

To: Sam Clark - ask+request-8514-fcabd254@asktheeu.org

Brussels, 28 September 2020

Subject: Your application for access to documents – Ref No 2020-30

Dear Sam Clark,

We refer to your e-mail dated 03/09/2020 in which you make a request for access to documents, registered on 07/09/2020 under reference number 2020/30. The deadline to reply is therefore 28/09/2020.

You requested access to:

*“- Correspondence between the European Data Protection Board and the European Commission regarding the proposed Google/Fitbit merger.
- Formal guidance provided by the European Data Protection Board to the European Commission regarding the data protection considerations involved in the Google/Fitbit merger.”*

Assessment

We have identified 5 documents that fall within the scope of your request. Please note that while the EDPB has not provided any formal guidance to the European Commission regarding the data protection considerations involved in the Google/Fitbit merger, for the sake of clarity, we have considered one document to be in scope which contains analysis carried out by the EDPB in relation to the data protection aspects of the Google/Fitbit transaction.

Full non-disclosure

Having examined these documents under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we have come to the conclusion that the documents cannot be disclosed. Their disclosure is prevented by the following exceptions to the right of access laid down in Article 4 of the Regulation, namely:

1. **Exception 4(1)(b) (“Privacy and integrity of the individual”)**: The documents to which you request access contain personal data, in particular names and contact details of data subjects, as well as other personal information. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons

with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. When access is requested to documents containing personal data, Regulation 2018/1725 becomes fully applicable¹. According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. This exception applies to all the documents falling within the scope of your request. For this reason they cannot be disclosed.

2. Exception 4(2) 3rd indent (“purpose of investigations”): The documents you seek to obtain refer to an ongoing investigation in which the EPDB is cooperating. These documents contain views related to the subject matter of this investigation. Such views and opinions may have an impact on the investigation and, therefore, are not meant to be published at this stage, since disclosure of that information would seriously undermine the protection of the purpose and result of the investigation. In addition, disclosure of some of the information provided may result in assumptions and conjectures regarding the procedural steps being taken, which would have a negative impact on the investigation as it would reveal information that is not meant to be public at this initial stage. Therefore, disclosure of such information would also seriously undermine the protection of the purpose and result of the investigation.

3. Exception 4(3) 2nd paragraph (“space to think”): The documents you seek to obtain contain discussions, views and/or opinions of the EDPB members and/or of its Secretariat concerning decisions that have already been taken. Thus, disclosure of the views and opinions provided by the EDPB in this context would seriously undermine the decision-making process of the EDPB, in particular as it would curtail the members’ “space to think”, by preventing them from freely submitting their uncensored views on the matter, and freely discussing the issues at stake. The disclosure of these opinions will have consequences in forthcoming discussions, since specific views of the EDPB are subject to updates and revisions and can thus be reopened at any time, especially taking into account that the views of the EDPB have been provided in the course of an ongoing investigation for which the EDPB may be requested to provide further feedback in the future.

Furthermore, the EDPB may be requested to continue its cooperation with the European Commission regarding this, and future, investigations. Since this investigation is conducted by the European Commission, any advice, analysis and/or views are provided by the EDPB in the context of its role and mandate, but also in the context of good inter-institutional cooperation with the European Commission, which are essential for the work of the EDPB. Therefore, disclosing documents pertaining to an investigation that is (i)

¹ Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECR 2010 I-06055. This case concerns the previous Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

being conducted by the European Commission and (ii) currently ongoing, given the potential impacts mentioned in the paragraphs above, could impact said inter-institutional relations and consequently seriously harm the decision-making process of the EDPB. This is especially the case where the EDPB is consulted by other EU institutions concerning important discussions in the field of data protection and privacy.

Therefore, the decision-making process of the EDPB would be seriously undermined by the disclosure.

These exceptions apply to all the documents in scope of your request in their entirety, therefore a partial disclosure is not possible.

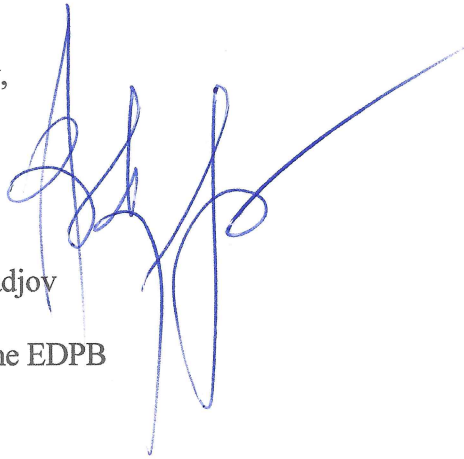
The exceptions laid down in Articles 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the document. We have not been able to identify such an interest. For these reasons, access to these documents is denied.

Means of redress

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the European Data Protection Board to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the following email address: edpb@edpb.europa.eu. Please make reference to the case number of your request in the subject.

Yours faithfully,



Ventsislav Karadjov

Vice-Chair of the EDPB