

**To:** Alexander Fanta [ask+request-6948-638f12e2@asktheeu.org](mailto:ask+request-6948-638f12e2@asktheeu.org)

Brussels, 02 September 2019

**Subject: Your confirmatory application for access to documents – Ref No 2019-19**

Dear Mr. Fanta,

We refer to your email dated 19/07/2019 in which you made a confirmatory request, registered on 24/07/2019 under reference number 2019/19.

In accordance with article 8(2) of Regulation 1049/2001, a 15-working day extension of the initial deadline was submitted to you on 14/08/2019. Thus, the final deadline for replying to your initial confirmatory request was extended until 5 September 2019.

In your initial request, you requested access to documents related to the EDPB mission to San Francisco and to Facebook's "be on the lookout" internal information system.

In your confirmatory application, you request access to the documents whose disclosure was prevented by the exception enshrined in Article 4(3) 2nd paragraph of Regulation 1049/2001.

In accordance to Article 4(3) 2nd paragraph of Regulation 1049/2001, access to documents containing opinions for internal use shall be refused even after the decision has been taken, if such disclosure would undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

In the initial response, we considered that disclosure of the documents to which the above-mentioned exception applied would seriously undermine the EDPB's decision-making process, since the documents contain discussions, views and/or opinions of the EDPB members and/or its Secretariat that are part of internal deliberations and positions. Access to those internal preparatory documents would create confusion with regard to the EDPB members' views, and would curtail the Members "space to think", by preventing them from freely discussing their opinions and views of the matter. The disclosure of these opinions will also have consequences in forthcoming discussions, since specific discussions/opinions/views of the EDPB are subject to updates and revisions and can thus be reopened at any time. In this manner, public access to such documents would impair the quality of the decision-making process of the EDPB.

Nonetheless, if there is an overriding public interest in disclosure, access to the documents shall be granted. In the initial response, we were not able to identify an overriding public interest that would prevail over the reasons justifying the refusal to disclose the documents concerned. After having examined again whether there is such overriding public interest in disclosing the documents, we have reached the same conclusion.

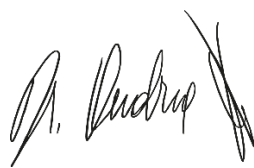
The Court of Justice of the European Union (“CJEU”) is consistent in considering that the applicant has to prove the existence of an overriding public interest in the disclosure.<sup>1</sup> In order to do this, the applicant has to refer to the specific circumstances that demonstrate the prevalence of the public interest over the reasons given for the non-disclosure based on Article 4(3) 2nd paragraph of Regulation 1049/2001. Thus, reference to general considerations such as the principles of transparency or democracy would not be sufficient to substantiate the existence of an overriding public interest, unless the particular circumstances of the case indicate otherwise.<sup>2</sup>

In this regard, you argue in your confirmatory request that there is a need for the public to better understand the debate within regulatory bodies. According to the case law of the CJEU, this general reference does not constitute an overriding public interest that would prevail over the reasons provided for the non-disclosure of the documents. This is particularly applicable with regard to documents that are not part of legislative procedures, as is the case here. In these situations, the principle of transparency can only constitute an overriding public interest if it is especially pressing and based on concrete elements, as the CJEU has held in several rulings, such as *Pint v Commission*; *LPN and Finland v Commission*; *Strack v Commission* and *Sweden and Others v API and Commission*, among others.<sup>3</sup>

Therefore, since disclosure of the documents would seriously undermine the decision-making process of the EDPB, and the existence of an overriding public interest in disclosure has not been demonstrated, the exception enshrined in Article 4(3) 2nd paragraph of Regulation 1049/2001 applies. Accordingly, access to the documents concerned is denied.

In accordance with Article 8(1) of Regulation 1049/2001, you are entitled to instituting court proceedings against the EDPB and/or make a complaint to the Ombudsman, under the conditions laid down in Articles 263 and 228 of the TFEU, respectively.

Yours faithfully,



Andrea Jelinek  
Chair of the EDPB

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<sup>1</sup> In this regard, see e.g. Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, EU:C:2013:738, par. 94; and Case C-127/13, *Strack v Commission*, EU:C:2014:2250, par. 128.

<sup>2</sup> In this regard, see e.g. case C-514/07, *Sweden and Others v API and Commission*, EU:C:2010:541, par. 156-158; Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, EU:C:2013:738, par. 93; case T-755/14, *Herbert Smith Freehills v Commission*, EU:T:2016:482, par. 74; case C-127/13, *Strack v Commission*, EU:C:2014:2250, par. 129-131; Case T-634/17, *Pint v Commission*, EU:T:2018:662, par. 56 & 70; and Case C-612/13 P, *ClientEarth v Commission*, EU:C:2015:486, par. 93.

<sup>3</sup> Case T-634/17, *Pint v Commission*, EU:T:2018:662; Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, EU:C:2013:738; Case C-127/13, *Strack v Commission*, EU:C:2014:2250; and Case C-514/07, *Sweden and Others v API and Commission*, EU:C:2010:541.