Subject: Your application for access to documents under Regulation (EC) No 1049/2001 – EASE 2023/7330

Dear Mr Fanta,

I refer to your request registered on 11 December 2023, submitted in accordance with Article 6(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (¹) (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR APPLICATION

In your application, you requested access to

- Any documents providing insights into case law on Regulation 1049/2001. This is meant to include any documents containing a case law overview, internal manuals, instructions or FAQs used by the Transparency Unit.

- Any templates for replies to access to documents requests. This includes standard responses that a request has been registered or that a request has not been registered; concerning wide-scope requests; concerning "fair solutions"; "holding replies"; third party consultations. This is meant to apply to templates for both initial as well as confirmatory applications’.

The initial request was assigned to the Secretariat-General.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

Further to the assessment of your application under the relevant provisions of Regulation (EC) No 1049/2002, the Secretariat-General has identified 43 documents falling under the scope of your application. The documents are listed in Annex I of this reply.

Please note that the documents listed in the Annex contain central guidance for all Commission Services (including the Secretariat-General).

With respect to documents 1 to 37 and document 40, the Secretariat-General is pleased to inform you that full access can be granted.

With respect to documents 38, 39, 41 and 42, the Secretariat-General is pleased to inform you that a partial access can be granted to the documents. Full disclosure is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001.

With respect to document 43, the Secretariat-General regrets to inform you that the access must be refused as the disclosure is prevented by the exceptions based on the second indent of Article 4(2) (protection of legal advice) and on the second subparagraph of Article 4(3) (protection of opinions for internal use and deliberations) of Regulation (EC) No 1049/2001.

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) (²), 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 (³) (hereinafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.


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’ (5).

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person (…); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as (…) location data (…)’.

Recital 26 of the Regulation (EU) 2018/1725 clarifies that ‘(...) [t]o determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person, to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments’.

The requested documents contain personal data, such as names, email, office addresses and telephone numbers of persons, including those who do not form part of the senior management of the European Commission. Moreover, they contain handwritten signatures.

The names⁶ 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.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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) No 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 of its own motion the existence of a need for transferring personal data.

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data (6). This is also clear from Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, the European Commission has to examine the further conditions for a 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 weighted the various competing interests.

In your request, you did not express any particular interest to have access to these data nor you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

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 reflected in the requested 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.

As to the handwritten signatures appearing in the requested documents there is a risk that their disclosure would prejudice the legitimate interest of the person concerned.

Consequently, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested 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.

2.2 Protection of legal advice

The second indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that ‘The institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings and legal advice [...] unless there is an overriding public interest in disclosure.

Pursuant to settled case-law the exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 protects two distinct interests: court proceedings

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and legal advice. (7) In the present case, this exception applies to the protection of the legal advice.

As far as the interest for the protection of legal advice is concerned, the examination to be undertaken by the institution concerned must necessarily be carried out in three stages, corresponding to the three criteria in that provision. (8) Apart from the criterion of the lack of an overriding public interest (which will be assessed in the corresponding section of the present decision below), the case-law identified indeed two cumulative criteria which must be fulfilled, for the exception under second indent of Article 4(2) of Regulation (EC) No 1049/2001 to apply.

In accordance with settled case-law, in order to invoke this exception, first, the institution must ‘satisfy itself that the document which it is asked to disclose does indeed relate to legal advice’ (9). The concept of legal advice refers to the content of a document and to the nature of the information concerned and not to its author or the manner in which a document is described (10). The decisive criterion in this respect is whether the advice in question relates to a legal issue (11), regardless of its form, including whether it is reflected in ‘track changes’ (12).

Secondly, the institution must examine whether [its] disclosure [in full or in parts] […] would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution’s interest in seeking legal advice and receiving frank, objective and comprehensive advice.

The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical’ (13).

Document 43 is a living document in constant update containing information aimed at providing legal advice to case-handlers and to the Commission as a whole with respect to the interpretation and consistent application of the European Court of Justice’s case-law related to transparency and access to documents.

It includes a curated choice of case law accompanied by its interpretation which addresses the services, whose disclosure would be harmful to the Commission’s interest in seeking legal advice and receiving frank, objective and comprehensive advice. This risk is reasonably foreseeable and not purely hypothetical.

In fact, the document contains the internal views and interpretation of a selection of the case law that are crucial to flag critical points that case handlers need to look at while assessing disclosure and drafting the decisions, so as to properly ensure the legality of the Commission’s responses. This preparatory and internal document is used by the Directorates-General and the Secretariat-General to prepare their initial replies and by the Secretariat-General to prepare confirmatory replies. The latter are legal acts expressing the Commission’s final position as an institution.

Its disclosure would thus risk undermining the Commission’s interest in seeking and receiving frank, objective and comprehensive advice and would risk deterring the relevant service from drafting and updating it and the Commission from ordering its update.

Consequently, the Secretariat-General concludes that access cannot be granted to document 43 pursuant to the second indent of Article 4(2) (protection of legal advice) of Regulation (EC) No 1049/2001.

2.3 Protection of 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’.

It is to be noted that the decision-making exception in Article 4(3) of Regulation (EC) No 1049/2001 does not refer only to decisions having legal effect. The wording in Article 4(3) of Regulation (EC) No 1049/2001 includes neither a definition of the decision-making process, nor any indication that would enable establishing the legislator's intention to limit the scope of the decision-making process protected by that exception only to the legislative process.

Indeed, the decision-making process has to be interpreted in a broad sense, encompassing also processes relating to administrative and other functions of the Institutions.
In addition, according to settled case-law the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution (14).

In the case at hand, document 43 must be fully protected by the exception laid down in the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 as the selection of case law and the internal considerations attached to each extract constitute internal guidance, not validated by the hierarchy, to enrich and inform the decision-making on how to reply to each request for access to documents.

Disclosing the document would thus undermine the decision-making of the Commission, which would then be constrained by the internal considerations and preliminary informal choice of case law that was included in the document to inform the decision-making, losing both its ability to ponder serenely and decide which case law/course of action best suits the case at hand, and the ability to resort to case law/courses of action which were not included in the document.

The General Court has confirmed that access to documents can be refused if it would seriously undermine the free exchange of views and carry a risk of self-censorship (15).

The disclosure of document 43 could cause confusion to the public, by placing in the public domain internal considerations made by staff members of the Commission, which do not necessarily reflect the final position of the Union.

In the case at hand, the disclosure of document 43 would seriously undermine the free exchange of views and carry a risk of self-censorship. In fact, the disclosure of the document would carry the risk that the opinions of Commission officials and unofficial interpretation of the case-law might be made public and that the authors would take that risk of disclosure into account in the future, to the point where they might be led to practise self-censorship and to cease putting forward any views. The result would be that the Commission could no longer benefit from the frank and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures.

Moreover, as stated in case C-506/08 Sweden v MyTravel and Commission (16) and in case T-18/15 Philip Morris v Commission (17), the exception of the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 is aimed at protecting the institution’s ‘space to think’ from external pressure by providing the possibility of expressing views independently within an institution and encouraging internal discussions with a view to

(16) Judgment of the Court of Justice of 21 July 2011, Sweden v MyTravel and Commission, C-506/08, EU:C:2011:496, paragraph 78
improving the functioning of that institution and contributing to the smooth running of the decision-making process.

Against this background, the Secretariat-General has concluded that public access to the redacted parts of document 43 risks undermining seriously the decision-making process of the Commission and must be denied on the basis of the exception of the second subparagraph of Article 4(3) (protection of decision-making process) of Regulation (EC) No 1049/2001.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note 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.

In contrast, the exceptions laid down in the second indent of Article 4(2) and in the second subparagraph of Article 4(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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal (18).

In your initial request, you do not put forward any arguments to justify the existence of an overriding public interest.

The Commission recalls that it is for the applicant to put forward specific circumstances that show that the existence of an overriding public interest, which justifies the disclosure of the documents concerned (19).

The Secretariat-General has equally not been able to identify any public interest capable of overriding the interests protected by the second indent of Article 4(2) and the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness20, provides further support to this conclusion.

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4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the widest possible partial access has been granted to the requested documents.

With respect to document 43, the Secretariat-General has considered whether partial access could be granted in accordance with Article 4(6) of the Regulation. However, it follows from the assessment made above that this document is entirely covered by the exceptions based on the second subparagraph of Article 4(3) and the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

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6. MEANS OF REDRESS

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

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Unit C.1. ‘Transparency, Document Management & Access to Documents’
BERL 7/076
B-1049 Brussels,

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

Yours sincerely,

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