



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS

Directorate D: Law Enforcement and Security
Unit D.4: Cybercrime

Brussels
HOME.D.4/AP

By registered letter with acknowledgment of receipt

Samuel Stolton
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Subject: Your application for access to documents – GESTDEM 2021/0614

Dear Mr Stolton,

We refer to your e-mail of 9 February 2021 in which you make a request for access to documents, registered on 10 February 2021 under the above-mentioned reference number.

You request access to all documentation (including but not limited to: general communications of any nature, written material of any kind, email correspondences, attendance lists, agendas, background papers, briefing papers, transcriptions of meetings, any written material whatsoever) containing references to the 'PhotoDNA' software.

As your application related to a very large number of documents, we contacted you by letter of 3 March 2021¹, with a view to finding a fair solution based on Article 6(3) of Regulation (EC) 1049/2001. We explained that such a fair solution could consist in narrowing down the scope of your request (i.e. the subject matter(s) and/or timeframe covered), so as to reduce it to a more manageable amount of documents.

We also indicated that, according to our first estimates, the handling of your request would take at least 42 working days, counting from the date of its registration, covering the following steps:

- retrieval and establishment of a complete list of the documents identified: [5] working days;
- assessment of the content of the documents in light of the exceptions of Article 4 of Regulation (EC) No 1049/2001: [12] working days;
- third party consultations: [10] working days;
- final assessment of the documents in light of the comments received: [5] working days;
- drafting of the reply: [1] working day;
- redaction of those parts of the documents to which one or several exceptions apply: [5] working days;
- internal review and approval of the draft decision: [2] working days; and
- preparation of the reply and the documents for dispatch (scanning of the redacted versions, administrative processing etc.): [2] working days.

¹ Ares(2021)1602587

We concluded that, according to our first estimates, a maximum of 4 categories of documents could possibly be dealt with within 30 working days counting from the date of registration of your application.

You have not replied to our letter proposing a fair solution. We have therefore decided to make use of the possibility, provided by the case law of the EU Courts, to balance your possible interest in access against the workload resulting from the processing of your application. As a result, we have decided to narrow down the scope of your request with a view to safeguarding the interests of good administration, according to the categories of documents identified in our proposal for a fair solution².

In your request, you specify that it extends to *any information that DG Home holds in relation to any of the above points, including information that may have been deemed short-lived or unimportant*.

We would like to draw your attention to the fact that pursuant to the Commission's policy on documents management and standard practice: e-mails and documents which do not contain important information (insofar as they do not involve action or follow-up, or may not later be needed as proof, and do not therefore qualify for permanent storage) are deleted when they become obsolete and/or are superseded by events.

The following documents fall within the scope of your application, as unilaterally narrowed down:

1. Technical information provided by the Commission to the Council in the framework of the negotiations on the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) 28 September 2019, Ares(2021)2114873, (hereafter 'document 1').
2. Technical information provided by the Commission to the European Parliament in the framework of the negotiations on the Proposal for a Regulation of the European Parliament and of the Council on a temporary derogation from certain provisions of Directive 2002/58/EC of the European Parliament and of the Council as regards the use of technologies by number-independent interpersonal communications service providers for the processing of personal and other data for the purpose of combatting child sexual abuse online, 10 November 2020, Ares(2020)6548379 (hereafter 'document 2').
3. Letter from Commissioner Ylva Johansson to Microsoft, 29 October 2020, Ares(2020)6100804
4. Letter from MICROSOFT – Call for action to continue fight against child sexual abuse online, addressed to President von der Leyen, Commissioner Johansson, Commissioner Breton, 2 September 2020, Ares(2020) 4589540 (hereafter 'document 4');
5. Flash report - call between Commission officials and Microsoft on PhotoDNA (technical update) and upcoming EUIF activities on the fight against CSA, 7 April 2020, Ares(2021)1707765 (hereafter 'document 5').
6. Report of a meeting with the creators of PhotoDNA, 6 March 2019, Ares(2021)1711478 (hereafter 'document 6');
7. Flash report - call between HoC Åsa Webber and the creators of PhotoDNA on the fight against disinformation, radicalisation and child sexual abuse, 21 April 2020, Ares(2021) 1707986 (hereafter 'document 7').

² Judgment of the General Court of 26 October 2011, Dufour v European Central Bank, Case T-436/09, EU:T:2011:634, paragraph 121.

Full disclosure

Disclosure of documents 1 and 2 can be granted.

Partial access

Having examined the documents under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the conclusion that documents 3 to 7 may be partially disclosed. Some 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(1)(b), Article 4(2), first indent, and Article 4(3), first subparagraph, of this Regulation.

With regard to the documents 3 to 7 listed above, a complete disclosure of the identified documents is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because they contain the following personal data:

- the names and contact information of Commission staff members not pertaining to the senior management;
- the names of other natural persons;
- handwritten signatures of natural persons;

Article 9(1)(b) of the General Data Protection Regulation 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 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.

Since document 4 originates from a third party, the originator of the document has been consulted.

The author has objected to disclosure of parts of the document. The redacted parts of the documents contain sensitive information, such as legal assessments made by the company that submitted it. Disclosure of that document would undermine the protection of the commercial interests of the company that submitted it and, therefore, the exception laid down in Article 4(2), first indent, of Regulation (EC) No 1049/2001 applies to this document.

Regarding documents 5, 6 and 7, the redacted parts of the documents contain commercially sensitive business information of the company and private parties.

Disclosure of these parts of documents 5, 6 and 7 would undermine the protection of the commercial interests of the company that submitted it, as putting this information in the public domain would affect its competitive position on the market. Therefore, the exception laid down in Article 4(2), first indent, of Regulation (EC) No 1049/2001 applies to this document.

Furthermore, disclosure of redacted parts of documents 5, 6 and 7 would seriously undermine the protection of the decision-making process of the Commission. Regulation No 1049/2001 affords protection to the

possibility of expressing views independently and of gathering information with a view to contributing to the smooth running of the decision-making process. This reasoning extends to working contacts with external parties, such as industry and academia. Disclosure of such exchanges would seriously undermine the trust between the Commission and external stakeholders, which would hinder the process of information gathering necessary for well-informed and evidence-based decision-making. Therefore, the exception laid down in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 applies to parts of these documents.

Additionally, disclosure of redacted parts of documents 6 and 7 would undermine the protection of privacy of the individual. Therefore, the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 also applies to parts of these documents.

The exceptions laid down in Article 4(2) and Article 4(3) apply unless there is an overriding public interest in disclosure of the documents.

We have examined whether there could be an overriding public interest in disclosure, but we have not been able to identify such an overriding interest, for the same reasons as above explained.

Finally, we want to stress that documents 5, 6 and 7 were drawn up for internal use under the responsibility of the relevant services of the Directorate-General for Home Affairs and Migration. They solely reflect the author's interpretation of the interventions made and do not set out any official position of the third parties to which the document refers, which was not consulted on its content. It does not reflect the position of the Commission and cannot be quoted as such.

In accordance with Article 7(2) of Regulation (EC) No 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:

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

Yours sincerely,

Monique Pariat
[e-signed]

Annexes: 7 documents