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The Secretary-General

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**Mr Arne SEMSROTT**

c/o Open Knowledge Foundation

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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° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017/308**

Dear Mr Semsrott,

I refer to your e-mail of 8 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 17 January 2017 you requested access to *any concept paper the EU Commission has prepared to counter 'Fake News' in the form of a European regulation and any correspondence by the EU Commission with Google and Facebook regarding 'Fake News'*.

In its initial reply of 1 March 2017, the Directorate-General for Communications Networks, Content and Technology (DG CNECT, hereinafter) identified the following documents as falling under the scope of your request:

1. Background Note on the subject of 'fake news' (Ares(2017)881559);
2. DG CNECT proposal for background note on 'fake news' (Ares(2017)881373);

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

3. Letter from Commissioner Oettinger to the President of the Commission on online platforms (Ares(2017)123266);
4. Note on online platform policy (Ares(2017)881690);
5. E-mail from Google to the Commission services on the '2016 Bad ads report' (Ares(2017)517901);
6. E-mail from Google to the Commission services on the issue of 'fake news' and other issues (Ares(2017)881011);
7. Exchange of e-mails between Facebook and the Commission services (Ares(2017)880679 and Ares(2017)881934).

Through its initial reply dated 1 March 2017, DG CNECT:

- Granted partial access to documents 5, 6 and 7, by redacting only personal data based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001;
- Refused access to documents 1, 2, 3 and 4, based on Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position and present several arguments supporting your requests. These will be addressed in the respective parts of this decision.

## **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 wide partial access is granted to documents 1, 2, 3 and 4. The undisclosed parts of these documents are covered by the exceptions of Article 4(3), first subparagraph (protection of the decision-making process) and of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

The detailed explanations are provided below.

### **2.1. Protection of the decision-making process**

Article 4(3), first subparagraph 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.*

Document 3 is a letter from Commissioner Oettinger, at the time the Member of the Commission responsible for Digital Economy and Society, addressed to President Juncker, stressing the importance of the issue, outlining some initial policy options and seeking his political orientation on the issue of fake news and online misinformation.

Documents 1, 2 and 4 are internal notes including some initial policy options based on a very preliminary analysis of the issue of online misinformation and fake news and preliminary assessments addressed to Vice-President Ansip. It is important to note that draft documents 1 and 2 have been transmitted neither to Cabinet of the President of the European Commission Jean-Claude Juncker nor to the other Members of the European Commission. These purely internal preliminary considerations reflect only the opinions of the Commission staff members on challenges, possible strategies and ways forward to address concerns regarding 'fake news' and online misinformation. These opinions were expressed for internal use and at that stage were not drafted in order to be transmitted to the public, at least while the Commission's decision-making process is ongoing and the Commission has not yet taken any decision whether, and if so, what action should be taken.

The Commission is treating the issue with the utmost care. In addition, due to the sensitivity of the topic and the attention that has and may arise in the media and among groups of stakeholders and the public, premature disclosure of the documents would seriously undermine the Commission's decision-making process as a full release of the documents at this stage would disseminate preliminary, internal considerations into the public domain. Indeed, it would trigger external pressure by the above-mentioned groups, which could misinterpret the content of the document and draw premature conclusions.

In addition, some parts of these documents reflect internal considerations, as well as references to views and positions expressed by Member States and external stakeholders. The engagement with different stakeholders is based on a relationship of mutual trust among all stakeholders involved which would be undermined by their disclosure.

In your confirmatory application, you argue that *the Commission has disclosed three other documents that demonstrate it actively sought input into its preliminary discussion on 'fake news' from a limited number of private stakeholders.*

As regards contacts with third parties, it is necessary to underline that the Commission followed the scope of the initial request where only *any correspondence by the EU Commission with Google and Facebook regarding 'Fake News'* was requested and subsequently wide partial access to these documents was granted.

In addition, it is apparent from the correspondence disclosed to you at the initial stage that, contrary to what you argue, the Commission services did not consult Facebook and Google on any policy strategy. To the contrary, the correspondence between the Commission and these two companies concerns purely factual information, regarding *inter alia* the action taken by Google and Facebook.

Furthermore, such premature disclosure would also lead to a risk of self-censorship as these internal documents contain opinions, points of views and critical remarks that will help building the steps to follow. The Commission staff concerned would be hesitant to freely exchange views, both internally and with third parties, were that information to be made public.<sup>2</sup> Public disclosure of the whole documents requested would also seriously undermine the serenity of the ongoing discussions within the Commission services and their Cabinets. Indeed, the Commission and its staff members would not be able to explore all possible options free from external pressure.

This, in turn, would seriously undermine the decision-making process protected by Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

The Court of Justice, in the *ClientEarth*<sup>3</sup> and *AccessEuropeInfo*<sup>4</sup> 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 will affect the Commission's ability to defend its future proposals. Furthermore, as established in the *Turco* judgment<sup>5</sup>, the Court of Justice distinguished this preliminary assessment of the institution from the presumption of wider openness for the institutions when acting in their legislative capacity.

The sensitive nature of the matters at stake, such as cases of medical or scientific misinformation, fake news about national and EU institutions and EU policies, cases of defamation and disinformation propagated as part of a cyber-attack, 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<sup>6</sup>.

In light of the foregoing, access to the documents requested is refused based on the exception of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

## **2.2. Protection of privacy and the integrity of the individual**

Article 4(1)(b) of Regulation 1049/2001 provides that *the 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.*

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<sup>2</sup> Judgment of 18 December 2008, *Muñiz v Commission*, case T-144/05 P, EU:T:2008:596, paragraph 89.

<sup>3</sup> Judgment of 13 November 2015, *ClientEarth v Commission*, Joined Cases T-424/14 and T-425/14, EU:T:2015:848, paragraph 95.

<sup>4</sup> Judgment of 17 October 2013, *Council v Access Info Europe*, case C-280/11 P, EU:C:2013:671.

<sup>5</sup> Judgment of 1 July 2008, *Sweden & Turco v Council*, case C-39/05 P and C-52/05 P, EU:C:2008:374.

Judgments of 1 July 2008, *Sweden & Turco v Council*, case C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69 and judgment of 15 September 2016, *Philip Morris v Commission*, case T-796/14 and T-800/14, EU:T:2016:487.

The documents requested also contain personal data, such as names, e-mail addresses, telephone numbers.

Pursuant to the Commission's administrative practice, access is granted to the names of individuals who hold a senior management position. However, access must be refused to the names and contact details of individuals of the Commission or third parties who do not hold a senior management position, for the reasons explained below.

In this respect, Article 4(1)(b) of Regulation 1049/2001 provides that access to documents is refused where disclosure would undermine *the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001<sup>7</sup> (hereafter 'Data Protection Regulation') becomes fully applicable<sup>8</sup>.

Article 2(a) of the Data Protection Regulation provides that '*personal data*' shall mean *any information relating to an identified or identifiable 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. According to the Court of Justice, there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'*<sup>9</sup>. The names<sup>10</sup> of the persons concerned as well as other data, from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. 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<sup>11</sup>. Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In its recent judgment in the *ClientEarth* case, 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

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<sup>7</sup> 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, Official Journal L 8 of 12 January 2001, page 1.

<sup>8</sup> Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

<sup>9</sup> Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>10</sup> Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

<sup>11</sup> *Ibid*, paragraphs 77 and 78.

decide on the request for access<sup>12</sup>. 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 data<sup>13</sup>.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the abovementioned personal data.

Therefore, I have to conclude that the transfer of personal data through the disclosure of the redacted parts of the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 of Regulation 45/2001 and 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 concerned would not be prejudiced by such disclosure.

Finally, the exception in Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(3), first 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 argue that *there is an overriding public interest in disclosure of the four documents about 'fake news' because the issue deals directly with Article 11 of the Charter of fundamental Rights of the European Union on freedom of expression and information.*

I agree that the issue of fake news, online misinformation and its role in shaping public opinion has generated considerable political and media attention. The European Union has already established policies on Media Freedom and Media Pluralism, based on Article 11 of the Charter of Fundamental Rights. These include addressing violations of media freedom and pluralism within the EU competences, facilitating independent monitoring and practical solutions to address media freedom violations, and promotion of media freedom in enlargement policy and external action.

To the contrary, since the decision-making process is ongoing and full disclosure of the internal documents would affect the Commission's ability to act freely from external pressure in exploring all possible options at the current preparatory stage, I consider that such disclosure would be contrary to the public interest, as it would have the effect of undermining the quality of the results of the Commission's deliberations.

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<sup>12</sup> Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

<sup>13</sup> Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

Furthermore, I assure you that the Commission interpreted and applied the exception of Article 4 of Regulation 1049/2001 strictly, which resulted in wide partial access to requested documents 1-4.

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, based on Article 4(3), first subparagraph of Regulation 1049/2001.

#### **4. PARTIAL ACCESS**

According 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.*

Pursuant to Article 4(6) of Regulation 1049/2001, wide partial access is granted to those parts of documents 1, 2, 3 and 4 which are not covered by any of the exceptions of Article 4 of the Regulation 1049/2001.

#### **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*