DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2022/3211

Dear Mr Fanta,

I refer to your letter of 22 July 2022, registered on the same day, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delays in treating your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 31 May 2022, addressed to the Directorate-General for Communication Networks, Content and Technology, you requested access to ‘[a]ll documents related to the meeting between Commissioner Breton and cabinet with Meta on 19/05/2022. This includes meeting minutes, e-mails and other relevant documents’.

The European Commission identified the following documents as falling under the scope of your request:

- Email regarding a meeting request, 13 April 2022, reference Ares(2022)3010219 (hereafter ‘document 1’);

---

In its initial reply of 15 July 2022, the Directorate-General for Communication Networks, Content and Technology partially refused access to these documents based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of individuals), the third indent of Article 4(1)(a) (protection of international relations), the first indent of Article 4(2) (protection of commercial interests) and the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

2. **Assessment and Conclusions under Regulation (EC) No 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I can inform you that:

- wide partial access is granted to documents 1 and 2, subject to redactions based on the exception of Article 4(1)(b) (protection of privacy and integrity of individuals);

- further partial access is granted to document 3.

As regards the redacted parts of document 3, I regret to inform you that I have to confirm the initial decision of Directorate-General for Communications Networks, Content and Technology to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of individuals), the third indent of Article 4(1)(a) (protection of international relations), the first indent of Article 4(2) (protection of commercial interests) and the second subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

**2.1. Protection of privacy and the integrity of the individual**

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’. 
In its judgment in Case C-28/08 P (Bavarian Lager)\(^3\), the Court of Justice ruled that when a request is made for access to documents containing personal data, 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\(^4\) (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by 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 \(^5\) (hereafter ‘Regulation (EU) 2018/1725’).

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with […] [the Data Protection] Regulation’ \(^6\).

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person […]’.

As the Court of Justice confirmed in Case C-465/00 (Rechnungshof), ‘there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life’ \(^7\).

Document 1-3 contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission. Moreover, it contains the name, contact details and/or function of third parties who are not public figures acting in a public capacity.

The names\(^8\) of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

---


\(^6\) European Commission v The Bavarian Lager judgment, cited above, paragraph 59.

\(^7\) Judgment of the Court of Justice of 20 May 2003, Rechnungshof and Others v Österreichischer Rundfunk, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.
Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if “[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (ClientEarth), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data ⁹. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you bring arguments regarding the disclosure of the name of the representative of Meta. In this respect, I take note that the Commission press service as well as the communication adviser of Commissioner Breton made public on Europa and Twitter, respectively, with whom Commissioner Breton met from Meta on that day. As this information was made public lawfully, I consider that their transmission would not prejudice the legitimate interests of the person concerned, and after weighing competing interests, the name and functions of the person representing Meta, can, in this particular case, be disclosed.

On the other hand, you do not bring any arguments by which you try to establish the necessity to have the data of other individuals transmitted for a specific purpose in the public interest. Therefore, in the latter case, the European Commission does not have to examine whether there is a reason to assume that the data subjects’ legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data.

---

⁸ European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access be granted only to part of the personal data, as the need to obtain access to the rest of the personal data for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the public interest as regards […] international relations […]’.

As far as the interests protected by virtue of Article 4(1)(a) of Regulation (EC) No 1049/2001 are concerned, the Court of Justice has confirmed that it ‘is clear from the wording of Article 4(1)(a) [of Regulation (EC) No 1049/2001] that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests’.

The Court of Justice stressed in the In ‘t Veld ruling that the institutions ‘must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest’.

Consequently, ‘the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exception […] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’.

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned article, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine

\[10\] Judgement of the Court of Justice of 1 February 2007, C-266/05 P, Sison v Council, EU:C:2007:75, paragraph 46.
\[11\] Judgment of the Court of Justice of 3 July 2014, Council v In ‘t Veld, C-350/12, EU:C:2014:2039, paragraph 63.
those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care.

Such a decision requires, therefore, a margin of appreciation’ 13. This was further confirmed by the Court of Justice 14.

Parts of document 3 concern actions and expectations related to the Russian invasion of Ukraine, which – especially in the case of the reference to disinformation spread outside Europe – has an external relations dimension. Moreover, it contains key messages to pass on regarding Russian disinformation and its impact on Ukraine, which are particularly sensitive in the context of the ongoing conflict.

Disinformation is false or misleading content that is spread with an intention to deceive or secure economic or political gain, and which may cause public harm. The spread of disinformation can have a range of harmful consequences, such as threatening our democracies, polarising debates, and putting the health, security and environment of EU citizens at risk.

Large-scale disinformation campaigns are a major challenge for Europe and require a coordinated response from EU countries, EU institutions, online platforms, news media and EU citizens. The Commission has made it a priority to tackle disinformation and has developed a number of initiatives to accomplish this goal.

The public disclosure of these parts would lead to misinterpretation/speculation for the repercussions of disinformation and decisions taken at EU level. In this respect, disinformation actors regularly seek to undermine sanctions and other measures to fight disinformation in the context of the Russian invasion. The redacted information can be easily taken out of context and used by certain third parties to discredit the actions taken by the Commission, which may adversely affect the international relations of the Union (also in other fields such as media freedom and pluralism etc.). This is because countries that are active in disinformation campaigns against the Union or that are taking authoritarian measures against the freedom of information are eager to either portray the EU’s actions as a hostile act – rather than a defensive measure – or as a false equivalent to their own actions in order to justify them. On another note, the ongoing discussions and the mutual trust in the framework of the Transatlantic Trade and Technology Council on cooperation in the field of crisis response on disinformation actions may also be seriously affected and undermine the EU – US relations, as well as EU’s credibility as international partner.

There is therefore a reasonably foreseeable and not purely hypothetical risk that the disclosure of the document and part of documents redacted under this exception would

undermine the international relations between the EU and the USA, as well as EU’s credibility as international partner. In this context, I would like to remind you that the documents released under Regulation (EC) No 1049/2001 become available to the public at large (‘erga omnes’), and not only to the applicant who had requested them.

Against this background, I confirm that some redacted parts of document 3 need to be protected based on the exceptions provided for in the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

2.3. Protection of commercial interests

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, […] unless there is an overriding public interest in disclosure’.

As the Court of Justice explained, ‘in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, it must be shown that the documents requested contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person. That is the case, in particular, where the requested documents contain commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned or to their commercial relations […]’ 15.

Furthermore, the Court of Justice recognised that, ‘[i]n order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible’ 16.

Moreover, in its judgment in Case T-516/11, the General Court said that ‘in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, the institution must show that the documents requested contain elements which may, as a result of the disclosure, seriously undermine the commercial interests of a legal person’ 17.

---

Finally, the General Court also stressed that ‘in principle, precise information relating to the cost structure of an undertaking constitutes business secrets, the disclosure of which to third parties is likely to undermine its commercial interests’.

Redacted passages of document 3 contain sensitive commercial information about Meta/Facebook, such as their commercial strategy and services offered, general revenue, breakdown of revenue, and relevant financial data of the company, which are not publicly available. Disclosing the company’s financial data could harm their reputation and thus undermine their commercial interests. In addition to this, part of the redacted passages reflects the Commission’s conclusions and estimations on the financial reports of Meta/Facebook. Moreover, document 3 contains the commercial intentions/strategy of other companies, which have not been made public by the latter. This information, which is not being publicly available, should be protected as commercially sensitive information, whose disclosure would harm the interests of the respective companies.

Against this background, I confirm that parts of document 3 need to be protected based on the exceptions provided for in the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001.

### 2.4. Protection of the decision-making process

The second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 provides that ‘[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

Pursuant to settled case-law, the above-mentioned exception may be applied where disclosure of preparatory documents would result in a serious, non-hypothetical and objectively justified risk of self-censorship.

Document 3 contains preliminary opinions of Commission staff on the implementation of the Digital Services Act and Digital Markets Act, which form part of internal deliberations and consultations for which the decisions have been taken. In addition to this, part of the document contains sensitive internal information on the benchmarks of compliance of the Digital Services Act.

The public disclosure of these internal reflections would deter the service concerned from freely expressing their opinions and having frank, internal discussions in the future, if they were to be made publicly available. Furthermore, this would pose a continued risk to discussions and deliberations on the current implementation and enforcement of the Digital Services Act and Digital Markets Act and expose the Commission to undue

---


external pressure from companies now subject to the regulations and disseminate preliminary conclusions that do not represent the final position of the European Commission. In light of the foregoing, the risk of disclosure of these views and reflections put forward in the document at question would seriously undermine the decision-making process.

Consequently, I conclude that, pursuant to the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, access cannot be granted to the parts of document 3, as public disclosure would seriously undermine the decision-making processes in a foreseeable and non-hypothetical way.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Articles 4(2) and 4(3) of Regulation (EC) No 1049/2001.

Please note also that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting further partial access to the documents requested.

As explained above, further access is granted to documents 1-3.
5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Ilze JUHANSONE
Secretary-General

Certified copy
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

Enclosures: (3)