

From: [REDACTED]

To: [REDACTED]

CC: [REDACTED]

European Data
ropa.eu>

Sent at: 14/11/19 15:13:13

Subject: RE: Case 2018-1083: Consultation on EASO social media monitoring reports (SMM)

Dear [REDACTED]

Thank you for the message below. As you will see here: https://edps.europa.eu/data_protection/our_work/our_work_by_type/consultations_en, we have in the meantime published our reply of 30 September 2019 in keeping with the (repeatedly) announced EDPS deadline.

On the points you raise:

- Legal basis: For your formal consultation of the EDPS and our equally formal reply to it, it is Article 57(1)(g) of Regulation (EU) 2018/1725 (as cited in our reply of 30 September 2019). As you will see from the publication link above, as noted during our telephone conversation, we routinely publish our replies to consultations not only to abide by our RoP, but, like any EU institution, Art. 15(1) TFEU.
- Extra contractual liability: We take note that "*EASO is concerned that the disclosure of the letter might potentially expose the Agency to extra contractual liability (Art 340 TFEU and Art 65 of the EUDPR)*". However, any such liability might legally arise not through publication of our reply of 30 September 2019, but rather based on the absence of a legal basis for the EASO processing operation at hand.
- ATD: I am unaware of any pending access to documents request under Regulation 1049/2001 regarding our reply of 30 September 2019. I am also unaware of any pending court case. Advice the EDPS gives under Article 57(1)(g) of Regulation (EU) 2018/1725 is not covered by the "legal advice" privilege of Article 4(2) of Regulation 1049/2001.
- Personal data contained in our reply: You will note that we have, indeed, redacted your name (which, as I explained during our telephone conversation, does not make you unidentifiable, but might address **your concern** expressed in the message below).

Best regards,
[REDACTED]

From: [REDACTED]

Sent: [REDACTED]

To: [REDACTED]; European Data
Prot

Cc: [REDACTED]

Subject: Case 2018-1083: Consultation on EASO social media monitoring reports (SMM)

Dear colleagues,

Following our phone conversation whereby you have informed us of the EDPS intention to publish on its website the letter sent to EASO on the 30 September in response to the consultation on EASO's Social Media Monitoring (SMM) project, we would like to make a following observations:

Legal basis This *formal consultation* is in stricto sensu not a prior consultation as per Article 40 of the EUDPR 2018/1725 seeing that at the moment EASO formally consulted the EDPS the activity (and related processing) was already ongoing. We would therefore like to understand under which article of the EUDPR the formal consultation falls, and what the legal basis is for making the document publicly available. Is our understanding correct that the disclosure of the formal consultation would fall under Article 54 of the EDPS Rules of Procedures of 17 December 2012?

Extra-contractual liability As per Article 65 of the EUDPR any person who has suffered material or non material damage as a result of an infringement of this Regulation should have the right to receive compensation from the controller or processor for the damage suffered, subject to the conditions provided for in the Treaty (340 TFEU, 'Liability'). Even more, as per the 'Annotated version of the EUDPR' it states that "if there is more than one controller responsible for the purposes and means of the processing (co controllership), each of them is liable for damage caused and for compensating data subjects (see FRA Handbook on European data protection law, p. 106 referring to Art. 82(4) GDPR)". In the letter addressed to EASO dated 30/09/2019 with subject "Formal consultation on EASO's social media monitoring reports (case 2018 1083)" the EDPS seems to imply that EASO has breached data protection due to the absence of a legal basis for the processing operation at hand. Therefore, this situation differs from other prior checking opinion published online where the respective institution did not yet commence the data processing, and therefore, no damage could have yet been generated. EASO is concerned that the disclosure of the letter might potentially expose the Agency to extra contractual liability (Art 340 TFEU and Art 65 of the EUDPR).

Access to document Regulation (1049/2001) We would like to understand whether the legal basis for disclosure of documents as per the EUDPR should be reconciled with the Access to documents regulation whereby if access is requested by third parties (e.g NGOs, EU agencies), the provisions of ATD regulation 1049/2001 should be respected? If for example, EASO would be currently in legal proceedings on the matter, could the restriction foreseen in Article 4(2) be applied as to avoid disclosure of the document: "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice, [...], unless there is an overriding public interest in disclosure."?

Names in the letter We understand that any **personal data mentioned in the letter** will be redacted?

Apologies for this reaction past the deadline you mentioned.

Kind regards,

[Redacted signature]



European Asylum Support Office
MTC Block A, Winemakers Wharf, Grand Harbour Valletta, MRS 1917, Malta

[Redacted contact information]



Website: www.easo.europa.eu