



EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

Director-General

Brussels,
CONNECT/I2/VD/hz (2017) 3495620

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Rue Belliard, 20
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REGISTERED LETTER WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Your application for access to documents – Ref GestDem No 2017/2215

Dear Ms Fiedler,

We refer to your email dated 10/04/2017 in which you make a request for access to documents, registered on 10/04/2017 under the above mentioned reference number.

1. SCOPE OF THE REQUEST

You request access to "*documents which contain the following information for the period of 14 July until the publication of the draft Copyright Directive on 14 September 2016:- all correspondence (including emails) to officials in DG CNECT from the International Federation of the Phonographic Industry (IFPI) and the European Grouping of Societies of Authors and Composers (GESAC).*" You further mentioned that you were only requesting "*access to the contents of the communications and that personally identifiable information (such as email headers) can therefore be sent with redactions*".

Since the description given in your application did not enable us to clearly identify the concrete documents which would correspond to your request, we sent you a request of clarification on 02/05/2017 (Ref. Ares (2017)2251266). On 08/05/2017, you informed us that your request "*covers all correspondence (including emails) from the International Federation of the Phonographic Industry (IFPI) and the European Grouping of Societies of Authors and Composers (GESAC) sent to officials in DG CNECT regarding the proposal for a directive on copyright in the Digital Single Market, for the period running from 14 July 2016 until 14 September 2016 (adoption of the proposal)*" (Ref. Ares (2017) 3094896). On 01/06/2017, we sent you a holding reply concerning the extension of the deadline. (Ref. Ares (2017)2762934).

2. DOCUMENTS COVERED BY REGULATION 1049/2001

Your application concerns the following documents:

- (1) Email from IFPI with legal note, 15/07/2016, (Ref. Ares(2017)2268842)
- (2) Email from IFPI with legal note, 19/07/2016, (Ref. Ares(2017)2268925)
- (3) Email from IFPI, 29/07/2016, (Ref. Ares(2017)2268979)
- (4) Email from IFPI, with legal note, 02/08/2016, (Ref. Ares(2017)2269094)
- (5) Email from IFPI with legal note, 05/08/2016, (Ref. Ares(2017)2269139)
- (6) Email from IFPI with legal note, 11/08/2016, (Ref. Ares(2017)2269213)
- (7) Email from IFPI, 30/08/2016, (Ref. Ares(2017)2269439)
- (8) Email from GESAC, 05/09/2016, (Ref. Ares(2017)2269315)
- (9) Email from IFPI, 07/09/2016, (Ref. Ares(2017)2269382)
- (10) Email from GESAC, 14/09/2016, (Ref. Ares(2017)2269504)

3. ASSESSMENT OF THE DOCUMENTS

The documents which you seek to obtain relate to correspondences between stakeholders (IFPI and GESAC) and the Commission (namely officials in DG CNECT) during the period preceding the adoption 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). They contain legal opinions and third parties' positions regarding areas of law related to the Proposal.

Since the documents originate from third parties, IFPI and GESAC, the originators of the documents, have been consulted pursuant to article 4(4) of the Regulation (EC) No 1049/2001 (hereinafter "Regulation 1049/2001") regarding public access to documents.

IFPI has objected to full disclosure of the documents 2, 4-7 and 9 on the basis of the exceptions provided for in Articles 4(2) second indent (protection of legal advice), 4(2) first indent (protection of commercial interests) and 4(3) (protection of the Institution's decision making process) of the Regulation 1049/2001. GESAC did not object to disclose their emails (documents 8 and 10).

Following an examination of the documents requested under the provisions of this Regulation and taking into account the consultation of the third parties, I have arrived at the following conclusion:

a) DOCUMENTS 3, 8 AND 10: FULL ACCESS WITH ONLY PERSONAL DATA REDACTED

Annex 1 contains the documents to which full access is granted following simple redaction of personal data.

Pursuant to Article 4(1) (b) of Regulation 1049/2001, access to a document has to be refused if its 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. The applicable legislation in this field is 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 (hereinafter "Regulation 45/2001") .

When access is requested to documents containing personal data, Regulation 45/2001 becomes fully applicable.

According to Article 8(b) of this Regulation, 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.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Moreover, in your application you mention expressly that personally identifiable information can be redacted. Therefore, we are disclosing the documents requested expunged from this personal data.

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 requesting the Commission to review this position according to the procedure laid down at the point 5 of this letter.

b) DOCUMENTS 1, 4 AND 5: PARTIAL ACCESS

Annex 2 contains the documents to which partial access is granted.

Some parts of the documents have been redacted as their disclosure is prevented by one or more exceptions to the right of public access to documents laid down in Article 4 of Regulation 1049/2001:

i. Protection of privacy (Art. 4 (1) (b))

Some of the deleted parts of the documents contain personal data, in particular names of senders, recipients and contact details, which have been redacted for the reasons indicated under point 3a).

ii. Protection of legal advice (Art. 4 (2) second indent) and of the commercial interest (Art. 4(2) first indent)

Article 4(2), second indent of Regulation 1049/2001 provides that "*[t]he 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(2), first indent 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.*"

Documents 1, 4 and 5 consist of an email exchange between the European Commission and IFPI in which reference is made to legal advice (enclosed) prepared by IFPI's external counsel or by their in-house lawyer.

In reply to the Commission's consultation, IFPI argues that the public release of the documents would seriously undermine the company's legal professional privilege. This privilege is considered as the company's ability to seek legal advice and to choose and revert to its legal advisers in all freedom and without any outside interference or risk of disclosure of the related communications. The legal advisers/law firm concerned or other legal advisers/law firms would become hesitant in future to provide advice to IFPI and to do so it in a frank, objective and comprehensive manner if they would learn that their legal opinions, which they provided specifically and in all confidentiality to IFPI, would be made public.

Release of the documents would therefore have the effect of undermining the protection of legal advice in the sense of Article 4(2), second indent of Regulation 1049/2001.

For similar reasons (i.e. the direct, indirect revelation on the specific legal issues of interest for IFPI and the legal strategy and approach taken by them) the release of the documents would also harm the professional secrecy and the commercial image of both IFPI's members and their legal advisers/law firm concerned, and in this way undermine the commercial interests protected by Article 4(2), first indent of Regulation 1049/2001. It could notably jeopardize IFPI's members' position with regard to future contractual negotiations or litigations given that defendants would have prior knowledge of legal arguments.

- iii. Protection of legal advice (Art. 4(2) second indent) and of the Institution's decision making process (art.4(3))

One redacted part of document 1 relates to a position taken by the Commission's legal service on an issue related to the copyright reform. Disclosure of the part of this document at this stage would have a serious impact on the Commission's interest in receiving frank, objective and comprehensive legal advice. It would also constitute a risk to weaken the Commission in any possible dispute.

Furthermore, based on Article 4(3) of Regulation 1049/2001, I consider that providing access to the part of the document concerned would seriously undermine the decision making process in the context of the ongoing legislative process and the intense discussions and negotiations of the legislative Proposal in the European Parliament and the Council.

c) **DOCUMENTS 2, 6, 7 AND 9: NO DISCLOSURE**

Annex 3 contains the list of documents to which access is denied.

As regard documents 2, 6, 7, 9, I regret to inform you that your application cannot be granted, as disclosure is prevented by the exceptions to the right of access laid down in Article 4(2) first and second indent of the Regulation 1049/2001.

These documents contain non-public positions of IFPI on specific issues arising in the context of the copyright reform, the disclosure of which at this stage could seriously undermine the negotiating position of IFPI's members in the course of their business activity. They constitute commercially sensitive business information, representing commercial interests, which are protected against disclosure under the first indent of Article 4(2) of Regulation 1049/2001.

They also contain legal advice from IFPI's external and in-house lawyers on specific legal issues pertaining to copyright. For the same reasons as the ones here-above mentioned by

IFPI, access to these documents must be denied as they are covered by the exception laid down in the second indent of article 4(2) of Regulation 1049/2001.

I have considered whether partial access could be granted to the documents without undermining the interests described above. Yet I have arrived at the conclusion that this was not possible, since the invoked above exceptions of Article 4(2) cover the documents in their entirety.

4. OVERRIDING PUBLIC INTEREST

The exceptions called upon in point 3b)ii and 3b)iii and laid down in Article 4(2) and 4(3) of Regulation 1049/2001 apply, unless there is an overriding public interest in disclosure of the documents. While recognising the importance of transparency in enabling citizens to participate in the democratic process, in this case, I take the view that the public interest in making the content of these documents public does not outweigh the harm that their disclosure would cause to the interests protected by the invoked exceptions.

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 its 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:

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

Enclosure: 3