Subject: Your application for access to documents – EASE 2023/4000

Dear Mr Lohninger,

We refer to your email of 10 July 2023 in which you make a request for access to documents pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter ‘Regulation 1049/2001’), which was registered on the same day under the above-mentioned reference number.

1. Scope of your application

Your application reads as follows:


This request is in line with common practice as the Commission usually releases all responses received. […]’

We refer to our clarification request of 28 July 2023 in which we informed you that the Commission is preparing the publication of the non-confidential versions of the documents.
requested in due course and invited you to clarify whether the information we provided satisfies your inquiry or if you prefer to maintain the existing access to documents request.

In your reply of 28 July 2023 to the abovementioned clarification request you indicate that your access to documents request remains open and valid and you ask to provide you with the requested responses within no later than three working days.

2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

We have identified the following documents as falling within the scope of your application:

- Responses to the consultation on ‘The future of the electronic communications sector and its infrastructure’ (‘the identified documents’)

Please note these documents refer to all the replies received, which account to approximately 430 responses and approximately 160 pdf documents. It would require a disproportionate effort to list all these documents for the purpose of this access to documents request, bearing in mind that the non-confidential and – where requested - anonymized responses will be published in due course using the EU survey tool.

3. ASSESSMENT UNDER REGULATION 1049/2001

Following an examination of the identified documents under the provisions of Regulation 1049/2001, we regret to inform you that access these documents cannot be granted as disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

(i) Protection of commercial interests

Article 4(2) first indent of Regulation 1049/2001 provides that the 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.

This provision must be interpreted in light of Article 339 of the Treaty of the Functioning of the European Union (TFEU), which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Parts of the identified documents are covered by the abovementioned exception as they contain sensitive business information relating to the concerned third parties’ activities, positions and views. DG CONNECT is working to prepare public versions of the replies that do not contain any business secrets or other confidential information. Given that non-confidential versions are not yet available, disclosure would at this stage undermine the third parties’ commercial interests. Therefore, access to the identified documents cannot be granted as its disclosure is prevented by the exception to the right of access laid down in Article 4(2), first indent of Regulation 1049/2001.

(ii) Protection of the decision-making process

The first subparagraph of Article 4(3) of Regulation 1049/2001 provides that ‘[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused
if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.'

The identified documents are covered by the abovementioned exception of the first subparagraph of Article 4(3) since they are subject to the process of preparing the non-confidential responses to be published online with a view to publish the results of the consultation on ‘the future of the electronic communications sector and its infrastructure’. Disclosure would at this stage seriously undermine the evaluation of responses to the consultation, in particular regarding the analysis of the confidential nature of the documents. The risk of disclosing sensitive information regarding the concerned entities before verifying whether they contain any business secrets or other confidential information would impair frank and outright conduct of stakeholder consultations with the concerned entities on that matter. Disclosure of the identified documents would therefore seriously undermine the protection of the exception laid out in Article 4(3) first subparagraph. This risk is also reasonably foreseeable and not purely hypothetical. The Commission will publish the non-confidential versions of the responses in due course.

In light of the foregoing, the disclosure of the identified documents has to be refused completely based on the abovementioned exceptions of Article 4 of Regulation 1049/2001.

We have considered whether partial access could be granted to identified documents. However, partial access is not possible considering that the documents are covered in its entirety by the abovementioned exception of Article 4 of Regulation 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Articles 4(2) and 4(3) of Regulation 1049/2001 apply, unless there is an overriding public interest in the disclosure of documents. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. We have examined whether there could be an overriding public interest in the disclosure of the aforementioned documents, but we have not been able to identify such an interest.

5. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission by asking for a review via your portal¹ account (available only for initial requests submitted via the portal account),

or via the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

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Yours faithfully,

Electronically signed

Roberto Viola