



European Ombudsman

Emily O'Reilly
European Ombudsman

Ms Kirsten Fiedler
European Digital Rights (EDRi)

kirsten.fiedler@edri.org

Strasbourg, 27/10/2016

Complaint 292/2016/PMC - Access to documents related to the EU Internet Forum - The Commission's reply

Dear Ms Fiedler,

Please find attached the Commission's reply concerning your above complaint.

If you wish to make any observations on the Commission's reply, please send them to me before the **end of November 2016**.

Please note that, if I do not receive any observations from you, I will proceed with my inquiry into the underlying matter, based on the information you have already provided, and on the Commission's reply to you.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure:

- Commission's reply to your complaint



Jean-Claude JUNCKER
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Brussels, - 7 OCT. 2016

Subject: *Complaint by Ms Kirsten FIEDLER, on behalf of European Digital Rights (EDRi), ref. 292/2016/PMC*

Dear Ms O'Reilly,

Thank you for your letter of 15 June 2016 regarding the above-mentioned case.

I am pleased to enclose the comments of the Commission on this complaint.

Naturally, the Commission remains at your disposal for any further information you may require.

Yours sincerely,

Enclosures

*Ms Emily O'REILLY
European Ombudsman
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F-67001 STRASBOURG Cedex*



Comments of the Commission on a request for an opinion from the European Ombudsman

- Complaint by Ms Kirsten FIEDLER, on behalf of European Digital Rights (EDRi), ref. 292/2016/PMC

1. THE ALLEGATION AND CLAIM

On 14 April 2016, the Ombudsman informed the Commission that she has opened an inquiry into the complaint from Ms Kirsten Fiedler (hereafter 'the complainant') as regards the following allegation and claim:

Allegation:

The Commission wrongly refused full access to the note of 10 June 2015 and to the concept note (access request GestDem 2015/3658).

Supporting arguments:

The complainant argues that the Commission is wrong in relying on the exception listed under Article 4(3), first sub-paragraph of Regulation 1049/2001 in order to protect its on-going decision-making process 'from external pressure', as the EU Internet Forum discusses the underlying topic with on-line service providers, that is, with external stakeholders. Relying on that exception to access also contradicts the Commission's announced intention to include civil society in its discussions.

Claim:

The Commission should provide full access to the note of 10 June 2015 and to the relevant concept note.

2. THE OMBUDSMAN'S PRELIMINARY ASSESSMENT

On 15 June 2016 and upon inspection of the documents in question, the Ombudsman informed the Commission of her preliminary assessment on the application of the relevant exceptions to the redacted parts of the documents under review and asked the Commission to provide an opinion as regards the above allegation and claim.

The Ombudsman also requested a meeting with the Commission before the latter submits its opinion in order to identify those text passages which, on the basis of the Ombudsman's preliminary assessment, should be disclosed to the complainant. Such a meeting between the Commission's and the Ombudsman's representatives took place on 5 July 2016.

3. THE COMMISSION'S POSITION

The Commission understands that the Ombudsman's review in the present case concerns the Commission's confirmatory decision of 3 November 2015 to the complainant's

confirmatory application Gestdem 2015/3658 and the application of the relevant exceptions **at that point in time**, that is to say on 3 November 2015.

The Commission recalls that by its confirmatory decision it provided partial access to the two documents, namely: (i) the note of 10 June 2015 (**document 1**) and (ii) the concept note (**document 2**).

The Commission justified the redactions on the basis of the exceptions defined in Article 4(1)(a), first indent (protection of public security) and Article 4(3), first subparagraph (protection of the decision-making process).

The Commission also recalls that, in the absence of any challenge of the Commission's confirmatory decision before the EU Court that decision has become final.

Concerning the allegation that the Commission wrongly refused full access to the above-mentioned documents and the related claim

The Commission's seven-page confirmatory decision of 3 November 2015 contains an extensive reasoning as to why the Commission refused to grant full access to the documents requested and why the invoked exceptions to access were applicable to the redacted parts of the said documents at the time the confirmatory decision was adopted. The Commission also explained in detail in its decision why it considered there was no overriding public interest in disclosing fully the requested documents and why further partial access could not be granted at the time.

The Commission does not consider it necessary to reiterate here the reasoning laid down in the said confirmatory decision. The Commission will limit itself to addressing the points raised by the Ombudsman in her preliminary assessment.

3.1. The application of the exception as regards the protection of public security

The Ombudsman states that it is not clear how revealing those parts of the text that the Commission refers to as constituting references to specific initiatives, topics to be discussed and concrete steps to be implemented would specifically and actually undermine the public interest as regards public security, that is, the Commission's ongoing efforts to prevent radicalisation to terrorism and violent extremism, in a manner that is reasonably foreseeable and not purely hypothetical. The fact that the issues that are to be discussed in the context of the EU Internet Forum are closely related to matters of public security is not sufficient to prove that making the requested documents public would undermine the public interest as regards public security.

The Commission recalls at the outset that the two documents requested constitute the Commission's internal reflections on the preparation of the EU-level Forum with IT companies to enhance co-operation in addressing the rise in terrorists' use of the internet.

As the Commission explained, the redactions, justified under the exception pertaining to the protection of public security, express concerns, explore possibilities to overcome the challenges of on-line terrorist propaganda and contain references to specific initiatives,

topics to be discussed and steps to be implemented with a view to reducing the on-line accessibility of terrorist material (see the redaction made on page 2, first paragraph after the bullet-point; on page 3 under point 3; and on page 4 of document 1; as well as the redactions made on pages 2-4 of document 2).

The Commission is of the view that revealing the possible initiatives that are being explored bears the danger of alerting those engaged in, or supporting, terrorist activities to the Commission's internal reflections in this field, which in turn risks undermining its efforts to effectively tackle terrorist propaganda. The Ombudsman is well aware that public access under Regulation 1049/2001 is *erga omnes*. The redacted information regarding specific initiatives before they materialise would therefore also be made public to terrorist groups, thereby allowing them to circumvent counter-terrorist measures so as to pursue their terrorist objectives.

The Commission also wishes to point out that releasing publicly details about its engagement and cooperation with industry results in these industry representatives potentially becoming subject to threats by terrorists, as was the case for the Chief Executive Officers (CEOs) of Facebook and Twitter. In this respect, the Commission kindly refers the Ombudsman, by way of example, to the article in The Independent about ISIS hackers threatening Facebook and Twitter founders for shutting down accounts¹, as well as the article (and video) on CNN "*Mark Zuckerberg is 'very concerned' about ISIS threats*"².

These articles in the media are clear examples that the threat to public security, when releasing such information is **real** and **not purely hypothetical**, contrary to what the Ombudsman suggests in her preliminary assessment.

Such threats are not only illustrative of the scale of the problem and the means employed by terrorists, but also clearly undermine the Commission's on-going effort in combatting the on-line terrorist material, which is based on voluntary cooperation of the relevant stakeholders - many of whom are outside of the EU - with the Commission.

Given that that terrorists have shown to be ready to employ all possible means in order to be able to continue with their on-line jihadist propaganda and recruitment, as demonstrated by the specific example, and to circumnavigate counter terrorism measures, the Commission is of the view that wider public release of the two documents would have specifically and actually undermined the public interest as regards public security in a reasonably foreseeable and not purely hypothetical manner.

The Commission would also like to refer the Ombudsman to the applicable case-law on the absolute exceptions (including the exception relating to the protection of public security), which the Ombudsman does not seem to have taken into consideration in her preliminary assessment.

¹ Available at: <http://www.independent.co.uk/news/people/isis-hackers-threaten-facebook-and-twitter-founders-for-shutting-accounts-a6894921.html>

² Available at: <http://money.cnn.com/2016/02/29/technology/mark-zuckerberg-threat-isis/index.html>

In Case *Sison v Council*³, the Court confirmed that the Court's standard of review of the use, by the institutions, of Article 4(1)(a) exceptions is looser than in the case of the exceptions defined in Article 4(2). Whenever an Article 4(1)(a) exception is invoked, the institution has a wide discretion in deciding whether to release or not. In such cases, the Court's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers.

In a more recent judgement, in case C-350/12 P, *Council of the European Union v Sophie in 't Veld*, which also concerned an absolute exception (in this case the protection of the Union's international relations), the Court of Justice confirmed that, whilst the principle of transparency cannot be ruled out in international negotiations, the institutions *must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest*⁴.

Considering that the redacted elements refer to the specific initiatives, topics to be discussed and concrete steps to be implemented in the context of addressing terrorists' use of the internet, the Commission is unable to see any manifest error in its decision to refuse public access to this information on the basis of the exception pertaining to the protection of public security.

3.2. The application of the exception as regards the protection of the Commission's on-going decision-making process

In her preliminary assessment the Ombudsman underlines that the documents drawn up by the institution for internal use only (such as the one under review), which relates to a matter where the decision has not been taken must be disclosed, unless such a disclosure would **seriously** undermine the institution's decision-making process. In the present case, the Commission argued that its decision-making process would be adversely and seriously affected by external influence, if the latter were to disclose the redacted parts.

According to the Ombudsman, however, the Commission *has not explained what would constitute external influence and how, specifically and actually, such external influence would seriously undermine its decision-making process.*

In response to the Ombudsman's finding, the Commission invites the Ombudsman to take into consideration the detailed explanations provided in section 2.1 of the confirmatory decision, where the Commission explains how the release of the redacted parts of document 1 and 2 would seriously undermine its on-going at the time decision-making process concerning the organisation of the EU Internet Forum. At the point in time when

³ Judgement of the Court C-266/05 P of 1 February 2007, *Sison v Council*, ECLI:EU:C:2007:75, paragraph 47. See, by analogy Case T-14/98 of 19 July 1999, *Hautala v Council*, ECLI:EU:T:1999:157, paragraph 72, confirmed on appeal.

⁴ Judgement of the Court of Justice of 3 July 2014 in case C-350/12 P, *Council v In't Veld*, ECLI:EU:C:2014:2039, paragraph 63.

the Commission was still reflecting on both the substantive aspects relating to the Forum, such as its remit and focus, and organisational aspects, such as the involvement of various stakeholders, public release of the Commission's internal reflections would have indeed **seriously** undermined the Commission's margin of manoeuvre in exploring, in the framework of the ongoing decision-making process, all possible options free from external pressure.

The Commission considers that it would have been clearly premature to release its internal reflections and considerations concerning the organisation of the Forum at the time, when it was still deliberating on a number of organisational and policy-related questions regarding the Forum. Moreover, sharing such internal reflections publicly would have created false expectations and/or misled the public about these pending issues. In fact, several of the contemplated events and initiatives considered at the time did not materialise.

Moreover, public disclosure of the redacted information would have informed the public of internal reflections and preliminary considerations before they had been shared with and endorsed by the stakeholders of the EU Internet Forum. The EU Internet Forum having been set up as a joint endeavour with industry, such dissemination to the public would have severely undermined the confidence of the Commission's stakeholders in the Forum, thereby jeopardising the goodwill of those stakeholders and their readiness to participate in ongoing or future consultation processes.

This, in turn, would have severely jeopardised the Commission's ability to establish the EU Internet Forum in December 2015. Without stakeholders' input, the Commission's ability to address terrorists' use of the Internet would also have been severely undermined.

Against this background, the Commission maintains its view that the relevant redactions made in document 1 and 2 at the point in time when the Commission's confirmatory decision was taken were justified under the exception pertaining to the on-going decision making process.

The Commission acknowledges, however, that several words remained redacted from document 1 (bullet-points at the end of page 2), while the same words were released in document 2 (second paragraph on page 1). The Commission wishes to clarify that its intention was obviously to release these words, but due to a technical error they remained redacted in one of the documents. This, however, does not invalidate the fact that public access to the said words was already granted to the complainant.

Finally, the Commission would like to address a possible misunderstanding about the stakeholders of the EU Internet Forum, an issue raised by the complainant. Contrary to what the complainant alleges, the EU Internet Forum is also engaged with civil society through the involvement of the Radicalisation Awareness Network's Centre (RAN Centre) of Excellence. Involving civil society through engagement with the RAN Centre of Excellence does not equate to the activities of the Forum being open to the general public or to civil society organisations at large.

4. CONCLUSION

The Commission considers that its confirmatory decision, which has become final in the absence of any legal challenge before the EU Court, was fully in line with the applicable

legislation and the relevant case-law on access to documents at the point in time it was taken.

The Commission acknowledges that at present, nearly 10 months after the organisation of the Internet Forum and nearly 1 year after it had taken its confirmatory decision, additional information about certain initiatives contemplated at the time, or more broadly information about the scope and activities of the EU Internet Forum, have in the meantime been made public. This, however, does not invalidate the Commission's conclusion that its assessment was accurate and correct at the time.

The Commission would like to point out that the complainant has in the meantime submitted a number of new initial applications for access to documents concerning the EU Internet Forum, notably requests for access Gestdem 2015/6363, 2016/0095 and 2016/1420. Following these requests, the Commission has granted further access to documents pertaining to the Forum. The applicant is free to introduce further requests, which will be assessed in light of the (then) applicable legal and factual circumstances.

In light of the above, the Commission concludes that there was no manifest error of assessment and that its handling of the request in question did not amount to an instance of maladministration.

Enclosure: (1)

- *A copy of the article (and video) on CNN "Mark Zuckerberg is 'very concerned' about ISIS threats"*
- *A copy of the article in the Independent about ISIS hackers threatening Facebook and Twitter founders for shutting accounts*

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Mark Zuckerberg is 'very concerned' about ISIS threats

by Hope King @lisahopeking

February 29, 2016: 1:02 PM ET

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Mark Zuckerberg has opened up about the threats made against him by ISIS supporters last week.

"I am very concerned but not because of the video," he told Mathias Döpfner, the CEO of German media giant Axel Springer. "There have been worse threats."

Zuckerberg met with Döpfner while he was in Berlin last week. Their wide-ranging interview was published in Die Welt am Sonntag on Sunday.

A few days before their meeting, a group of ISIS supporters published a 25-minute video threatening to take down Facebook (FB, Tech30) and Twitter (TWTR, Tech30) -- as well as their leaders. The video was created in response to efforts by both companies to stop terrorist activity on their platforms.

"If you close one account we will take 10 in return," reads one of the slides in the video. "And soon your names will be erased after we delete you [sic] sites."

A few years ago, a Pakistani extremist tried to get the Facebook founder sentenced to death because the company would not take down a Facebook group that encouraged people to draw pictures of the prophet Mohammed. The act is illegal in Pakistan. (A Facebook spokeswoman did not immediately respond to questions about how this issue was resolved.)

Zuckerberg sees a common theme in both of these threats. "I think the bigger issue is that what Facebook stands for in the world is giving people a voice and spreading ideas and rationalism," he told Döpfner.

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Mark Zuckerberg speaks during a town hall Q&A in Berlin (Feb. 29, 2016)

Related: ISIS supporters threaten Mark Zuckerberg and Jack Dorsey

Combating hate speech and terrorist activity online has become a growing problem for social media platforms -- especially Facebook and Twitter.

Extremists find supporters in these large open forums, then use them to publish and distribute propaganda.

Facebook and Twitter try to limit the reach of these networks and materials by suspending accounts and removing posts. But often, their efforts are slow compared to how quickly new problems pop up.

On Twitter for example, many ISIS-related accounts are set up with follower networks -- groups of users that follow one another called "swarm accounts." When one account in the network gets shut down, the others remain active and their follower base remains intact.

Facebook's problem is its size. With 1.6 billion people on its network every month, the company has hundreds of regional problems to deal with, on top of the big international issues like the Islamic State.

"Our North Star is that we want to give the most voice possible to the most people," Zuckerberg said in the interview. "We work closely with governments and local organizations to be certain we are applying [Community Standards] appropriately for local conditions and to identify and remove hateful or threatening content."

For example, Zuckerberg says that Facebook now removes threatening speech toward migrants in Germany amid growing tensions over the Syrian refugee crisis.

Closer to home, he has also had to deal with the issues of racism and free speech at Facebook's corporate headquarters.

CNNMoney (New York)
First published February 29, 2016 12:11 PM ET

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Isis hackers 'threaten' Facebook and Twitter founders for shutting accounts

Twitter has dismissed the personal threat to Jack Dorsey as part of 'everyday life' at the network, while Facebook is yet to respond to the threat to Mark Zuckerberg

Adam Withnall | @adamwithnall | Thursday 25 February 2016 | 7 comments





Isis video threatens Twitter's Jack Dorsey and Facebook's Mark Zuckerberg

A group of pro-Isis hackers has reportedly released a video threatening the founders of Facebook and Twitter – because their social media accounts keep getting shut down.

In a 25-minute video which began circulating on social media on Tuesday afternoon, pictures of Facebook's Mark Zuckerberg and Twitter's Jack Dorsey were shown superimposed with bullet holes.

Described by terror analyst Rita Katz as “looking like something an elementary student threw together one night before the project was due”, it claims to show hackers taking over social media accounts, changing profile pictures and using them to disseminate jihadist propaganda.

Twitter has dismissed the personal threat to Mr Dorsey as part of “everyday life” at the global network, while Facebook is yet to respond to the video.



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It was    d shared by a group calling itself “Sons of Caliphate Army” – which the Site Intel Group has described as the latest “rebrand” of Isis’s supporters online.

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And while the direct threat to the two CEOs is unlikely to elicit any new reaction from their respective companies, the video does highlight the continued failure to prevent jihadists from using sites like Twitter and Facebook as a platform.

Text appearing on the video reads: “You announce daily that you suspend many of our accounts, and to you we say: Is that all you can do? You are not in our league.

“If you close one account we will take 10 in return and soon your names will be erased after we delete you [sic] sites, Allah willing, and will know that [sic] we say is true.”

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Earlier this month, Twitter said it had suspended over 125,000 accounts since the middle of 2015 “for threatening or promoting terrorist acts, primarily related to Isis”.

“We condemn the use of Twitter to promote terrorism and the Twitter Rules make it clear that this type of behavior, or any violent threat, is not permitted on our service,” the company said.

Facebook has previously said there is “no place for terrorists on Facebook”. Spokesman Andrew Souvall told Wired: “We work aggressively to ensure that we do not have terrorists or terror groups using the site, and we also remove any content that praises or supports terrorism.”

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