



EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

Director-General

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

Subject: Your application for access to documents – Ref GestDem No 2018/0811

Dear Sir,

I refer to your mail dated 05/02/2018 in which you make a request for access to documents, registered on 08/02/2018 under the above-mentioned reference number. I refer to the holding reply sent on 28/02/2018 (Ref. Ares (2018)1131764) and to the calls you had with my colleagues on 27/02/2018 and on 27/03/2018.

Following your agreement to a fair solution, you received, on 5/04/2018, a first reply concerning documents falling under an Annex 1, for the period running from 01.08.2016 until the date of your application (i.e. 05/02/2018) (Ref. Ares(2018)1833352).

This Annex 1 contained documents sent by the European Commission to third parties (Documents 1-12) and documents sent by Third parties to the Commission (Documents 13-18), only expunged from personal data.

The reply also contained a list of European parliamentary questions related to the object of your request, for which the Commission has provided an answer.

The present reply covers other documents falling under a new Annex 1 and Annex 2.

1. SCOPE OF YOUR APPLICATION

You request access to:

"Any document since 2015 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. For your assistance, the information sought for is sometimes called "publishers' right", "neighbouring right" or similar.

In case documents are classified or cannot be released because of exceptions or special treatment, I am asking for the name and the reference number of this document.

I am especially but not exclusively looking for information in the form of proposals, memos, studies, notes, meeting records, letters to Commissioner Oettinger and his successors and Cabinet staff members dealing with EU copyright and the protection of press publishers by application or amendment of EU copyright law. I do not consent to any narrowing of the scope or to the discarding of information if it is considered "unimportant" or has not yet been filed, archived or registered. This includes draft notes and internal correspondence.

If information under the scope of regulation 1049/2001 is not held by DG CNECT but by the Commission, the Commissioner or another DG or Commission unit, I would like this information to be included in this request.

In order to prevent duplication of work, the request refers to documents that were not released via the Access to Documents request 2016/4441."

Based on the foregoing, I consider your request to cover documents from 08/08/16 (the date of your application under Gestdem 2016/4441) until the date of your application under this Gestdem (i.e. 05/02/2018).

2. OTHER DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST AND ASSESSMENT UNDER REGULATION 1049/2001

Having examined the other documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents (hereinafter "Regulation 1049/2001") and taking into account the consultation of third parties involved, we have arrived at the following conclusion:

a) DOCUMENTS CONTAINED IN ANNEX 1: PARTIAL ACCESS

The documents contained in Annex 1 correspond to:

- A. Third parties letters;
- B. Documents from the European Commission:
 - i. Reports of meetings with stakeholders and meetings regarding European Parliament activities
 - ii. Briefings regarding EC meetings where the publisher's right was discussed
 - iii. Other (Internal note, slides, etc.)

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

Some other parts of the documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001. A comment has been added at the beginning of the expunged paragraphs to indicate the applicable exception.

i. Protection of privacy and integrity of the individual (Art. 4 (1) (b))

Annex 1-A: Third party documents

Since the documents in **Annex 1-A** originate from third parties, the latter have been consulted pursuant to article 4(4) of Regulation 1049/2001.

Following an examination of these documents and taking into account their consultation, I have come to the conclusion that these documents may be partially disclosed; expunged from personal data.

Certain parts of these documents contain names, email addresses, phone numbers, office numbers and handwritten signatures. These constitute personal data that have been expunged for the reason set out below.

Please note that the documents received by the Commission from third parties are disclosed for information only and cannot be reused 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.

Annex 1-B: European Commission documents

Documents contained in **Annex I-B** are European Commission's documents in relation to internal meetings, meetings with stakeholders and meetings regarding European Parliament activities. They take the form of briefings (ii) or report of meeting usually called "Back to Office" (BTO) (i).

Annex II also includes slides from the European Commission, Internal note on the adoption of the copyright package and exchange of mails regarding the Joint Research Centre (JRC) study "*The economics of online news aggregation and neighbouring rights for news publishers*" such as disclosed under previous Gest dem (2017/6751, 7583, 7585, 7593 and 7578). (iii)

Some of the deleted parts of these documents similarly contain personal data, in particular names, email addresses, phone numbers, office numbers of Commission staff members, of third persons attending meetings with the Commission, Cabinets and members of the European Parliament. Likewise, these data have been expunged.

I consider that the disclosure of the above-mentioned data would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data (Article 4(1)(b) of Regulation 1049/2001). The applicable legislation in this field is Regulation 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 (hereinafter "Regulation 45/2001")¹.

When access is requested to documents containing personal data, Regulation 45/2001 becomes fully applicable². According to Article 8(b) of Regulation 45/2001, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing a version of the above mentioned documents in which these personal data have been redacted.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application (following the procedure specified at the bottom of this letter) requesting the Commission to review this position.

ii. Protection of commercial interests (Art. 4(2) first indent)

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 documents n° 19, 27 and 30 under **Annex 1-A**, of documents n°5, 9 to 12 and 21 under **Annex 1-B (i)** and n° 21, 23, 31, 32 under **Annex 1-B (ii)**, contain non-public positions of EJF (European Federation of Journalist) EPC (European Publisher Council) NME (News Media Europe) and EMMA (European Magazine Media Association) ENPA (European News Publisher's Association) and BURDA regarding the publisher's right issue (Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market -COM (2016)593– here after the "Copyright legislative proposal") and the ongoing interinstitutional negotiations of the Commission Copyright legislative proposal.

Disclosure of these non-public positions on article 11, which appears to be one of the most sensitive and complex provisions of the Commission's proposal, at this stage, would undermine the protection of their commercial interests.

¹ Official Journal L 8 of 12.1.2001, p. 1

² Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

iii. Protection of the Institution's decision-making process (Art.4 (3))

Annex 1-B: European Commission documents

Limited parts of documents included in **Annex 1-B** contain sensitive internal information about the Commission, Members States and Members of the European Parliament's - often preliminary- positions on the publisher's right issue (Article 11 of the Copyright legislative proposal).

Based on Article 4(3), second subparagraph of Regulation 1049/2001, I consider that premature disclosure of these extracts would seriously undermine the decision making process in the context of the ongoing legislative process and the intense discussions and negotiations of the copyright legislative proposal in the European Parliament and the Council.

It would create confusion in the public and might lead to premature and/or wrong conclusions and would therefore expose the current negotiations and internal assessment to undue external pressure. This is all the more so taking into account that the trilateral negotiations between the Parliament, the Council and the Commission should be starting within the next months and given that the discussions on the publisher's right appear to be complex and intense. Premature disclosure of the information described above would undermine the position of the Commission in these discussions and its capacity to facilitate agreement between co-legislators. This risk is reasonably foreseeable and not purely hypothetical.³

b) DOCUMENTS CONTAINED IN ANNEX 2: NON-DISCLOSURE

The documents contained in Annex 2 correspond to:

- A. Third parties letters;
- B. Documents from the European Commission:
 - i. Reports of meetings regarding activities of the European Parliament;
 - ii. Reports of meetings regarding Council activities and documents from the Council;
 - iii. Other (Documents related to Inter Service Consultation, Notes of State of play)

Annex 2- A: Third parties letters

Document n° 1 and 2 originate from third parties which have objected to their disclosure. They consider that the disclosure of these documents would undermine the protection of their commercial interests.

Following an examination of the document and taking into account the consultation of EVA and the citizen, I regret to inform you that your application cannot be granted, as disclosure is indeed prevented by an exception to the right of access laid down in Article 4 of Regulation 1049/2001.

Annex 2 – B: European Commission documents

³ Judgment of the General Court of 13 November 2015 in joined cases T-424/14 and T-425/14, ClientEarth v Commission, (ECLI:EU:T:2015:848), paragraph 97.

Annex 2-B contains Commission's internal documents **(iii)** including documents about meetings in the Council **(ii)** and with Members of the European Parliament **(i)**, which full disclosure cannot be granted as exceptions to the right of access laid down in Article 4 of Regulation 1049/2001 apply.

Without prejudice to the application of the exception laid down in Article 4(1)(b) regarding the protection of privacy and integrity of the individuals, I consider that the full disclosure of these documents would seriously undermine the ongoing decision making process pursuant to Article 4 (3) second subparagraph.

Along the same line of what was developed above regarding parts of the documents under Annex 1-B, I consider that providing full access to the documents under **Annex 2-B** at this stage of the legislative process of the Copyright legislative proposal would expose the current negotiations and internal assessment to undue external pressure.

Indeed, the **Annex 2-B** contains internal minutes of all the meetings of the Copyright Working Group in the Council where Article 11 of the Copyright legislative proposal was discussed among the EU Members States and minutes of meetings between officials from the Commission and assistants of Members of European Parliament (MEPs) or teams of lead (JURI) or Associated Committees (IMCO, CULT, etc.). It also contains documents pertaining to the Inter Service Consultation (ISC 2016/) and Notes to the files with State of play, which reflects preliminary views and opinions on the Copyright legislative reform for internal use only.

A premature disclosure of such documents would then prejudice the Institutions (Commission, Parliament and Council) margin of maneuver and directly undermine the decision making process pursuant to Article 4(3), second subparagraph of Regulation 1049/2001.

3. PARTIAL ACCESS

I have considered whether partial access could be granted to the documents listed in Annex II and I have arrived at the conclusion that this is not possible, since the invoked above exceptions cover the document in their entirety.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Articles 4(2) and Articles 4 (3) of Regulation 1049/2001 applies, unless there is an overriding public interest in disclosure of the documents. I have examined whether there could be an overriding public interest in disclosure, but I have not been able to identify such an interest. The larger debate regarding the copyright framework is public. The European Commission participates on a regular basis in public debates, discussion with Members of the European Parliament and replies to citizens' questions as well as to oral and written questions from the European Parliament. I therefore take the view that there is the required transparency at this stage to meet the public interest in the debate.

5. CONFIRMATORY APPLICATION

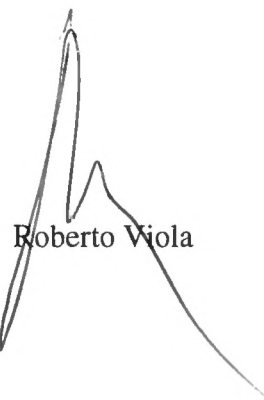
In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review the above positions.

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:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Brussels

or by email to: sg-acc-doc@ec.europa.eu

Yours faithfully,



Roberto Viola

Contact: CNECT-I2@ec.europa.eu

Enclosures:

List of Annexes I and II

ANNEX I. A - Third Party document

ANNEX I. B i – EC Reports of meetings

ANNEX I. B ii – EC Briefings

ANNEX I. B iii – Other EC Documents