



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR TRADE

The Director-General

Brussels  
TRADE/SW/PK/PYA/el

***By registered letter with acknowledgment  
of receipt***

Ms Julia Reda  
Gesellschaft für Freiheitsrechte e.V.  
Hessische Str. 10  
10115 Berlin  
Germany

***Advance copy by email:***  
ask+request-7916-  
5c3b4420@asktheeu.org

**Subject: Your application for access to documents – Ref GestDem 2020/2472 & 2020/2478**

Dear Ms Reda,

I refer to your application dated 28 April 2020, in which you make a request for access to documents under Regulation (EC) No 1049/2001<sup>1</sup> ('Regulation 1049/2001'), registered on 29 April under the above mentioned reference number. In addition, I make reference to your request of 28 April addressed to DG CNECT, under reference number GestDem 2020/2478. As the documents held by DG TRADE and DG CNECT that fall within the scope of your request overlap, DG TRADE responds to both requests. You have been informed accordingly already by DG CNECT in their letter of 28 May.

Please accept our apologies for the delay in preparing the reply to your request, which is mainly due to the high number of documents identified and the thorough analysis involved in combination with consultation on the release of a substantial part of these documents with third parties.

**1. SCOPE OF YOUR REQUEST**

In your request, you asked for access to documents related to a letter sent on 20 March 2020 by the EU Ambassador to the Republic of South Africa, Ms Riina Kionka to Dr. Cassius Reginald Lubisi, Director-General in the Office of the South African President, on the subject of South Africa's copyright issue.

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

In your request, you are seeking any information the Commission has in connection with the letter of 20 March 2020, as well as any information related to the South African Draft Copyright Bill. You are requesting all information, including internal communication, inter-service consultation, communication with the EEAS, any South African bodies, or with third parties such as external stakeholders regarding or in connection with the letter of 20 March 2020 or the South African Draft Copyright Bill.

## 2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law<sup>2</sup>, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach:

- first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception;
- second, it must examine whether disclosure of the parts of the document in question pose a ‘reasonably foreseeable and not purely hypothetical’ risk of undermining the protection of the interest covered by the exception;
- third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Article 4(2) and Article 4(3) of Regulation 1049/2001, the institution is required ‘to ascertain whether there is any overriding public interest justifying disclosure’<sup>3</sup>.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents<sup>4</sup>, ‘the exceptions to that right [...] must be interpreted and applied strictly.’<sup>5</sup>

In reply to your request, I can inform you that we have identified **52 documents** that fall within the scope of your request. Having examined the requested documents under the applicable legal framework, I am pleased to grant you access to **43 documents**. **Nine documents** are withheld as they are covered by the exception of commercial interest (article 4.2 first indent of Regulation 1049/2001).

Please note that parts of **document 30** that do not relate to your request have been redacted as falling out of scope.

In most accessible documents names and other personal data have been redacted pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 2018/1725. Hence, the main content of these documents relevant to your request is accessible.

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<sup>2</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

<sup>3</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52-64.

<sup>4</sup> See Regulation 1049/2001, recital (4).

<sup>5</sup> Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

The identified documents are listed for ease of reference in Annex I. For each of the documents the Annex provides a description and indicates whether parts or entire documents are withheld and if so, on which grounds pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed to this letter.

The reasons justifying the application of the abovementioned exceptions are set out below in Sections 2.1 and 2.2. Section 3 provides an assessment of whether there exists an overriding public interest in the disclosure.

## **2.1 Protection of the privacy and integrity of the individual**

**Documents 2, 3, 4, 6, 7, 9, 10, 14, 15, 16, 17, 17a, 17b, 17c, 18a, 23, 23d, 24, 25, 26, 26a, 27, 28, 30, 30a, 31, 32, 32c, 33 and 34** contain personal information, such as names, e-mail addresses, telephone numbers that allow the identification of natural persons, as well as other personal information.

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

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, the Data Protection Regulation 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 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 application, 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 documents, 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, I conclude that, pursuant to Article 4(1)(b) of Regulation 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.

However, in line with the Commission's commitment to ensure transparency and accountability, the names of individuals who are public figures and are acting in their public capacity are disclosed (Heads of State, Ministers, Ambassadors, MEP's, etc.). Additionally, signatures also have been removed to avoid the risk of fraudulent use of such signatures.

## 2.2 Protection of commercial interests

**Documents 5, 11, 12, 18, 19, 20, 23(e), 29 and 29(a)** are covered by the exception set out in article 4(2) first indent (protection of commercial interests) and completely withheld. 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'.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent<sup>6</sup>, it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy<sup>7</sup>. Accordingly, it must be information that is 'known only to a limited number of persons', 'whose disclosure is liable to cause serious harm to the person who has provided it or to third parties' and for which 'the interests liable to be harmed by disclosure must, objectively, be worthy of protection'<sup>8</sup>.

In relation to all withheld documents, we have consulted the third party which sent these documents to the Commission, and they have not agreed to their release arguing that, in the absence of information about the applicant's identity, their member companies' commercial interests, including those related to their business relations with other stakeholders, could be undermined. **Documents 5, 11, 12, 18, 19, 20, 23(e) and 29(a)** present industry positions related to the proposed provisions of the South African Draft Copyright Bill and their economic impact on the business of the third party's member associations. These industry positions contain descriptions of licensing and revenue sharing strategies. **Document 29** is an email to which **document 29(a)** was attached.

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<sup>6</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>7</sup> See Article 339 of the Treaty on the Functioning of the European Union.

<sup>8</sup> Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

### 3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(2) first indent of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

Accordingly, we have considered whether the risks attached to the release of the withheld documents are outweighed by the public interest in accessing the requested documents.

We have not been able to identify any such public interest capable of overriding the commercial interests of the organisation concerned. In the present case, there is no such evidence.

### 4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 ‘*if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*’. Accordingly, I have also considered whether partial access can be granted to the individual submissions.

However, we consider that the requested documents are fully protected by a coherent application of Article 4(2) first indent of Regulation 1049/2001, and that therefore access to the requested documents has to be refused.

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You may reuse public documents, which have been produced by the European Commission or by public and private entities on its behalf based on the Commission Decision on the reuse of Commission documents. You may reuse the documents disclosed free of charge and for non-commercial and commercial purposes provided that the source is acknowledged and 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.

Please note that the documents originating from third parties are disclosed to you based on Regulation 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

Please note that **document 33** (Report of Meeting with rightholders concerning copyright bill in South Africa) was drawn up for internal use under the responsibility of the relevant service of DG TRADE. It solely reflects the service’s interpretation of the interventions made and does not set out any official position 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.

### 5. MEANS OF REDRESS


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 Secretary-General of the Commission at the following address:

Secretary-General  
European Commission  
Transparency, Document Management & Access to Documents  
BERL 7/76  
1049 Brussels

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Weyand', with a stylized flourish at the end.

Sabine WEYAND

Encl.:           Annex I: List of documents  
                  (Partially) released documents