

This is a confirmatory application to appeal the refusal of access to certain documents in the case Ref GestDem No 4105/2014. The refusal was conveyed by way of an e-mail (and letter) from DG Enterprise, reference ENTR/F4/CS/vv (2014) 3632018, carrying the date 17th October 2014.

The request was made under Regulation (EC) No 1049/2001 (“the regulation”). Article 4.1(b) of that regulation, together with Case C-28/08 P were cited as grounds for the refusal.

I submit

- a) The decision to refuse access was not justified in that DG Enterprise did not consider Article 4.6 of the regulation under which “If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”.
- b) The judgement of the court in Case C-28/08 P does not prevent the disclosure of at least parts of the requested documents, and does not inhibit the application of Article 4.6 of the regulation to the present case.
- c) It is wrong to imply or believe that documents from third parties may generally be disclosed only with the consent of the third party.
- d) In assessing which part of any relevant document may qualify for the exceptions to disclosure, the nature of the document must be taken into account.
- e) I also apply for access to the list or register of documents that would come within the ambit of my request and that the Commission may (continue to) refuse to disclose.

My arguments in support of my appeal are include the following:

1 (a) The regulation confers a right on citizens of the Union, in this case me. EU institutions have a duty to respect and vindicate that right and to apply exceptions to that right only to the extent that it is strictly necessary and lawful to do so. This does not appear to have been the approach adopted in this case. The letter of refusal does not indicate that the DG Enterprise have considered Article 4.6 of the regulation and indeed does not mention that provision at all. I submit that the (apparent) omission to consider Article 4.6, combined with the actual omission to mention that provision in the letter of refusal, gives rise to a reasonable suspicion of objective bias in the manner in which DG Enterprise has dealt with my request. That suspicion is compounded by the fact that the letter of refusal did mention another provision that might have been relevant to my request, but one that would be very much harder to argue - see Paragraph 5 below. The refusal to disclose any part of any document originating from DG Enterprise itself is a further indication of the possibility of

objective bias. Such documents could easily have been released in line with the provisions of Article 4.6, and without the necessity to consult third parties.

(b) Since the letter of refusal is signed by the Director General I presume that it reflects the settled opinion and policy of DG Enterprise.

2 (a) Although the meaning is not entirely clear, the absence of any reference to Article 4.6 means that the letter of refusal may be read as implying that Case C-28/08 P is authority for refusing access to any and all parts of the relevant documents in this case. Any such implication would represent both a misreading of the judgement in Case C-28/08 P and a faulty application of that judgement to the issue at hand.

In Case C-28/08 P, a document (minutes of a meeting) was disclosed but with the names of five individuals redacted. The Court held that the Commission was right to redact the names of five persons who had not agreed to, or who had objected to, disclosure of their identities. In that case, the Commission had redacted those parts of the document that came within the privacy exception, and released the remaining parts - in line with Article 4.6 of the regulation. The same approach could be followed here.

(Article 4.6 was not pleaded or considered in Case C-28/08 P because it was not relevant to the particular facts of that case.)

As the Commission's Legal Service put it in its summary of the case:

“The Court concluded that the Commission was therefore right to check whether the attendees at the meeting of 11 October 1996 agreed to the disclosure of their names and that in the absence of the consent of five of them, it released an expurgated version of the minutes”.

(http://ec.europa.eu/dgs/legal_service/arrets/08c028_en.pdf)

3 The letter of refusal refers to third parties having agreed to the disclosure of those few documents that have been disclosed. To avoid misunderstanding, I would point out the release of third party documents does not require the consent as such of relevant third parties - only that they be consulted in certain cases “.. with a view to assessing whether an exception in paragraph 1 or 2 is applicable..”. The decision to disclose a document or part of a document in accordance with the relevant laws rests with the Commission. Third parties may have a right to oppose disclosure of (part of) a document on specific grounds but not a general right to prevent all disclosure.

4 Apart from the names of some individuals there may be other parts of the documents that DG Enterprise may be disposed to regard as coming under the allowed exceptions in the regulation. I submit that it is important to consider here the nature of the correspondence, and records of correspondence, to which I have requested access. This correspondence is not itself of a private or personal nature. It is correspondence to and from a public institution and a professional association on matters of public policy. Expressions of opinion or sentiment that might be protected

in purely private and personal correspondence may enjoy no such protection in official/professional correspondence. If an official were to express a partisan political view in official correspondence, for example, he or she could not plead the data protection rules to prevent disclosure. (This is an example to illustrate my argument; I am not suggesting this actually happened.)

There may also be other elements in the documents, which of course I have not seen, which again may be protected in purely private and personal correspondence but not in professional/official correspondence.

5 The letter of refusal invited me to put forward arguments “*showing the need for having personal data transferred ... and the absence of adverse effects to the legitimate rights of the persons whose personal data should be disclosed*”. Thus, I am invited to argue that an unknown number of documents that I have not seen would not have adverse effects on an unknown number of individuals who are not named. In the absence of any register or list of “refused” documents, I reserve my position here.

6) The Mission Letter from incoming President Juncker to the incoming Commissioner for Internal Market, Industry, Entrepreneurship and SMEs included the following passage. “*You will have seen that the Political Guidelines include a new commitment to transparency. Transparency should be a priority for the new Commission and I expect all of us to make public, on our respective web pages, all the contacts and meetings we hold with professional organisations or self-employed individuals on any matter relating to EU policy-making and implementation. It is very important to be transparent where specific interests related to the Commission’s work on legislative initiatives or financial matters are discussed with such organisations or individuals*”.

Any further dealings with my request will provide an opportunity for the Commission to apply these principles and even, if you hurry, to anticipate them.

To summarise, I assert here my right of access to all those parts of all the relevant documents that may properly be released under Article 4.6 of the regulation

I also request access to a register or list of all documents covered by my request and which the Commission may (continue to) be disposed to refuse to disclose.