



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND
TECHNOLOGY

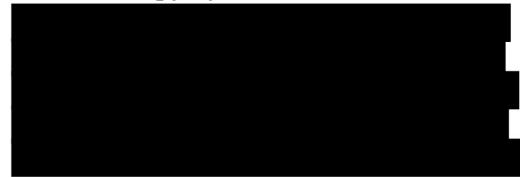
The Director-General

Brussels,

Mr Alexander Fanta
netzpolitik.org



Advance copy by e-mail:



REGISTERED MAIL WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Your application for access to documents – GestDem 2019/3996, 2019/3998, 2019/4169, 2019/4293 and 2019/4295

Dear Mr Fanta,

We refer to your e-mails dated 9 July 2019, 17 July 2019 and 19 July 2019 in which you make five requests for access to documents pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter, ‘Regulation 1049/2001’). The requests were registered on 11 July 2019, 18 July 2019 and 23 July 2019 under the above-mentioned reference numbers. We also refer to our emails dated 08 August 2019, 13 August 2019 and 14 August 2019 (our references Ares(2019)5148797, Ares(2019)5230765, Ares(2019)5230691, Ares(2019)5243786, Ares(2019)5243827), whereby we informed you that the time limit for handling your application was extended by 15 working days pursuant to Article 7(3) of Regulation 1049/2001.

Reference is also made to our clarification request dated 23 July 2019 (our reference Ares(2019)4794571) concerning the access to documents requests GestDem 2019/3996 and 2019/3998 and to your response of 24 July 2019 (our reference Ares (2019)4844842).

1. SCOPE OF YOUR APPLICATIONS

All your applications cover a period between November 2014 and July 2019 and concern:

‘-a list of lobby meetings held by our Directorate-General and [Google, Facebook, Apple, Microsoft and Amazon] or its intermediaries. The list should include: date, individuals attending and organisational affiliation, the issues discussed,

- Minutes and other reports of these meetings

- All correspondence including attachments (i.e. any emails, correspondence or telephone call notes) between the Directorate-General (including the Commissioner and the Cabinet) and [Google, Facebook, Apple, Microsoft and Amazon] or any intermediaries representing its interests in that time.

- All documents prepared for the meetings and exchanged in the course of the meetings between both parties in the given time frame.’

Given the involvement of many services in the Commission and the wide scope of your requests, on 1 August 2019 we contacted you with a view to finding a fair solution based on Article 6(3) of Regulation 1049/2001 (our reference Ares(2019)5044607). We invited you to specify the objective of your requests and your specific interest in the documents requested, to reduce the amount of documents. We informed you of the various steps required for the handling of your simultaneous requests, which involve the entire Directorate-General and Cabinet. We also informed you that according to our estimates and taking into account the other access to documents requests being handled within our Directorate-General at the same time, the overall workload of the concerned staff during the same period, the human resources available and the need to safeguard good administration, only documents related to two meetings published in the Transparency register per request could possibly be dealt with within the extended deadline. We also indicated that a limitation concerning the categories of documents is necessary and we informed you that within the given timeframe, we could identify and assess only briefings, documents presented at the meeting and meetings’ minutes. We provided you with the links to the Transparency Register lists related to meetings of our Director-General, Commissioner Gabriel and members of her Cabinet. In case you were not able to specify the meetings, we proposed limiting your requests to the documents related to the most recent meetings listed in the abovementioned websites and to the following categories of documents: briefings, documents presented at the meetings and meetings’ minutes. We mentioned that in the absence of a reply, we would unilaterally restrict the scope of your application[s] to those parts that could be dealt with within the extended deadline.

You have not replied to our invitation to propose a fair solution. For the reasons outlined above and given the limitations resulting from the time limits set by Regulation 1049/2001 and given also, the need to safeguard the interests of good administration, we see ourselves obliged to balance your possible interest in being granted access against the workload resulting from the processing of your application. This is in line with the case law of the EU Courts¹.

In light of the above and as announced in our fair solution proposal of 1 August 2019, we have proceeded with unilaterally restricting the scope of your requests to the two most recent meetings published in the Transparency register and to the following categories of documents: briefings, documents presented at the meetings and meetings’ minutes. This is what can be dealt with within the 30 working days’ time frame. Based on the information available we have not been able to identify any other conceivable way of dealing with your requests.

2. DOCUMENTS FALLING WITHIN THE SCOPE OF YOUR REQUESTS

The following meetings fall within the scope of the request after having been restricted as set out above:

a) GestDem 2019/3996 (meetings with Google)

- Meeting of 19 March 2019 (Commissioner Gabriel)

¹ Judgment of the Court of Justice of 2 October 2014 in case C-127/13, Strack v Commission, paragraphs 27-28

- Meeting of 4 June 2019 (Roberto Viola)

b) GestDem 2019/3998 (meetings with Facebook)

- Meeting of 2 April 2019 (Manuel Mateo-Goyet)

- Meeting of 20 May 2019 (Roberto Viola)

c) GestDem 2019/4169 (meetings with Apple)

- Meeting of 10 January 2019 (Eric Peters)

- Meeting of 21 May 2019 (Roberto Viola)

d) GestDem 2019/4293 (meetings with Microsoft)

- Meeting of 27 June 2018 (Commissioner Gabriel)

- Meeting of 7 December 2018 (Eric Peters)

e) GestDem 2019/4295 (meetings with Amazon)

- Meeting of 15 October 2018 (Eric Peters)

- Meeting of 26 February 2019 (Roberto Viola)

Within the timeframe provided in Article 7 of Regulation 1049/2001, we have identified and assessed the following documents:

a) GestDem 2019/3996 (meetings with Google)

- **Document No 1:** Briefing for the meeting of 19 March 2019 between Commissioner Gabriel and Google

- **Document No 2:** Briefing for the meeting of 4 June March 2019 between the Director - General and Google

- **Document No 3:** Back to office report for the meeting of 4 June 2019 between the Director-General and Google

b) GestDem 2019/3998 (meetings with Facebook)

With regard to the meeting of 2 April 2019, we have not identified any document falling within the restricted scope of the request (i.e. briefing, meetings' minutes and documents presented at the meeting). For this reason, with regard to this meeting we have extended the scope as restricted, to other categories of documents and have identified the following:

- **Document No 4:** Meeting request for the meeting of 2 April 2019

- **Document No 5:** Briefing for the meeting of 20 May 2019 between Director-General and Facebook

c) GestDem 2019/4169 (meetings with Apple)

With regard to the meeting of 10 January 2019, we have not identified any document falling within the restricted scope of the request (i.e. briefing, meetings' minutes and documents presented at the meeting). For this reason, with regard to this meeting we have extended the scope as restricted, to other categories of documents and have identified the following:

- **Document No 6:** Meeting request for the meeting of 10 January 2019

With regard to the meeting of 21 May 2019, the briefing identified is the same as the one identified for GestDem 2019/3998 (Document No 5).

d) GestDem 2019/4293 (meetings with Microsoft)

- **Document No 7:** Briefing for the meeting of 27 June 2018

With regard to the meeting of 7 December 2018, we have not identified any document falling within the restricted scope of the request (i.e. briefing, meetings' minutes and documents presented at the meeting) and an extension of the scope to include other categories of documents did also not result in any identified documents.

e) GestDem 2019/4295 (meetings with Amazon)

With regard to the meeting of 15 October 2018, we have not identified any document falling within the restricted scope of the request (i.e. briefing, meetings' minutes and documents presented at the meeting). For this reason, with regard to this meeting we have extended the scope as restricted, to other categories of documents and have identified the following:

- **Document No 8:** Meeting request for the meeting of 15 October 2018

- **Document No 9:** Steering Brief for the meeting of 26 February 2019

- **Document No 10:** Back to office report for the meeting of 26 February 2019

3. ASSESSMENT UNDER REGULATION (EC) 1049/2001

Having assessed the identified documents under the provisions of Regulation 1049/2001, we have arrived at the conclusion that they can be partially disclosed. Some parts of the documents have therefore been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001. Parts of some documents have also been blanked out as being out of scope.

a) Protection of international relations

Article 4(1)(a), third indent of Regulation 1049/2001 stipulates that access to a document shall be refused where disclosure would undermine the protection of the public interests as regards international relations.

According to settled case-law, *"the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation"*². In this context, the Court of Justice has acknowledged that the institutions enjoy *"a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4(1)(a)] could undermine the public interest"*³.

² See Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

³ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

Document No 5 contains parts, which are covered by the aforementioned exception. This document is a briefing prepared for meetings held by the Director-General and various companies during his visit to Silicon Valley on 20 May 2019 and 21 May 2019. The parts covered by this exception relate to comments and assessments made in preparation for the meeting with Facebook, which were in general meant for internal use. There is a concrete risk that the public disclosure of these parts of the briefing would affect the mutual trust between the EU and other countries and thus undermine their relations, as their content could easily be misinterpreted and misused in a national or international context. As the Court recognised in Case T-301/10 in *t Veld v Commission*, “[...] establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise”.

Consequently, the above-mentioned parts of Documents 5 have been redacted.

b) Protection of privacy and integrity of the individuals

Parts of the identified documents contain personal data, in particular names, functions, CVs and contact details of the European Commission staff and the third party’s staff.

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document is to be refused where its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Union legislation on the protection of personal data.

The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁴ (hereinafter, ‘Regulation 2018/1725’).

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data ‘*means any information relating to an identified or identifiable natural person [...]*’. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁵ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff numbers of an institution are to be considered personal data⁶.

Pursuant to Article 9(1)(b) of Regulation 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 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 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 has established 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

⁴ Official Journal L 205 of 21.11.2018, p. 39.

⁵ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case [C-434/16](#), *Peter Nowak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, [ECLI:EU:C:2017:994](#).

⁶ Judgment of the General Court of 19 September 2018 in case [T-39/17](#), *Port de Brest v Commission*, paragraphs 43-44, [ECLI:EU:T:2018:560](#).

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 weighed the various competing interests.

In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the 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.

Consequently, we conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, 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. In light of the foregoing, we are disclosing a version of the document requested in which this data has been redacted.

c) Protection of the purpose of investigations

Article 4(2) third indent of Regulation 1049/2001 provides that access to a document shall be refused where disclosure would undermine the protection of investigations, inspections and audits.

Parts of Document No 5 contain information relating to antitrust and State aid cases and relevant competition files. Releasing this could undermine the purpose of investigations if publicly disclosed. It would also lead to a situation where the parties involved (undertakings subject to investigations, potential informants, complainants and Member States) would lose their trust in the Commission's reliability and in the sound administration of competition files. Moreover, the prospect of publication of sensitive information concerning the economic activities of the undertakings involved after an investigation is closed, runs the risk of adversely affecting the willingness of undertakings to cooperate while the investigation is pending. These parties would then become reluctant to cooperate with the Commission and would reduce their cooperation to a minimum. This, in turn, would lead to a situation whereby the Commission would be unable to properly carry out its task of enforcing EU competition law and, hence, undermine the protection of the purpose of investigations. The relevant parts of Document No 5 have therefore been blanked out.

d) 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 Documents No 2, 4, 5, 6, 8, 9 contain sensitive commercial information.

In particular, parts of Documents No 2 and 4 contain information on the companies' activities and strategies, disclosure of which would affect the companies' competitive position and harm their commercial interests.

Parts of Document No 5 and 6 contain information on the company's activities and the company's position on the relevant policy files. Disclosure of these parts could affect the company's business decisions and relations and harm its commercial interests.

Documents No 8 and 9 contain information concerning the Amazon's views and their business strategies. These constitute commercially sensitive information the public disclosure of which would seriously affect Amazon's competitive position and therefore its commercial interests.

Based on the foregoing, it is considered that there is a real and non-hypothetical risk that public access to these parts of the documents would seriously undermine the companies' commercial interests.

Consequently, the above-mentioned parts of Document No 2, 4, 5, 6, 8, 9 have been blanked out.

e) 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 the 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 second subparagraph of Article 4(3) of Regulation 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.'

Documents No 2 and 9 contain parts covered by the aforementioned exception of Article 4(3) first subparagraph.

Parts of Documents No 2 and 9 relate to the proposal for the Regulation on terrorist content online. Since inter-institutional negotiations are still ongoing, disclosure of these parts of the documents would seriously undermine the ongoing decision-making process.

Part of Document No 2 concerns also an ongoing decision making process pursuant to Article 5 of Regulation (EC) 2019/1150.

Documents 2, 5, 9 contain parts which are covered by the aforementioned exception of Article 4(3) second subparagraph. These documents are briefings prepared for the respective meetings. Parts of these documents contain preliminary views and reflections, which were under consideration at that time. Disclosure of these parts of the documents would seriously undermine the Commission's functioning and internal decision-making process and deter Commission services and officials from putting forward their views and without being unduly influenced by the prospect of wide disclosure exposing the Commission.

Moreover, parts of Document No 9 also contain views expressed by Amazon on the relevant EU files. Disclosure of this information would undermine the trust enjoyed by the European Commission to hold free exchange of views with stakeholders concerning the work it carries out. The European Commission's decision-making process would be harmed without the possibility

to obtain the industry's point of view. The companies would also be less likely to engage into a constructive dialogue with the European Commission due to the risk of their positions being exposed. The risk of harming the future decision-making process by disclosing the aforementioned parts of these documents is therefore real and non-hypothetical.

Consequently, the above-mentioned parts of Document No 2, 5 and 9 have been blanked out.

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 parts of the document which are being withheld but we have not been able to identify such an interest.

5. REUSE OF DOCUMENTS

Documents No 4, 6 and 8 originate from third parties. They are disclosed for information only and cannot be re-used without the agreement of the originators, who hold a copyright on them. These documents do not reflect the position of the European Commission and cannot be quoted as such.

Document No 1, 2, 3, 5, 7, 9, 10 were drawn up for internal use under the responsibility of the relevant services of the European Commission. They solely reflect the services' interpretation of the interventions made and do not set out any official position of the third parties to which the documents refer, which were not consulted on the content. They do not reflect the position of the European Commission and cannot be quoted as such. You may reuse these documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the re-use.

6. 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 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 sincerely,

(e-Signed)
Roberto Viola

Enclosures: (10)