



EUROPEAN COMMISSION  
DG Competition

The Director-General

Brussels, 28/11/2013  
COMP/C3/BA/se/HT.3524/Bundle 2013/116522

Simon Davies

via e-mail:

[simon@privacy.org](mailto:simon@privacy.org)

**Subject: Application for access to documents according to Regulation 1049/2001  
GESTDEM 2013/5737 relating to case COMP/39740 – Google**

Dear Sir,

Thank you for your message dated 14 November 2013, registered on 18 November 2013 under reference number GESTDEM 2013/5737, requesting access to documents under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001").<sup>1</sup>

## 1. DOCUMENTS CONCERNED

Your application concerns access to 18 documents or categories of documents. This letter addresses items 8 to 18 of your application, which relate to documents pertaining to case COMP/39740 – Google. The other items of your application (numbers 1 to 7) do not relate to a specific competition case. They will be treated separately under the references GESTDEM 2013/5865, 2013/5870, 2013/5871 and 2013/5872.

## 2. BACKGROUND

The documents you request access to are part of the administrative file in case COMP/39740 – Google. The Commission has not yet adopted a decision of any kind in that case. The investigation is ongoing.

Having carefully examined the documents concerned in the light of Regulation 1049/2001, I have come to the conclusion that all documents requested fall under the exceptions of Article 4 of the Regulation. Access to these documents is therefore refused. In the following sections of this letter, you will find the detailed assessment as regards the

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<sup>1</sup> OJ L145, 31.05.2001, p. 43.

application of the exceptions of Article 4(2), first and third indent, and Article 4(3) of Regulation 1049/2001.

### 3. APPLICABLE EXCEPTIONS

*Article 4(2), third indent, protection of the purpose of investigations and Article 4(3) protection of the institution's decision making process*

Pursuant to Article 4(2), third indent, of Regulation 1049/2001, the Commission shall refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits.

Pursuant to Article 4(3) of Regulation 1049/2001, access to the documents drawn by the Commission or received by the Commission shall be refused if the disclosure of the documents would seriously undermine the Commission's decision making process.

These exceptions aim at protecting the Commission's capacity to ensure that Member States and undertakings comply with their obligation under Union law. For the effective conduct of pending investigations, it is of utmost importance that the Commission's investigative strategy, preliminary assessments of the case and planning of procedural steps remain confidential.

In *Commission v TGI*, a case which concerned an access to documents request to all documents in two State aid cases, the European Court of Justice upheld the Commission's refusal and held that there exists with regard to the exception related to the protection of the purpose of investigations a general presumption that disclosure of documents in the file would undermine the purpose of State aid investigations. The Court reasoned that such disclosure would call into question the state aid procedural system.<sup>2</sup>

The reasoning in *Commission v TGI* can be applied by analogy to documents in cases regarding the application of Articles 101 and 102 TFEU which are governed by the procedural rules set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,<sup>3</sup> disclosure of which would similarly undermine the procedural rules system set up by that regulation, and in particular the rules on confidentiality and access to the file.<sup>4</sup>

Moreover, as mentioned above, the requested documents relate to a pending antitrust investigation and contain a preliminary assessment of the facts and other information from which the direction of the investigation, the future procedural steps which the Commission may take as well as its investigative strategy may be revealed to the public. This information could easily be misinterpreted or misrepresented as indications of the Commission's possible final assessment in this case. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of the companies investigated, in particular if no decision is adopted establishing a violation of the competition rules. Moreover, the requested documents would reveal the Commission's investigation strategy and their disclosure would therefore undermine the protection of the

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<sup>2</sup> See also Case C-514/07 P, *API v Commission*, para. 99 and 100.

<sup>3</sup> OJ L 1, 4.1.2003, p. 1.

<sup>4</sup> See case C-404/10 P *Commission v Odile Jacob*, paras.108-126 where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

purpose of the investigation and would also seriously undermine the Commission's decision making process.

In view of the foregoing, all requested documents are manifestly covered in their entirety by the exception related to the protection of the purpose of the Commission's antitrust investigations set out in Article 4(2), third indent, of Regulation 1049/2001. Moreover, the internal Commission documents are also covered by the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

*Article 4(2), first indent, protection of commercial interests*

Pursuant to Article 4(2), first indent, of Regulation 1049/2001, the Commission shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person.

Economic entities have a legitimate commercial interest in preventing third parties from obtaining strategic information on their essential, particularly economic interests and on the operation or development of their business. Moreover, the assessment made by the Commission and contained in Commission's documents are commercially sensitive, particularly at a stage where an investigation has not been finally concluded yet.

The documents you request, as specified above, are part of the file in a competition case, have not been brought into the public domain and are known only to a limited number of persons. In particular, they contain commercial and market-sensitive information regarding the activities of the involved undertakings whose public disclosure would undermine the latter's commercial interests. This information concerns in particular commercial strategies. Disclosure of these documents could bring serious harm to the companies' commercial interests.

In view of the foregoing the requested documents are covered by the exception set out in Article 4(2), first indent, of Regulation 1049/2001.

#### **4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Pursuant to Article 4(2) and 4(3) of Regulation 1049/2001, the exception to the right of access contained in this Article must be waived if there is an overriding public interest in disclosing the document requested. 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 interest protected under Article 4(2), first and third indent, and 4(3) of Regulation 1049/2001.

In your application you have not established arguments that would present an overriding public interest to disclose the documents to which access has been hereby denied. 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.

## **5. PARTIAL ACCESS**

I have also considered the possibility of granting partial access to the documents for which access has been denied in accordance with Article 4(6) of Regulation 1049/2001. However, the general presumption of non-disclosure invoked above also applies to partial disclosure for all documents concerned and, consequently, no partial access can be granted.

## **6. MEANS OF REDRESS**

If you want this position to be reviewed you should write to the Commission's Secretary-General at the address below, confirming your initial request. You have fifteen (15) working days in which to do so from receipt of this letter, after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

The Secretary-General  
European Commission,  
B-1049 Brussels

Yours faithfully,

A handwritten signature in black ink, consisting of a horizontal line with a loop and a downward stroke.

Alexander Italianer