



noyb – European Center for Digital Rights  
Goldschlagstraße 172/4/3/2  
1140 Vienna  
AUSTRIA

To:  
Data Protection Commission  
21 Fitzwilliam Square  
Dublin 2  
IRELAND

Vienna, 15.10.2021

**Subject: Request to Remove Content from noyb.eu**

Dear [REDACTED],

I acknowledge the receipt of your extraordinary letter of 14.10.2021. I understand that the DPC is concerned about its reputation given the contents of the Draft Decision. Nevertheless, I have to reject in the strongest terms any idea that we would limit our freedom of speech and our right to publicly criticise a decision that is relevant for millions of Europeans in a situation where:

- There is an undeniable public interest in a decision that denies rights to millions of users.
- You are well aware that there is no basis in law to require us to keep documents confidential.
- The documents are clearly not containing any commercially sensitive material.
- The complainant is a party before the Austrian DPA under the applicable Austrian Procedural Law (§ 17 AVG), which does not limit the use of such documents in any way. The relevant law that applies to the complainant was discussed and confirmed by the Austrian DPA.
- The cited exchanges between *noyb* and the DPC concern the “draft report” of the investigator and highlight consistently that *noyb* does not accept any duty or undertaking to keep documents confidential, but refrains from publications on a voluntary basis and to avoid further friction caused by the DPC’s wish to keep any case-related documents confidential.
- Especially the cited exchange of 4 October 2019 clearly relates to the “draft report” (the “draft decision” was not even existing for another year) and highlights over the entire page in the German original that *noyb* does not accept any limitation on the use of documents, but will factually limit publications to avoid friction caused by the problematic factual behaviour of the DPC.
- The cited exchanges consistently highlight that we voluntarily refrained from publishing these documents, showing that we have clearly not given any “undertaking” whatsoever.
- The relevant investigative phase of the procedure is clearly over when a “Draft Decision” under Article 60(3) GDPR was issued by the LSA and is now circulated among 48 CSAs.
- The Irish DPC has no jurisdiction to order an Austrian entity to remove content from its website.

We will therefore not engage in any further debate with the DPC about alleged “confidentiality” of documents, which we take as an attempt to prevent legitimate criticism.

Should the DPC take the view that we are under any legal obligation to remove these materials from our website, we are very much looking forward to having this matter decide in the relevant courts of law in Austria (likely the Commercial Court of Vienna, see § 51(1)(8b) JN iVm § 1(1)(1) MedienG).

## **Background information**

As outlined, this topic is clearly not a legal matter. It seems to us that the publication of documents is, however, a matter the DPC feels very passionate about. I therefore hope that the following additional context would allow the DPC to understand that the publication by *noyb* were not only absolutely lawful, but also necessary to have our voice represented in the public debate:

### Publication was immanent on 13 October 2021

We were contacted on the morning of 13 October by a media outlet that was aware of the contents of the Draft Decision from a source outside of *noyb*.

While we welcome if the free press is being made aware of a questionable decision that concerns millions of users, it is notable that it must have been Facebook, the DPC, a CSA or any actor that works on behalf of them who initially provided such information to the media. We were further informed that this information was then confirmed, likely by the DPC or Facebook.

The publication of the contents of the decision was therefore immanent on 13 October at noon and already caused by actors outside of *noyb*.

### Publication by *noyb* given the immanent publication by others

On 13 October, we have prepared most of the published statement based on the documents we have every right to access and use under § 17 of the Austrian Administrative Act (AVG).

Given the immanent publication, we have published our update at this time to ensure that the public is fully informed in a neutral way. It is a matter of good practice and credibility that any decision that is criticised by *noyb* is also made available, so that the public can draw its own conclusions and verify our claims. Despite the fact that we would have every right to publish further documents of the case, we have also limited the publication to our own submissions and the Draft Decision itself.

As the DPC entertains a whole department for media and public relations, it is no stranger to how public relations are conducted and surely understands the steps described above.

Given these legal and practical clarifications, we are looking forward to the DPC coming to realize, that there is simply no legal basis to limit *noyb's* publication of decisions – especially in cases that potentially deprive millions of users of their rights. This is for good reasons: we are living in a liberal democracy and in a European framework, where authorities have to operate in a transparent way and are subject to criticism by the public. We understand that public criticism may cause frustration by authorities at times, but the natural way to avoid such criticism (as intended by the generations before us that fought for the freedom of speech and the freedom of information) would be to improve the quality and transparency of the procedures and decision-making process of the DPC. The team of *noyb* stays determined to support you on this journey.

Kind Regards,



Max Schrems