



Simon Davies

15th December 2013

The Secretary-General
European Commission,
B-1049 Brussels
BELGIUM

GESTDEM 2013/5737 (application for access to documents): Request for review of decision

Dear Secretary-General,

I refer to my application of 14th November 2013 (GESTDEM 2013/5737) for access to documents, according to Regulation 1049/2001. This application relates in part to investigation case COMP/39740 — Google.

I am writing with specific regard to the determination COMP/C3/BA/se/HT.3524/Bundle 2013/116522 of 28th November 2013 in which full or partial access to these documents was refused on the grounds of the exceptions in Article 4(2), first and third indent, and Article 4(3) of Regulation 1049/2001.

The determination noted that my application had not established an overriding public interest to disclose the documents:

Consequently, the prevailing interest in this case lies in protecting the effectiveness of the Commission's investigations, its decision-making process and the commercial interests of the undertakings concerned.

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In this appeal I will assert that there is an overriding public interest for disclosure of the documents. I will set out my reasoning for why this is an issue of genuine public interest, rather than it being the private interest of the applicant.

I am aware of the potential sensitivity of documents relating to any competition investigation. However my application for access to these documents raises issues that go to the heart of the integrity and the credibility of the investigative processes. However, the public interest in this matter extends beyond the current Google investigation.

1. Background and summary

The requested documents (listed below) were divided for administrative convenience into documents of a general nature and documents that are specific to the current Google inquiry into Google. It is those documents that are the subject of this appeal.

The request was made with the intention of helping to maintain public trust in the operations of the Competition Commissioner by improving the level of transparency of its investigative procedure.

2. The legal basis for refusal of disclosure

While articles 4(2) and 4(3) of Regulation 1049/2001 set out exceptions to disclosure of documents, the regulation clearly establishes that disclosure is “in itself” a public interest, enabling a more open and participative Union. In light of this, disclosure should be viewed – in the general sense - as the default condition, and any application of exceptions needs to be based on sound reasoning (c.11 of Regulation 1049/2001). The Commission’s letter to me of 28th November does indeed set out its justification, based entirely on the *Commission v TGI* case.

The Commission’s response to me does not set out its reasoning for assuming such broad applicability. While I understand the significance of the *Commission v TGI* ruling it is clear the Commission has applied the findings in widest possible sense to cover by default all Competition investigations. I would appreciate receiving a more detailed argument behind this assumption.

With regard to the context of *Commission v TGI* I would also appreciate learning whether the decision to refuse disclosure of the documents was based on a concrete individual assessment (the letter uses the words “Having carefully examined the documents”). Are these equivalent procedures?



I accept that in the absence of an argument establishing an overriding public interest for disclosure such an assumption is reasonable. However it is equally clear that once a public interest argument has been made (as will be set out in this appeal) then disclosure must be decided on a case-by-case basis. I say this with some awareness of Regulation No 659/1999 that does not establish a right of access to documents in the Commission's administrative files for interested parties in the context of the review procedure opened in accordance with Article 88(2) EC.

3. Arguments for consideration of overriding public interest

I assert that in the case of the Google investigation there are specific circumstances that warrant a consideration of overriding public interest in disclosure. I am not arguing against the general applicability of *Commission v TGI*.

There are three exceptional circumstances that I believe should be taken into account when determining an overriding public interest for disclosure.

3.1 Public trust in the processes of the inquiry

First, I refer to the Commission's response to point 7 of my access request (email of December 5th from Jane Wheatley, Chief Economic Team of DG-COMP) that stated:

DG Competition does not have any such specific documents, etc. that "provide guidance to the Commissioner on parameters and minimum standards for assessment and testing of data supplied by companies that are the subject of investigation".

The response noted that DG Competition has published a document entitled "*Best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases*"¹

This situation clearly establishes that while guidance has been published for submission of data, there are no measurable or consistent means of testing

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http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf



that data. This is a matter of concern to all interested parties to the current Google case, but which also extend generally to the conduct of investigations. It is crucial that public trust is maintained in the procedures and operations of Commission investigations, and permitting an “open source” assessment of the data supplied by Google – and the Commission’s own assessment – would be an important means to establish that trust. This trust would be fatally compromised if there were a perception that the Commission’s assessment of evidence and data was random and inconsistent.

3.2 Lawfulness of Google’s operations

The second point concerns the lawfulness of Google’s operations within Europe and whether this aspect was considered by the Commission.

You may be aware that over the past two years there has been a considerable level of investigation by EU data protection authorities, much of which has concluded that Google’s Terms of Service are unlawful in many jurisdictions. The most recent findings (November 28th 2013) ruled that Google’s contract and operations breach Dutch data protection law,² a finding which has also been made in Germany³ and France.⁴

The report summary observed:

The investigation shows that Google combines personal data relating to internet users that the company obtains from different services. Google does this, amongst others, for the purposes of displaying personalised ads and to personalise services such as YouTube and Search. Some of these data are of a sensitive nature, such as payment information, location data and information on surfing behaviour across multiple websites. Data about search queries, location data and video's watched can be combined, while the different services serve entirely different purposes from the point of view of users. Google does not adequately inform users about the combining of their personal data from all these different services. On top of that, Google does not offer users any (prior) options to consent to or reject the examined data processing activities. The consent, required by law, for the combining of personal data from different

² http://www.dutchdpa.nl/Pages/pb_20131128-google-privacypolicy.aspx

³ <http://www.pcworld.com/article/2065320/berlin-court-rules-google-privacy-policy-violates-data-protection-law.html>

⁴ <http://www.privacysurgeon.org/blog/incision/french-privacy-regulator-finds-google-in-breach-of-national-law-as-spain-and-germany-close-in/>



Google services cannot be obtained by accepting general (privacy) terms of service.

This is an issue of fundamental importance. Google has been operating unlawfully in Europe and in doing so achieves competitive advantage. To what extent has the commission considered the unfairness of this situation and the competitive irregularity that it has created? The documents that have been requested may shed some light on this question. It is a matter of public interest that this question is clarified.

3.3 Scope of the investigation

Finally, I believe there is a public interest in clarifying the extent to which the Competition Commissioner has taken into account the importance and the value of Google's key asset – personal data. There have been inconsistencies⁵ in the Commissioner's own public statements on this point, raising questions about the validity and relevance of the current investigation.

There is a perception that the Commissioner has ignored crucial data protection and privacy concerns, despite having signaled in public statements that the privacy aspect was relevant to competition considerations.⁶

The request seeks to explore why the commissioner contradicted a previously stated position that a monopoly of data would be a competition issue. What is the commissioner's reasoning for abandoning this prior position when the privacy issues concerning Google are now even more volatile?

The Commissioner has previously noted that this inquiry is virgin territory for his investigators, but there is an important question over whether he has consulted data protection regulators to determine the extent of their knowledge of Google's data holdings and operations. Equally as relevant, has he sought their view on the economic power of data and therefore its competitive impact?

These aspects are, in my view, issues of overriding public importance and justify at least partial disclosure of related documents. I hope that you are able to

⁵ <http://www.privacysurgeon.org/blog/incision/the-eu-competition-authority-is-heading-for-a-fall-over-the-google-antitrust-inquiry/>

⁶ Speech by Competition Commissioner, 26th November 2012 http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm

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uphold this appeal to ensure that this public interest is supported.

Yours sincerely,

Simon Davies



Requested documents

- 1 Documents, correspondence, policies, minutes, position papers and other material that provide guidance to the Commissioner about parameters and limitations of contact with staff of companies that are the subject of a current investigation.
- 2 Documents, correspondence, policies, minutes, position papers and other material that provide guidance to the Commissioner about parameters and limitations of contact with relevant a) complainants and b) other stakeholders during the course of an investigation.
- 3 Documents, position papers, resources and other references relating to legal and ethical aspects of 1) and 2) above.
- 4 Documentation and training material on privacy and data protection that are made available to staff of the Commissioner involved in conducting investigations.
- 5 Internal data protection manuals and guidance that apply generally to operational activities of all staff.
- 6 Documents, correspondence, policies, minutes, position papers and other references that provide guidance to the Commissioner on parameters and minimum standards for evidence-gathering in the course of investigations.
- 7 Documents, correspondence, policies, minutes, position papers and other references that provide guidance to the Commissioner on parameters and minimum standards for assessment and testing of data supplied by companies that are the subject of investigation.
- 8 All documents, including notes of minutes, emails, text messages and other correspondence relating to contacts between the Commissioner and Google's executives during the period 1st February 2013 to 3rd October 2013 relating to the present inquiry into Google.
- 9 All documents, including notes of minutes, emails and other correspondence relating to contacts between the Commissioner and EU Data Protection Authorities during the period 1st May 2012 to 3rd October 2013 relating to the present inquiry into Google.
- 10 Any documentation evidencing the number of letters from concerned parties relating to the Google inquiry, meetings held with them and

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- responses to their requests.
- 11 The Commissioner's original assessment of Google's first proposal.
 - 12 Any data supplied by Google in support of its revised proposals.
 - 13 Any documentation setting out the details of the methodology Google has used to test its proposals.
 - 14 Any internal documents, correspondence, policies, minutes, position papers and other material from October 2010 to the present, relating to consideration of the relevance of privacy and data protection aspects of the present inquiry into Google.
 - 15 Minutes, correspondence and memos relating to the meeting in New York on the week of 22nd September 2013 between the Commissioner and Eric Schmidt of Google.
 - 16 Minutes, correspondence and memos relating to meetings prior to the week of 22nd September 2013 between the Commissioner, senior Commission staff and Google executives.
 - 17 Logs of phone interactions between the Commissioner and his staff and Google executives between October 2010 and the present.
 - 18 Logs of phone interactions between the Commissioner and his staff and complainants between October 2010 and the present.