



EFF comments on the Draft Recommendation on the protection of human rights with regard to search engines
Committee of Experts on New Media (MC-NM)
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The Electronic Frontier Foundation (EFF) is grateful for the opportunity to submit comments to the Council of Europe Committee of Experts on New Media on the currently available version of the Draft Recommendation on the protection of human rights with regard to search engines.

EFF is an international civil society non-governmental organization with more than 14,000 members worldwide, dedicated to the protection of citizens' online privacy and freedom of expression rights. EFF engages in strategic litigation in the United States and works in a range of international and national policy venues to promote balanced laws that protect human rights, foster innovation and empower consumers. EFF is located in San Francisco, California, and has members in 67 countries throughout the world. EFF has over 4,300 members in the EU.

In relation to the proposed draft recommendation, EFF respectfully asks the Council of Europe to revise its guidelines and recommendations to ensure that search engines will protect privacy vis-à-vis the government, foster transparency on search records requests, and increase due process protections. We also ask the Council of Europe to ensure that freedom of expression rights are respected by search engines.

I. The Council of Europe needs to ensure privacy protections are not curtailed by search engines

At a time when individuals regularly turn to search engines to find information on the Internet, search privacy is of paramount importance. Search engines have the ability to record individuals' search queries and maintain massive databases that can include the most intimate details of a person's life. The search terms individuals enter into search engines can be used to compose a telling portrait of each individual's interests and concerns. Also, efforts to anonymize search data are often insufficient. When revealed to others, these details can

be embarrassing and even cause great harm. Every person must have confidence that search engines will protect the privacy of their users.

Personally identifiable search records stored with search engines must be given strong legal protections comparable to protections for data on your personal computer, or information stored in your file cabinets. Potential threats to privacy through search records include unauthorized access of search records by search engine employees, civil litigants' access to data, security breaches, and compelled disclosure of search records to law enforcement and national security investigators. Government or individual litigants can get access to a person's search records and connect that information to a specific identity.

Moreover, because search engines play a central role as intermediaries by enabling the public to seek, impart and receive information and ideas, search engine records can contain sensitive information about persons' intellectual, political, cultural, religious, psychological and physical (health) beliefs, conditions and actions that can be of interest to state actors and civil litigants. The operation of search engines may therefore implicate persons' rights to freedom of expression and information and the right to privacy and protection of personal data, and other human rights and freedoms, precisely because state actors and civil litigants may seek such sensitive information from search engines. European Privacy officials have previously stated in an opinion on data protection issues related to search engines that search queries themselves are considered content of communications.

EFF recommends that the draft recommendation expressly identify law enforcement's and intelligence agencies' access to information held by search engines as a new item on privacy vis-à-vis the government. The introductory section should focus not only on what search engines themselves do but also what others might force search engines to do.

II. Transparency about the use of personal data and privacy, the respect of data protection and privacy

On section III on Transparency, EFF calls attention to the following privacy protections

2.1 The Council of Europe needs to ensure that data minimization and privacy protections are implemented by search engines

Search engines should limit the collection of personal data to the minimum amount of information necessary to provide the services. They should store information for the minimum time necessary for the purpose of their operations. Search engines should effectively obfuscate, aggregate and delete unneeded or unused user information. They should also maintain written policies addressing those data collection and retention minimization policies. Search engines should enable site-wide SSL to protect users' information and communications from eavesdropping.

2.2 The Council of Europe needs to encourage search engine anonymity

In addition the guidelines should encourage innovative approaches to search engine privacy services. For instance, the guidelines should encourage search engine providers to enable users to search anonymously on the Internet. The right to freedom of expression includes the right to speak and **read** anonymously. Academics have made clear that "the close

interdependence between receipt and expression of information and between reading and freedom of thought make recognition of such a right [the right to read anonymously] sound constitutional policy”.¹

2.3 Transparency on search record requests and due process requirements

To address concerns of privacy violations, lack of transparency and public oversight mechanism on search record requests, we respectfully make the following suggestions:

- The Council of Europe should recommend that Member States adopt strong legal safeguards and due process before disclosure of individuals’ search records to governmental entities at the national level. Government access should be done only upon receipt of a court order, in accordance with international legal norms and instruments relevant to the protection of private life. Government should allow search engines to notify the person whose search record is sought.
- The Council of Europe needs to ensure that search engines adopt reasonable efforts to notify the person whose search record is sought unless search engines are prohibited from doing so by law or court order. If possible, agree to a timetable for disclosure of the information to the party seeking it that provides a reasonable opportunity for the individual to file an objection with a court before disclosure.
- The Council of Europe needs to ensure that transparency about the disclosure of citizens’ search records pursuant to a governmental request applies to search engines.
 - Allow and encourage search engines to publicly disclose an accounting of the nature and frequency of governmental requests for access to search records;
 - Allow and encourage search engines to publicly disclose the nature and frequency of government entities’ requests or orders for access to search records.

III. The Council of Europe needs to ensure individuals’ freedom of expression rights, especially the reader’s right to read information on the web

3.1 Blocking or filtering of specific web sources based on self-regulation or requests from private parties and governments

The value of search engines is their ability to organize and provide objective snapshots of the information available on the web that is responsive to a particular query at a certain point in time. Individuals expect search engines to make the information available on the web accessible and to protect their rights to read that information. A regime that includes filtering and blocking undermines those purposes.

Mechanisms for due process and redress when search results are removed from search indexes often do little to protect the individuals whose rights are being challenged because those individuals are typically not easily identified and notified. Moreover, filtering and blocking systems can quickly become loopholes for censorship. In addition, search engines are not well-placed to make determinations about the legality of content, and requiring them to do so on the basis of extra-judicial requests from private parties or the government raises

¹ Julie Cohen, A Right to Read Anonymously: A Closer Look at “Copyright Management” In Cyberspace, 28 CONN. L. REV. 981 (1996).

significant concerns for transparency and citizens' due process and expression rights. The risk of lawful content being removed inappropriately is magnified by search engines' concerns of liability for not disabling content even where it is unclear that the content is illegal.

To address concerns of violations of due process, user rights, and censorship, we respectfully make the following suggestions:

- In order to ensure individuals' freedom of expression rights, especially readers' rights to read the information available on the web, the guidelines should be very clear that a search engine is not required to conduct any kind of ex ante filtering or blocking and will not be penalized for failure to do so.
- The Council of Europe should recommend that Member States ensure that search engines will not be held liable for failure to remove content upon an extra-judicial request, and that Member States establish processes in their national laws for timely preliminary judicial review of challenged content.
- The guidelines should encourage search engines to clearly disclose to individuals whenever search results have been limited or affected by action of law and/or by self-regulatory action of the search engine, and to disclose an accounting of the nature and frequency of governmental orders for content removal, blocking, or filtering.
- It is important that any law, policy or single request on blocking or filtering is done with full respect of the right to freedom of expression and to seek information, judicial oversight and due process. If the blocking or filtering of specific web sources by private parties and individuals with a takedown-based, self-regulatory regime is permitted, the principles of due process and access to redress mechanisms should also be respected in this context, especially with regards to penalties. In addition, a timely judicial process for obtaining legal redress for misuse and abuse of the takedown process must be implemented. Any redress mechanism must be independent, transparent, accountable and effective.

3.2 No general obligation to monitor principle

The guidelines should be very clear that a search engine does not need to conduct any kind of filtering or blocking that would constitute monitoring its service or affirmatively seeking facts indicating illegal activity. This “no general obligation to monitor” principle established in the European and US frameworks has fostered the growth of the Internet as a vehicle for free expression and commerce by helping provide legal certainty for service providers; without it, general awareness that illegal activity could be occurring might be interpreted as imposing an obligation on service providers to devote considerable resources to proactively finding and removing instances of illegal content. Many innovative services would not exist today if they had been saddled with that burden early in their development. Moreover, investigation and monitoring is likely to lead search engines to over-block in order to avoid any possibility of litigation, which means lawful content will inevitably be taken down. The Council of Europe needs to ensure that freedom of expression rights, and readers rights to read information free from surveillance be respected.

In relation to the proposed text, on title IV: Filtering and blocking

Paragraph 10 of the Appendix should read:

10. A prerequisite for the existence of effective search engines is the freedom to crawl the available information on the Web. Sometimes governments seek to block or filter certain types of content on specific web sources, asserting that this blocking is authorized by local legal norms. In many countries, search engine providers block or filter specific websites at the request of the government (or of public authorities), to meet the requirements in the legal framework or at their own initiative, for example in the case of websites spreading spyware. Blocking at government or private party request should only occur subsequent to judicial review.

In relation to paragraph 11 of the Appendix:

EFF acknowledges that it is important that any law, policy or single request on blocking or filtering be done with full respect of the right to privacy, freedom of expression and to seek information. However, EFF believes that filtering and blocking distorts the principle that a search engine should provide objective snapshots of the information available on the web at a certain point in time, and should not occur except *ex post* and subsequent to judicial review. As explained above, allowances for due process and redress mechanisms are important but often have little effect in the case of search engines, where the individuals' whose rights are being challenged are not always easily identified and notified.

In relation to title V. self and co-regulation, paragraph 12 of the Appendix:

EFF believes that the text should explicitly acknowledge that self-regulation mechanisms should not include a requirement for search engines to monitor and police their customers as explained above (see item 3.1 and 3.2). Self-regulatory guidelines should not curtail individuals' freedom of expression rights as well as readers' rights to read information available on the web free from surveillance.

The text should not welcome examples of those self and co-regulation initiatives in France and Germany without clarifying the details and scope of those initiatives, and to ensure that search engines self and co-regulation initiatives do not curtail individuals' freedom of expressions rights, and the readers' rights to read information online.

Conclusion

EFF respectfully asks the Council of Europe to revise its guidelines and recommendations to ensure that search engines will protect privacy vis-à-vis the government, foster transparency on search records requests, and increase due process protections. EFF also asks the Council of Europe to ensure that freedom of expression rights, including the readers' rights to read information online be respected, and not curtailed, by search engines.