



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP
AND SMES

The Director-General

Brussels,
GROW.03/LB

Mr Alexander Fanta
Rue de la Loi, 155
Brussels

E-mail :
a.fanta.up842bd5us@fragdenstaat.de

**Subject: Your application for access to documents – Ref GestDem No
2019/4163**

Dear Mr Fanta,

We refer to your e-mail dated 09/07/2019 in which you make a request for access to documents, registered on 18/07/2019 under the above-mentioned reference number.

You request access to all documents related to:

“- A list of lobby meetings held by the Directorate-General with Google or its intermediaries. The list should include: date, individuals attending + 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 and Google or any intermediaries representing its interests.

- All documents prepared for the purpose of the meeting and/or exchanged during the course of the meeting”.

Following your reply to our confirmation request you also informed us that:

“the time frame I am interested in is the run of the Juncker Commission, from 2014 up to the present. In this time, at least nine meetings between Commissioner Bieńkowska, her cabinet and Google/Alphabet took place. This is the focus of my request.”

After examination of your request according to the Regulation 1049/2001 on public access to documents¹, we have listed 26 documents to be partially disclosed. Please find enclosed the list of documents identified in Annex 1.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001, I have come to the conclusion that they may be partially disclosed. Some parts of the documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of the Regulation. Those exceptions concern: protection of privacy and the integrity of the individual - Article 4(1)(b); protection of the commercial interests of a legal person and protection of investigations – Article 4(2); and protection of the decision making process – Article 4(3) of Regulation (EC) No 1049/2001.

1. Protection of privacy and the integrity of the individual

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

All of documents identified as falling within the scope of your request contain personal data, in particular names, signatures, functions and contacts of internal and external individuals.

Therefore, we needed to assess those documents in accordance with the relevant legislation.

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/EC² (‘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 data³.

¹ 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 (OJ L 145, 31.5.2001, p. 43).

² Official Journal L 205 of 21.11.2018, p. 39.

³ 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](https://eur-lex.europa.eu/eli/jud_2017/994).

Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data⁴.

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁵, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable⁶.

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 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, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 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

⁴ 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](#).

⁵ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁶ Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725

reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

As to the handwritten signatures, which are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

2. Protection of the commercial interests of a natural or legal person, including intellectual property and protection of the purpose of inspections, investigations and audit unless there is an overriding public interest in disclosure

Some elements of the identified documents listed below concern the Commission investigations in Google cases; those are:

- Briefing for a meeting between Cabinet of Commissioner Bieńkowska and Google, on 20 January 2015 (Ares (2019) 5588251);
- Briefing for a meeting between Cabinet of Commissioner Bieńkowska and Polish representatives of Google, on 10 April 2015 (Ares(2015) 1782535);
- Briefing for a meeting between Commissioner Bieńkowska and Google on 3 May 2016 (Ares(2019) 5517307).

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: — commercial interests of a natural or legal person, including intellectual property, — court proceedings and legal advice, — the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure”*.

The exception laid down in Article 4(2) of Regulation 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. In your application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested, nor have I been able to identify any public interest capable of overriding the interests protected by Article 4(2).

Consequently, I conclude that, pursuant to Article 4(2) first indent of Regulation 1049/2001, access cannot be granted to the manufacturer and brand identification, as this would undermine the commercial interests of the legal person concerned and an overriding public interest in disclosure has not been substantiated.

Google has appealed the Commission decisions in the Google Shopping, Google Android and Google AdSense cases and its applications for annulment are currently pending before the General Court. As those cases are still under investigation, granting access to these documents would risk jeopardising that on-going investigation. An overriding public interest in disclosure has not been substantiated, the exception defined in the Article 4(2) third indent is therefore applicable.

3. Protection of the decision-making process

In addition with reference to the identified documents listed above under point 2 the exception concerning the protection of the decision making process as set out in the Regulation 1049/2001 applies.

Article 4(3) of Regulation 1049/2001 stipulates that: *”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 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.”

Therefore, the disclosure of those parts of documents that would curtail the ‘*space to think*’, i.e. the possibility of the respective staff to freely exchange uncensored opinions and use this information in the accomplishment of their tasks should be refused. Such disclosure would deter staff from making suggestions independently and without being unduly influenced by the prospect of wide disclosure, thereby exposing the institution of which they are part.

The refusal of access to those parts of the documents is, therefore, necessary in order to ensure the independence of the institution and the smooth implementation of its decision-making processes.

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
Unit C.1. ‘Transparency, Document Management and Access to Documents’
BERL 7/076
B-1049 Bruxelles, or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

e-signed

Timo PESONEN