Subject: Your access to documents request - EASE 2023/4175

Dear Mr Fanta,

We refer to your email of 18 July 2023 wherein 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 abovementioned reference number.

1. SCOPE OF YOUR APPLICATION

Your request reads as follows:

‘Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

- All replies from providers of online platforms and trade associations, industry groups as part of the public consultation on the Digital Services Act (DSA) Transparency Database’

Given the wide-scope of your request, we contacted you on 2 August 2023 with a view to finding a fair solution based on Article 6(3) of Regulation 1049/2001 (our reference Ares(2023)5360722). In order to help you narrow down the scope of the request, we informed you about the number of documents, including a breakdown of the number of documents per category mentioned in your application.
On 3 August 2023, in response to our proposal, you requested a list of the documents identified for you to narrow down the scope of your request, or alternatively you requested the identified documents originating from providers of online platforms. In addition to this, you question whether these documents are publicly available.

Please note that these documents are not publicly available. We have therefore, proceeded with narrowing down the scope of your application to the documents originating from providers of online platforms under point 2 below. It is what could be achieved, taking into account the Commission’s resources and the global workload of the relevant staff during the same period, within the given timeframe.

Resulting from the principles of sound financial management and administration good to which the Commission is bound to, pursuant to Article 310(5) of the Treaty on the functioning of the European Union, we are obliged to balance your interest in access against the workload result from the processing of your application. This is in line with the case law of the EU courts (1).

2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

The following documents fall within the restricted scope of the request as set out above:

- Submission, Google, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 1’)
- Contribution, Snap, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 2’)
- Contribution, Wikimedia, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 3’)
- Contribution, Dailymotion, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 4’)
- Contribution, MG Freesites, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 5’)
- Contribution, Apple, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 6’)
- Contribution, Google, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 7’)
- Contribution, Zalando, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 8’)
- Contribution, CDiscount, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 9’)
- Contribution, Allegro, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 10’)
- Contribution, BOL, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 11’)
- Contribution, Booking, Consultation on the DSA transparency database, Ares(2023)5903603 (‘Document 12’)
- Contribution, MAFRA, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 13’)
- Contribution, Mozilla, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 14’)

3. ASSESSMENT UNDER REGULATION 1049/2001

Following an examination of the identified documents under the provisions of Regulation 1049/2001 and taking into account the opinion of the third parties concerned, we have arrived at the conclusion that full access can be granted to Document 1. Partial access can be granted to Documents 2-9. Access cannot be granted to Documents 10-18. Full and partial disclosure of the documents is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

A. Full access

Full access is granted to Document 1. Please find it enclosed to this letter.

B. Partial Disclosure

Protection of privacy and integrity of individuals

Full disclosure of Documents 2-9 is prevented by the exception concerning the protection of privacy and integrity of the individual outlined in Article 4(1)(b) Regulation 1049/2001, since they contain the following personal data:

– the names and contact details, as well as other personal data of natural persons.

Article 9(1)(b) of the Data Protection Regulation (2) does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced.

In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Consequently, we conclude that, pursuant to Article 4(1)(b) of the Regulation 1049/2001, access cannot be granted to the personal data contained in the identified documents, as the need to obtain access thereto 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 disclosure of the personal data concerned.

Consequently, the above-mentioned parts of Documents 2-9 have been redacted.

C. Access Refusal

We regret to inform you that access to Documents 10-18 cannot be granted as their disclosure is prevented by exceptions laid down in Article 4 of Regulation 1049/2001.

Protection of commercial interests

Full and partial disclosure of Documents 10-18 is prevented by the exception concerning the protection of commercial interests laid down in Article 4(2) Regulation 1049/2001.

The first indent of Article 4(2) of the 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.

Documents 10-18 are contributions of legal entities to the public consultation on the Digital Services Act (DSA) transparency database. The documents contain views and positions of the organizations concerned, which relate to business strategies and other commercial interests of the organizations, including intellectual property in relation to the Digital Services Act. These contributions are not publicly available. We did not manage to obtain the opinion of the third parties on the public disclosure of these documents. We consider that there is a real and non-hypothetical risk that disclosure of these documents could undermine and seriously affect the commercial interests of the companies at question. Therefore, access to Documents 10-18 is refused as their disclosure is prevented by the exception to the right of access laid down in Article 4(2), first indent of Regulation 1049/2001.

Furthermore, parts of Documents 10-18 contain personal data, in particular, names and contact details of natural persons. Their disclosure is prevented by the exception of Article 4(1)(b) of Regulation 1049/2001 for the reasons set out in Section B.

We have considered whether partial access could be granted to the identified documents. However, no meaningful partial access is possible without undermining the interest described above or creating a disproportionate administrative burden in light of the fact that the documents to be redacted are very voluminous and the information contained therein which could be made public would be of no substantial added value as the explanations of the Commission, the questions and the privacy statement are already being disclosed to you with the partial disclosure of Documents 2-9.

Document 18 is a letter with the views and positions of the company and is covered in its entirety by the exception to the right of access laid down in Article 4(2), first indent of Regulation 1049/2001.

Pursuant to settled case-law, in exceptional circumstances, ‘a derogation from the obligation to grant partial access might be permissible where the administrative burden
of blanking out the parts that may not be disclosed proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required.

The General Court further held in the same judgment that ‘[…] The principle of sound administration requires that the duty to grant partial access should not result in an administrative burden which is disproportionate to the applicant's interest in obtaining that information.

Consequently, we have come to the conclusion that, in order to safeguard the principle of sound administration, Documents 10-18 cannot be partially disclosed under Regulation (EC) No 1049/2001. Indeed, the administrative burden engendered by implementing such partial access would not weigh up against your possible interest in obtaining the information contained in the parts that would remain unredacted.

Please be informed that the Summary Report of the replies received in the context of the Public Consultation on the Digital Services Act (DSA) Transparency Database has been published and you may access it under the following link:


4. OVERRIDEING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and Article 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 documents which are being withheld but we have not been able to identify such an interest.

5. REUSE OF DOCUMENTS

Documents 1-9 originate from third parties. Please note that they are disclosed to you based on Regulation 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released document without the agreement of the originators, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

6. CONFIRMATORY APPLICATION

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

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Such 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 portal (5) account (available only for initial requests submitted via the portal account), or at 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

Yours faithfully,

Roberto Viola

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