



EUROPEAN COMMISSION

Secretariat-General

The Secretary-General

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Ms Anna Mazgal
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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 2017/861

Dear Ms Mazgal,

I refer to your e-mail of 21 March 2017, 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 13 February 2017 you requested access to:

The European Commission's legal service opinion(s) on the drafts of the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD).

In its initial reply of 6 March 2017, the Legal Service identified the following documents as falling within the scope your request:

- 1) Note of the Legal Service to the Head of Cabinet of the Vice-President of the Commission of 21 June 2016: Legal concerns with "clarifying" the notion of communication to the public [registered under Ref. Ares(2016)2882089];

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

- 2) Note from the Legal Service to the Director-General of DG CONNECT of 30 August 2016: Copyright Reform - Fast-Track Consultation ISC/2016/04250 from DG CNECT [registered under Ref. Ares(2016)4876233];
- 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 (Annex 1 to document 2).

Access was refused 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 personal data) of Regulation (EC) 1049/2001.

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

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.

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 wider access is granted to document 2. Please find a copy annexed. The refusal is confirmed for document 1 and no further disclosure is granted to document 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 the 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 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.

Full disclosure of the requested documents would prejudice the capacity of the Legal Service to assist the 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.

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. 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 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 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 Strategy², adopted by the Commission on 6 May 2015, sets out the main elements of the modernisation of the EU copyright rules. The Communication on copyright adopted on 9 December 2015 details the next steps in this regard, including on possible legislative proposals and timelines. Further to the proposed Regulation on cross-border portability of online content services, adopted the same day as the Communication, the Commission adopted on 14 September 2016 a set of legislative measures, called the 'copyright second legislative package'.

² <http://ec.europa.eu/priorities/digital-single-market/>

As the Council and the European Parliament still have to take a position on the Commission's proposals, the decision-making process on these proposals of copyright reform refer to preliminary legal assessments for which the decision-making process is fully ongoing. Depending on the negotiations on this particular issue, the Commission may indeed have to adapt its position taking into account the elements contained in the above-mentioned documents. The finalisation of the above-mentioned negotiations is not envisaged before the end of 2017.

The European Court, in its *ClientEarth*³ and *AccessEuropeInfo*⁴ judgments, acknowledged that there may be a need for the Commission to protect internal reflections on the possible policy options available to the institutions in the phase preceding the (inter-institutional) legislative procedure. There is a concrete risk that disclosing the information at this stage would affect the Commission's ability to defend its proposals during the ongoing negotiations with the Council and the Parliament.

In the alternative, even if one were to consider that Article 4(3), first subparagraph of Regulation 1049/2001 no longer applies as the Commission put forward its proposals (*quod non*), 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 1049/2001, as their disclosure would seriously harm the decision-making process of the Commission even after its proposals have been adopted.

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 advice⁵.

Given the sensitivity of the subject matter and the various interests involved (e.g. those of right holders and information society service providers), if these documents were to be released, the Commission would be deprived of its ability to defend its proposal throughout the legislative procedure. The 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 (e.g. information and communication policies, internal market, competition policy, etc.).

³ Judgment of General Court, 13 November 2015 in joined cases T-424/14 and T-425/14, *ClientEarth v Commission*, paragraphs 100 to 105.

⁴ Judgment of Court of Justice, 17 October 2013 in case C-280/11 P, *Council v Access Info Europe*.

⁵ 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.

Furthermore, the dissemination of preliminary and obsolete positions of the Commission preceding the inter-institutional 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 Commission's proposals might indeed be subject to further inter-institutional negotiations.

The 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 Directive⁶.

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 1049/2001.

2.2. Protection of personal data

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 the exception regarding the protection of personal data, the names and personal details of the Commission's officials not having the function of senior management staff, as well as all handwritten signatures have been expunged from documents 1 and 2.

⁶ Judgments of Court of Justice, 1 July 2008 in case C-39/05 P and C-52/05 P, *Sweden & Turco v Council*, paragraph 69 and of General Court, 15 September 2016 in cases T-796/14 and T-800/14, *Philip Morris v Commission*.

These data undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001⁷, 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 these 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* ruling⁸, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. 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.⁹ Only if both conditions are fulfilled and the processing is lawful in accordance with the requirements of Article 5 of Regulation 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.*¹⁰

I refer also 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 data¹¹.

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 45/2001.

⁷ 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.

⁸ Judgment in *Commission v Bavarian Lager*, case C-28/08 P, EU:C:2010:378.

⁹ *Ibid.*, paragraphs 77 to 78.

¹⁰ Judgment in *ClientEarth and PAN Europe v EFSA*, case C-615/13 P, EU:C:2015:489, paragraph 47.

¹¹ Judgment in *Strack v Commission*, case C-127/13 P, EU:C:2014:2250, paragraph 106.

Consequently, 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.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2), second indent and 4(3), first and second subparagraph, 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 and second subparagraphs of Article 4(3) (protection of the decision-making process) and Article 4(2), second indent of Regulation 1049/2001.

To the contrary, as explained above the inter-institutional decision-making process is ongoing. Full disclosure of the briefing documents would affect the Commission's ability to act freely from external pressure in effectively defending the 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 Commission decision-making process. Furthermore, I assure you that the Commission interpreted and applied the exceptions of Article 4 of Regulation 1049/2001 strictly, which results in partial access to the requested documents.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the protection of decision-making process and legal advice, based on Article 4(3), first and second subparagraphs of Regulation 1049/2001 and Article 4(2), second indent of Regulation 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 1049/2001, I have considered the possibility of granting wider access to the documents requested. However, for the reasons explained above, no meaningful wider access is 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, 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

Enclosures: redacted document (1)