts in a way that interferes with the human rights of citizens that interference has to be based on law. However, if a private entity is asked to decide over the blocking and taking down of potentially illegal material, this is not the case; can thus easily lead to legitimate speech being limited and undermines the possibility for appeals processes.

The EU Internet Forum builds on cooperation, exchange of best practices and development of concrete deliverables as part of a broader endeavour to counter terrorism bringing together internet companies, civil society and law enforcement authorities. The framework of action of the EU Internet Forum is the EU and national law. I understand that you disagree that work within the EU Internet Forum builds on voluntary engagement with the industry and better collaboration with the different stakeholders. However, the argument put forward by you reflects your opinion on the content of the policy pursued by the Commission as regards the EU Internet Forum.

It does not demonstrate in any way the existence of a public interest in disclosing the (withheld parts of) the documents that form the subject of your request for access under Regulation 1049/2001.

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 Commission's decision-making process and the companies' commercial interests in the framework of the EU Internet Forum.

Therefore, I consider that in the present case, the prevailing interest is to secure the effective organisation and follow-up of the EU Internet Forum and ultimately the Commission's efforts to address violent extremism and terrorism-related activities in the Internet and social media, as part of the overall fight against terrorist radicalisation and recruitment.

Please note that Article 4(1)(a), first indent and Article 4(1)(b) of Regulation 1049/2001 do not include the possibility for the exception defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, partial access is granted to documents a), b) and c). However, for the reasons explained above, no further partial access is possible neither to these documents nor to document d) without undermining the Commission's on-going decision-making process and the protection of public security.

5. MEANS OF REDRESS

Finally, 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
Alexander ITALIANER
Secretary-General*