



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY

The Director- General

Brussels,
CONNECT/R4

Mr Robert Gorwa
Alexander von Humboldt Institut
für Internet und Gesellschaft
Französische Straße 9
10117 Berlin
GERMANY

Advanced copy by email to:
ask+request-7872-1cd6100c@asktheeu.org

REGISTERED LETTER WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Your application for access to documents – GestDem 2020/3305 (split request originating from GestDem 2020/2774)

Dear Mr Gorwa,

I refer to your application for access to documents pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹ (hereinafter 'Regulation 1049/2001') dated 20 April 2020 and registered on the same date under the above-mentioned reference number. I also refer to a further email communication provided to you on 3 June 2020, our reference Ares(2020)2870707, informing you about the split between different services/Directorates-General of the Commission, as regards the handling of your application.

1. SCOPE OF YOUR REQUEST

You request access to the following documents in relation to notification 2017/127/D ("Act improving law enforcement on social networks") that was notified in the framework of Directive (EU) 2015/1535²:

¹ Official Journal OJ L 145, 31.5.2001, p. 43.

² Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241 of 17.9.2015, p.1

“1. the comments issued by Italy and Sweden

2. the draft law assessment on 2017/127/D put together by JUST and CNECT, and shared internally between JUST and CNECT via email on 23 May 2017 [potential reference number: Ares(2017)5237754]

3. any other analysis, commentary or opinions on the notification 2017/127/D from the Legal Service, DG CNECT, DG GROW, DG JUST, or other DGs, including draft reports, memos, or other documents.”

As you were informed, your request was split between the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) - GestDem 2020/2274; the Directorate-General for Communications Networks, Content and Technology (DG CONNECT) - GestDem 2020/3305; the Directorate-General for Justice and Consumers (DG JUST) - GestDem 2020/3306 and the European Commission's Legal Service - GestDem 2020/3307. This response complements the responses of the other Commission services on point 3 of your request for the documents originating from DG CONNECT.

2. DOCUMENTS FALLING UNDER THE SCOPE OF YOUR REQUEST

We have identified three documents as falling within the scope of your request of 20 April 2020:

- (1) Ares(2017)5192100 – RE: Notifications 2017/127/D Act improving law enforcement on social networks - questions of understanding;
- (2) Ares(2017)5192750 – FW: Meeting at 1730;
- (3) Ares(2017)5188366– Main modifications on the NetzDG;

3. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

Having examined these documents under the provisions of Regulation 1049/2001, we have arrived at the conclusion that partial access can be granted to two documents and disclosure is refused for one document, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

a. Protection of legal advice

Pursuant to Article 4(2), second indent of Regulation (EC) No 1049/2001, 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.”

Documents 1 and 2 contain internal legal opinions on a sensitive matter, drafted under the responsibility of the different Commission services concerned. They relate to Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. In line with this Directive, the German authorities notified the draft act improving law enforcement on social networks to the European Commission. Documents 1 and 2 contain legal advice that was drawn up for purely internal purposes by staff members of DG CONNECT and DG JUST, following the notification by the German authorities.

Disclosure 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.

According to the case-law of the General Court, “legal advice” shall be interpreted as advice relating to a legal issue, regardless of the way or of the stage of the decision-making procedure during which it was issued³.

As further underlined by the General Court, the exception provided for in Article 4(2), second indent of Regulation No 1049/2001 - the exception relating to legal advice - must be construed as aiming to protect an institution’s interest in seeking legal advice and receiving frank, objective and comprehensive advice⁴.

Indeed, disclosure of the legal advice concerned, which was drawn up as part of a specific procedure, could constrain the Commission in any of its decision-making concerning the general topic of the fight against illegal content online, which remains sensitive.

Furthermore, in case of disclosure of the concerned passages, the Commission would be exposed to undue external pressure. With regard to the different interest representatives and their divergent intentions as to the fight against illegal content, the risk of undue external pressure is real and non-hypothetical.

As for Document 1, the remaining parts, after redaction of the passages containing sensitive legal advice, would be meaningless. Therefore, access to this document must be refused in its entirety.

The exceptions in Article 4(2) of Regulation 1049/200 apply unless there is an overriding public interest in the disclosure of the document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public (as opposed to private interests of the applicant) and, secondly, overriding, i.e. in this case it must outweigh the protection of legal advice under Article 4(2) of Regulation 1049/2001.

In your application, you have not established any arguments that would present an overriding public interest to disclose the documents and we could not identify such an interest.

b. Protection of privacy and the integrity of the individual

Disclosure of parts of Documents 1, 2 and 3 is prevented by the exception concerning the protection of privacy and integrity of the individual outlined in Article 4(1)(b) Regulation 1049/2001, since they contain the following personal data:

- Names/initials, functions and contact information of Commission staff members not pertaining to the senior management

Article 9(1)(b) of the Data Protection Regulation⁵ does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

³ Judgment of 15 September 2016, *Herbert Smith Freehills v Commission*, case T-755/14, EU:T:2016:482, paragraph 47

⁴ 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

⁵ OJ L 205, 21.11.2018, p. 39.

Consequently, pursuant to Article 4(1)(b) Regulation 1049/2001, access cannot be granted to the personal data contained in the requested documents, 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.

4. REUSE OF DOCUMENTS

Please note that the disclosed documents contain drafts and positions of preliminary character, which do not reflect the position of the Commission and cannot, therefore, be quoted as such. 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.

5. POSSIBILITY OF A 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 this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

(e-Signed)
Roberto Viola

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