

Maximillian Schrems,  
NOYB – European Centre for Digital Rights

By email only to:

[REDACTED]  
[REDACTED]

10 December 2021

**Our Reference: Inquiry C-18-5-5 (Facebook)**

Dear Mr Schrems,

I acknowledge receipt of your email of last night.

We are very surprised that you appear to consider it open to you to publish the “ROPA” document, received by you in the course of exchanges in relation to Inquiry 18-5-5 (Facebook), and to use it for purposes that clearly fall outside the scope of that inquiry.

As you are aware, the contents of this document – along with other materials exchanged between the parties to the inquiry - have long since been designated by the DPC as “confidential information” under Section 26(4) of the Data Protection Act, 2018. As such, this material was shared with you solely and exclusively for purposes directly concerned with the handling of the complaint under examination in Inquiry 18-5-5.

Moreover, you confirmed, in open correspondence, that NOYB would not publish the document or use it for any purpose not directly concerned with the handling of NOYB’s complaint.

Against this backdrop, it is not open to you to publish the material and/or use it for any collateral purpose.

So that there is clarity between us, we set out below our position in relation to the following matters:

1. The confidentiality of material exchanged between the parties to a statutory inquiry undertaken by this office.
2. An outline of our prior exchanges, in which you agreed that you would not publish inquiry materials and/or use such materials for any purpose outside the confines of the inquiry in which they were made available to you.

1. “Confidential Information”

Under Section 26(4) of the 2018 Act, and having regard to the powers conferred on the DPC by Sections 12(5) and 12(8) of the 2018 Act, it is open to the DPC to designate information relating to a statutory inquiry as constituting “confidential information” beyond that which would be treated as confidential at common law.

In practice, the DPC may designate information contained in its exchanges with complainants and/or controllers as confidential under this heading:

- to preserve/maintain free and frank exchanges between the DPC and each of the complainant and the controller, facilitating the kind of dialogue (and associated information flows) necessary to ensure that all of the issues under examination can be fully and effectively explored, and positions advanced by relevant parties fully and properly tested;
- to ensure that the issues under examination can be addressed within the confines of the decision-making process itself, and to reduce the scope for parallel exchanges taking place outside that process; and,
- to avoid the publication (or other disclosure to third parties) of exchanges identifying interim views and/or positions that remain under consideration by the DPC and which, if disclosed prior to the conclusion of the decision-making process, may reasonably be considered likely to compromise the decision-making process and/or give rise to procedural unfairness and/or cause harm to the interests of the complainant and/or controller, as the case may be.

As a corollary to its power to designate material as confidential, the DPC also has the power (likewise having its origin in the statutory provisions identified above) to adopt such measures as it considers reasonably necessary to preserve the integrity of its regulatory processes and, as one element of that, to impose restrictions on the parties’ right to use and/or disseminate inquiry materials, at least whilst such regulatory processes remain live.

2. Our prior exchanges on the confidentiality of materials exchanged in Inquiry 18-5-5

Following earlier exchanges between us in relation to the issue of confidentiality, we agreed to share the main body (but not all) of Facebook’s submissions with NOYB. When doing so, we noted that the material being released was confidential and was to be used solely for the purposes of the inquiry.

NOYB subsequently sought access to those parts of the submissions that had been withheld.

Following further exchanges between us, we agreed to release some additional material to NOYB, to include the ROPA document. We did so in order to ensure that, for fair procedures reasons, NOYB would have an opportunity to engage, fully, with Facebook's response to NOYB's complaint.

This further body of material was released to NOYB under cover of letter dated 16 August 2019. That letter specifically recorded the DPC's position that the additional material being released was confidential and should not be used for any purpose outside of the inquiry.

Within days of this material being released to NOYB, certain statements were published by you about it on Twitter. This office objected by letter dated 3 September 2019, in which it reiterated its position as to the confidentiality of the materials released, again noting that inquiry materials were not to be used outside the confines of the regulatory process in which they were released.

A further letter in similar terms was issued by this office on 20 September 2019.

NOYB replied by letter dated 4 October 2019, addressed to the Austrian DPA, and copied to the DPC.

In that letter, and consistent with positions previously outlined by and on behalf of NOYB, you said the following:

*"... We will therefore continue (on a voluntary basis) not to publish or communicate the material content of the file (such as the "draft Decision"), but external circumstances (such as the slow down of procedures, the previous meetings between DPC and Facebook, in which the system of circumvention of Article 6 (1) (a) of the GDPR have been met) are of course publicly available."*

NOYB's commitment to keep the contents of the inquiry materials confidential was also repeated in later correspondence between us, as summarised in a letter issued by this office to you on 14 October 2021 (in connection with the publication of the draft decision of 6 October 2021).

## **Conclusion**

In the circumstances, it is clear that, as a document submitted to the inquiry by Facebook, and shared with NOYB so that NOYB could address itself to Facebook's response to the complaint, the ROPA is confidential and cannot be used for any purpose outside of the inquiry.

If NOYB was to publish the ROPA and/or use it, not for the purposes of the inquiry, but for some other purpose, it would be acting unlawfully, and in breach of binding commitments it previously gave.

In that regard, it will be recalled that the DPC shared the ROPA with NOYB specifically on the basis that, as an inquiry document, it was confidential and was to be used solely for the purposes of the inquiry. At all

materials times NOYB has been on notice of the confidentiality attaching to the document. Moreover, it agreed that it would not publish it.

The DPC relied on the assurances given by NOYB in that respect.

In the circumstances, we would caution against the publication by NOYB of the ROPA document (or any inquiry materials) and/or the use of such materials (or any of them) for any purpose other than for the purpose of the inquiry. Please also note that our rights in relation to these matters are fully reserved.

We will await hearing from you.

Yours sincerely,

*[Sent electronically; bears no signature]*

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Data Protection Commission