EUROPEAN COMMISSION

Brussels, 18.3.2024
C(2024) 1894 final

Mr Fanta

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 - EASE 2023/7330

Dear Mr Fanta,

I refer to your e-mail of 19 January 2024, 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’).

1. SCOPE OF YOUR REQUEST

In your initial application of 11 December 2023 registered on the same day, 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 […] [; and]

- 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.’

In its initial reply of 18 January 2024, Directorate SG.C of the Secretariat-General identified 43 relevant documents, out of which 42 were fully or widely released, subject to, where applicable, the redaction solely of personal data in accordance with

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Article 4(1)(b) Regulation (EC) No 1049/2001 which provides for the protection of privacy and the integrity of the individual.

One document, namely an internal case-law table (identified as Document 43) was fully withheld, based on the exceptions laid down in the second indent of Article 4(2) (legal advice) and in the second subparagraph of Article 4(3) (decision-making process) of the regulation.

In your confirmatory application, you request a review of the position of Directorate SG.C of the Secretariat-General in respect to this fully withheld document. You underpin your request with arguments, which will be addressed 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 at the initial stage.

Following this review, I would like to inform you that the Secretariat-General confirms the initial decision of its Directorate SG.C to refuse access to the document requested, for the reasons explained below.

2.1. Protection of the public interest as regards legal advice and court proceedings

Pursuant to the second indent of Article 4(2) of Regulation (EC) No 1049/2001: ‘[t]he 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’.

In accordance with settled case-law, the above-mentioned provision protects two distinct interests, namely court proceedings and legal advice.

2.1.1. Protection of legal advice

As regards the exception for the protection of legal advice, the Court of Justice held that ‘the examination to be undertaken by the institution concerned when it is asked to disclose a document must necessarily be carried out in three stages, corresponding to the three criteria in that provision. [...] First, the institution concerned must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice and, if so, it must decide which parts of it are actually concerned and may, therefore, be covered by that exception. [...] Secondly, the institution concerned must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice, ‘would undermine the protection’ of that advice. [...] More specifically in that regard, that exception must be interpreted as aiming to protect an institution’s interest in

seeking legal advice and receiving frank, objective and comprehensive advice. [...] Lastly, thirdly, if the institution concerned takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on that institution to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined [...]14.

As far as the concept of ‘legal advice’ is concerned, it refers, pursuant to settled case-law, to ‘the content of a document and to the nature of the information concerned and not to the manner in which a document is described’5, as what is decisive is whether the advice relates to a legal issue, ‘regardless of the way in which that advice is given’6.

In this instance, the document requested consists of an internal case-law table drawn up by the Access-to-Documents Team of the Secretariat-General in collaboration with the Legal Service. It reflects a curated selection of specific quotes from public judgments handed down by the Court of Justice of the European Union, together with their interpretation and legal advice aimed at case-handlers and the Commission as a whole.

This informal document is inherently part of the legal advice provided in anticipation of the drafting of decisions and defensive arguments in court proceedings or in the framework of inquiries by the European Ombudsman. It is thus constantly updated and shared between the different Commission departments. As already indicated in the initial reply of Directorate SG.C of the Secretariat-General, this internal evolving document is used by Commission departments 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.

Therefore, the first criterion set by the above-mentioned case-law is met.

Moreover, disclosing this curated and specific choice of the critical parts of the judgments involving the implementation of Regulation (EC) No 1049/2001 would compromise the ability of the institutions to receive frank, objective and comprehensive advice, notwithstanding the fact that the judgments referred to in the table are in the public domain. Indeed, this choice flags the critical points that case-handlers need to look at while assessing disclosure and drafting the replies of the Commission, in order to ensure their legality. Disclosing it to the public would thus deter relevant services from drafting and updating this document.

Additionally, the perspective of having this legal advice published would likely alter the curation criteria, discouraging the selection of the most critical case-law in favour of the case-law more favourable to the institution, which would render the document unfit for

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6 See inter alia, Judgment of 15 September 2016, Herbert Smith Freehills v Commission, T-755/14, paragraph 47.
its purpose of flagging to the Commission services possible deficiencies while replying to requests for public access to documents.

Therefore, the second criterion set by the above-mentioned case-law is also met.

Consequently, the Secretariat-General considers that the document request qualifies as legal advice which requires protection pursuant to the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

As far as the third criterion related to the lack of any overriding interest is concerned, it is assessed under the dedicated section further below.

2.1.2. Protection of court proceedings

As regards the exception for the protection of court proceedings, the General Court held that in order to apply to documents which have not been drawn up in the context of specific court proceedings, ‘the documents requested must, at the time of adoption of the decision refusing access to those documents, have a relevant link either with a dispute pending before the courts of the European Union, in respect of which the institution concerned is invoking that exception, or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely’7.

The General Court also held that ‘[…] the principles of equality of arms and the sound administration of justice are at the heart of that exception […]. The need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial. However, in order for the exception to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, have a relevant link with a dispute pending before the Courts of the European Union, in respect of which the institution concerned is invoking that exception, and that disclosure of those documents, even though they were not drawn up in the context of pending court proceedings, should compromise the principle of equality of arms and, potentially, the ability of the institution concerned to defend itself in those proceedings. In other words, it is necessary that those documents should reveal the position of the institution concerned on contentious issues raised during the court proceedings relied upon’8.

Moreover, the General Court confirmed that documents which have not been drafted in the context of court proceedings, but reflect an internal position on a matter at issue raised in pending court proceedings, that is not necessarily the same as the one defended

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in the latter, may be protected under the exception for the protection of court proceedings, set forth in the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

Furthermore, the General Court ruled that ‘the principle of equality requires the institution by which the contested act was issued to be in a position effectively to defend the legality of its actions before the courts. That possibility would be seriously compromised if the institution in question were obliged to defend itself, not only having regard to the pleas in law and arguments raised by the applicant (…), but also having regard to the positions taken internally concerning the legality of the various options envisaged in the context of the drawing up of the act in question (…)’.

In this instance, public disclosure of this document (even partially) would upset the vital balance and equality of arms between the Commission and the applicants in several ongoing and imminent court proceedings concerning requests for access to Commission documents under Regulation (EC) No 1049/2001, as it would risk putting the institution in the difficult position in which its legal service might be forced to defend a position before the Court which was not necessarily the same as the position which it had argued for internally. This would be in particular the case where the selection of case-law was made in order to flag the usual weak points in Commission replies, instead of defending their legality. In this sense, the equality of arms between the parties could be seriously compromised if one of the parties were to benefit from privileged access to that kind of information belonging to the other party.

Consequently, the Secretariat-General concludes that the requested public disclosure would also seriously undermine the protection of courts proceedings within the meaning of the second indent of Article 4(2) of Regulation (EC) No 1049/2001, in a reasonably foreseeable and not purely hypothetical way.

2.2. Protection of the public interest as regards the decision-making process

Article 4(3) of Regulation (EC) No 1049/2001 provides as follows:

‘Access 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.

Access 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

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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, access to documents can be refused if it would seriously undermine the free exchange of views and carry a risk of self-censorship\textsuperscript{11}. Moreover, the exception provided under 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 improving the functioning of that institution and contributing to the smooth running of the decision-making process\textsuperscript{12}.

As already indicated in the initial reply of Directorate SG.C of the Secretariat-General, the selection of case-law performed in the document requested and the internal considerations attached to each excerpt contained therein, constitute internal guidance, not validated by the hierarchy. Their purpose is to enrich and inform the decision-making on how to reply to each request for access to documents.

In this instance, disclosing the requested document would therefore seriously undermine the decision-making of the Commission, insofar as it would be constrained by the internal considerations and preliminary informal choice of case-law that was included in the document to inform the decision-making. Commission departments could lose both their ability to ponder serenely and decide which case-law/course of action best suits the case at hand, and the ability to resort to others not included in the document.

Therefore, the public disclosure of the opinions of Commission officials and unofficial interpretation of the case-law contained in the document requested, would be taken into consideration in the future by the authors and contributors to the document in question, 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 would no longer benefit from the frank and complete views required of its staff and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures.

Consequently, the requested public disclosure would seriously undermine the free exchange of views and carry a reasonably foreseeable risk of self-censorship.

Moreover, contrary to the opinion expressed in your confirmatory application, the requested public disclosure of this internal document would cause public confusion, insofar as it would place in the public domain internal considerations made by staff members of the Commission, which do not necessarily reflect the final position of the institution.


\textsuperscript{12} Ibid. paragraph 78. See also, Judgment of 15 September 2016, Philip Morris v Commission, T-18/15, EU:T:2016:487, paragraph 87
In your confirmatory application, you further point out that ‘the document in question does not, as [you] understand it, pertain to any one ongoing decision, but is of a general interpretative nature’, and you therefore ‘question whether this exception applies at all’.

However, as explained above, the document in question constitutes key legal guidance addressed to the case-handlers in Commission departments for the handling of access to documents requests and drafting of their decisions.

Against this background, the Secretariat-General concludes that public access to the requested internal case-law table must also be refused based on the exception laid down in Article 4(3) of Regulation (EC) No 1049/2001.

3. **Overriding Public Interest in Disclosure**

The exceptions laid down in Article 4(2) and (3) of the regulation 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 the framework of your confirmatory application, you argue that a refusal to disclose the document requested ‘would give rise to the impression that interpretative tools in the hands of Commission staff are used against, rather than for the benefit of, the public’.

Moreover, you claim that ‘the public interest to aid access to a fundamental right is quite obvious, as disclosure would help citizens formulating better crafted requests’. According to you, ‘an improved public understanding of the case law, ultimately, would also benefit the Commission as it would likely lead to more requests being within the boundaries of the case law, thereby streamlining the institutional response’.

You also claim that 'releasing the document in question should be considered a public service by the Commission, as it would allow citizens’ to have the same level of legal guidance as it affords its own case handlers' and represents 'a chance at creating a better understanding of the official point of view'. According to you, disclosure of the document in question, ‘would be a measure of fairness to the public, which should be allowed to understand the official interpretation of rules that guide its access to a fundamental right under the Charter, Article 42’.

Please note that such general considerations, such as a need for transparency and openness, cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the document in question.

In any event, the Secretariat-General considers that transparency as regards the Commission’s implementation and interpretation of Regulation 1049/2001 is sufficiently ensured, insofar as the institution already publicly released access to its horizontal guidance notes related to access-to-documents. These notes refer to the relevant parts of

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the case-law where applicable. Relevant judgments, the text of which is already in the public domain, are also systematically referred to and summarised in the annual report of the institution on its implementation of the regulation. The Commission decisions on access to documents also include detailed reasoned analysis of the institution’s interpretation of the relevant provisions. Against this background, the public is able to understand the Commission’s official interpretation of Regulation (EC) No 1049/2001.

For this reason, the Secretariat-General considers that it already took the maximum measures in order to promote and safeguard the fundamental right of access to documents of European citizens and legal persons, within the only limit of the institution’s own right of defence.

The fact that the documents relate to administrative procedures and not to any legislative procedure, for which the Court of Justice has acknowledged the existence of wider openness\(^\text{14}\), provides further support to this conclusion.

4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting partial access to the documents requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the protection of the interests referred to above.

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*

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