



EUROPEAN COMMISSION

Secretariat-General

The Secretary-General

Brussels, 4.2.2018

C(2018) 722 final

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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 under Regulation (EC) No 1049/2001 - GESTDEM 2016/4441-Part II

Dear Mr Schindler,

I refer to your e-mail of 14 September 2016, registered on 15 September 2016, 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 1049/2001").

1. SCOPE OF YOUR REQUEST

In your initial application of 1 August 2016 you requested access to:

[a]ny document that relates to an ancillary copyright (Leistungsschutzrecht für Presseverleger), both referring to existing or proposed laws in EU Member states as well as any information relating to the introduction of such right into EU legislation.

You specified that you were especially but not exclusively looking for information in the form of proposals, memos, studies, notes, meeting records, letters to Commissioner Oettinger and Cabinet staff members dealing with EU copyright and the protection of press publishers by application or amendment of EU copyright law.

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

In its initial reply of 28 September 2016, the Directorate-General for Communications Networks, Content and Technology (DG CNECT, hereinafter) listed the documents falling under the scope of your request in four Annexes. DG CNECT:

- granted full access to documents contained in Annex 1 and 2 subject to protection of personal data;
- refused access to documents contained in Annex 4, based on Article 4(1)(b) (protection of privacy and integrity of the individual), Article 4(2), first indent (protection of commercial interests), and on Article 4(3) (protection of the decision-making process) of Regulation 1049/2001;
- informed you that Annex III contained documents and letters that originate from third parties and that the third-party consultations, in accordance with Article 4(4) of Regulation 1049/2001, were ongoing.

Through your confirmatory application you contest the absence of a reply within the deadlines by DG CNECT and request a review of this position, according to which access was *finally rejected*.

Following your agreement to a fair solution, you received, on 16 February 2017, a first confirmatory reply concerning the documents falling under Annexes 2 and 4 of the initial reply. The present confirmatory decision covers the documents falling under Annex 3 of the initial reply, i.e. documents and letters that originate from third parties. These are the following 20 documents:

1. Letter from Asociacion Espanola de Editoriales de Publicaciones Periodicas (AEEPP), 4/12/2015, (Ref. Ares(2015)5638085);
2. Letter from the Newspaper Association of America to President Juncker, 29/04/2016 (Ref. Ares (2016)2078724);
3. Letter from Börsenverein des Deutschen Buchhandels to Commissioner Oettinger, 15/06/2016 (Ref. Ares(2016)2801095);
4. Letter from University of Cambridge, CIPIL and Cardiff University to President Juncker, Vice-President Ansip, Commissioner Oettinger, 25/07/2016 (Ref. Ares(2016)3906509);
5. EPC, Draft Position Paper: Presenting the Case for a Publishers' Exclusive Right, 31/08/2015 (Ref. Ares(2016)5575203);
6. KANTAR MEDIA, Media Monitoring and Copyright: The main models in Europe, 30/11/2015 (Ref. Ares(2016)5575203);
7. VG Media, Presentation (Ppt) on the collecting society of private media enterprise, 11/02/2016 (Ref. Ares(2016)5575203);
8. ENPA and EMMA, Position paper for the European Council, Press Publishers' key priorities and concerns regarding the Digital Single Market Strategy, 22/02/2016, (Ref. Ares(2016)5668918);
9. ENPA and EMMA, response to the European Commission Green Paper, Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, 22/02/2016, (Ref. Ares(2016)5668918);

10. Updated Joint Response to Commissioner Oettinger on Publisher's Right (EMMA), 09/03/2016 (Ref. Ares(2016)2875393);
11. CCIA, Study benefits online service to news publishers - methodology, 04/04/2016 (Ref. Ares(2016)5575203);
12. Letter from EMMA with Aggregated Data on publishers' right, 24/05/2016, (Ref. Ares(2016)5575203);
13. STM, Position on the role of publishers in the copyright value chain and recognizing publishers' related rights, 01/06/2016 (Ref. Ares(2016)5662823);
14. GOOGLE, Paper Ancillary Copyright in Germany, submitted in a meeting with the Commission, 8/06/2016, (Ref. Ares(2016)5575203);
15. GOOGLE, Paper Digital News Initiative, submitted in a meeting with the Commission, 8/06/2016, (Ref. Ares(2016)5575203);
16. Dr Richard Danbury, Is an EU publishers' right a good idea? - Final report on the AHRC project: evaluating potential legal responses to threats to the production of news in a digital era, CIPIL, 15/06/2016, (Ref. Ares(2016)5575203);
17. EURIMAG, A Neighbouring Right for Publishers is not Conform with International Legal Obligations and EU law, 15/06/2016, (Ref. Ares(2016)5575203);
18. GOOGLE, Paper Further input to response to the European Commission's Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', 15/06/2016, (Ref. Ares(2016)5575203);
19. SPQN, réforme européenne du droit d'auteur: les enjeux d'un "droit voisin" pour les éditeurs de presse, 20/06/2016 (Ref. Ares(2016)2891812);
20. EPC, Annex: Methodology applied in the Belgian study 'Vers un modèle économique durable pour les éditeurs belges de journaux et de magazines: aperçu de l'importance de licences', published in February 2014, to estimate loss of revenues, 15/07/2016, (Ref. Ares(2016)5575203)

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 or service concerned at the initial stage.

Concerning the documents contained in Annex 3 of the initial reply, having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I am pleased to inform you that:

- full access is granted to eight documents, i.e. documents 7, 11, 13, 14, 15, 16, 18 and 20;
- wide partial access, subject only to the redaction of personal data, is granted to ten documents, i.e. documents 1, 2, 3, 4, 5, 6, 8, 9, 10 and 17;
- wide partial access is granted to documents 12 and 19, subject to the redaction of personal data and of parts falling under Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001.

Those parts of the documents which fall outside the scope of your request, i.e. parts of documents 12, 17 and 19, have been redacted with a written indication *[out of scope]* at the beginning of the corresponding passage.

Please find a copy of the documents to which full and partial access has been granted attached to the present decision. 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.

The reasons for the refusal of access to the withheld parts of the documents are set out below.

2.1. Protection of commercial interests

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.*

A limited part of document 19, i.e. certain parts of its last two pages, contain non-public positions of SPQN, a French Press Publishers Association, regarding the publisher's right issue, proposing specific provisions for the Commission's legislative proposal.

Knowledge of their detailed, non-public position on the publisher rights issue, including specific legislative options, would allow for conclusions on strategic preferences and choices of business models which, if made public, would undermine SPQN's and their member companies' commercial interests in their relationship, inter alia, with business partners, including online actors. Disclosure of this non-public position on the above mentioned sensitive subject matter, at this stage, would undermine, in particular, their negotiating position.

Indeed, in the present case of SPQN, French press publishers have negotiated and reached a global agreement with online search engines/aggregators for the online exploitation of their press publication. The disclosure of their position, including strategic preferences, would jeopardise the application of the agreement and undermine their negotiation position in possible future negotiations with them. Moreover, the position of SPQN contained in the withheld parts has evolved since then and its disclosure would risk creating confusion among its stakeholders and business partners, as well as vis-à-vis the public authorities. It would also reveal information on SPQN's negotiation strategy.

Based on the foregoing, I consider the information contained in the limited withheld parts as being commercially sensitive. In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of above mentioned parties.

Concerning document 12, one paragraph on page 21 (corresponding to page 19 of the page numbering at the pages' bottom) has to be withheld as it reflects a non-public position of the Polish press publishers on their advertising pricing structure. Its content is of a strategic nature and, if disclosed, would undermine their negotiation position in possible future negotiations on the conclusion of commercial agreements with search engine companies or news aggregators. The express refusal of the third party from which the document originates, to withhold that particular paragraph from within a document of 22 pages otherwise disclosed, reinforces this conclusion.

I conclude, therefore, that access to (very) limited parts of documents 12 and 19 must be denied on the basis of the exception laid down in the first indent of Article 4(2) (protection of commercial interests) of Regulation 1049/2001.

2.2. Protection of the privacy and the 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*].

In your confirmatory application you do not question the applicability of the above-mentioned exception to the requested documents. Nevertheless, I would like to provide additional explanations of how the disclosure of certain parts of the documents requested would undermine the interests protected by this exception.

Documents 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 17 and 19 contain names, email addresses, phone numbers, office numbers, positions and handwritten signatures of Commission staff members² and third-party representatives. These constitute personal data within the meaning of Article 2(a) of Regulation 45/2001³, 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, the public disclosure of this data in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling⁴, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable.

² Not forming part of senior management.

³ 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.

⁴ 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).

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.⁵ Only fulfilment of both conditions enables one to consider the processing (transfer) of personal data as compliant with the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that the Institution does not have to examine *ex officio* the existence of a need for transferring personal data⁶. In the same ruling, the Court stated that if the applicant has not established a need, the institution does not have to examine the absence of prejudice to the person's legitimate interests⁷.

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 disclosure of the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 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.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent 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 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 indent of Article 4(2) (protection of commercial interests) of Regulation 1049/2001.

Furthermore, I assure you that the Commission interpreted and applied the exceptions of Article 4 of Regulation 1049/2001 strictly, which results in granting full access to eight documents and (wide) partial access to 12 documents.

⁵ *Ibid*, paragraphs 77-78.

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 *Ibid*, paragraphs 47-48.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the protection of commercial interests, based on Article 4(2), first indent of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting wider partial access to documents 12 and 19. However, for the reasons explained above, no meaningful wider partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that limited parts of documents 12 and 19 are covered by the invoked exception to the right of public access.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress 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 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



*For the Commission
Alexander ITALIANER
Secretary-General*

Enclosures (20).