



EUROPEAN COMMISSION

Brussels, 22.07.2016
C(2016) 4908 final

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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2016/2662**

Dear Mr Dohle,

I am writing in reference to your email of 31 May 2016, registered on 3 June 2016, by which you submit a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

Through your initial application of 11 May 2016, you requested access to:

- *All correspondence received from citizens or civil society organisations related to the European Commission's civil servant [redacted] and the replies sent. Reference period: 2007 – now; and*
- *Also any internal or external correspondence/documents/phone logs/emails related to the above mentioned correspondence.*

¹Official Journal L 345 of 29.12.2001, p. 94.

In its initial reply of 31 May 2016, the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR) identified two documents as falling within the scope of your request and specified that you were the expedient of the said correspondence.

In your confirmatory application, you request an internal review of that position. You consider that there are other documents falling under the scope of your request. Moreover, you stress that DG NEAR only informed you about the documents found and about the fact that they were in your possession, but did not provide *public* access to the documents in question and the related correspondence.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

The Secretariat-General has conducted a fresh review of the reply given by the Directorate-General concerned at the initial stage.

On a preliminary basis, I would like to inform you that, notwithstanding the fact that only two relevant documents were identified within the framework of DG NEAR's initial reply, the Commission holds, as for any member of its staff, several documents in respect to the administrative activities or personal file of the individual who is the subject of your application for access to documents.

Following the review of the initial reply, I regret to inform you that the list of those documents would in itself constitute 'personal data' in the meaning of Article 2(a) of Regulation 45/2001, as it would constitute *information relating to an identified or identifiable natural person*, as this civil servant is clearly identified in your request. In addition, your request was introduced publicly via the website asktheEU.org so that a reply to your request would immediately identify to whom the list of documents relates.

The same applies to the content of the documents requested, which would also reveal *information relating to an identified or identifiable natural person*.

Therefore, I have concluded that the documents falling under the scope of your request, irrespectively of whether they are related to the administrative activities of the civil servant in question or form part of her personal file, cannot be disclosed, as they are protected against disclosure on the basis of the exception pertaining to the protection of privacy and the integrity of the individual provided in Article 4(1)(b) of Regulation, for the reasons set out below.

The documents to which you are requesting access concern a specific, named and identified individual.

This individual is a civil servant of the Commission who does not occupy a senior management position.

Article 4(1)(b) of Regulation 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 accordance with the *Bavarian Lager* ruling², when a request is made for access to documents containing personal data, Regulation 45/2001³ becomes fully applicable.

Article 2(a) of Regulation 45/2001 defines personal data as *any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.*

As stated above, as the documents requested provide information relating to an identified person, they clearly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001.

Pursuant to settled case law, *the concept of private life' must not be interpreted restrictively and [...] there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life.*⁴

The public disclosure of the requested documents would therefore constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

According to Article 8(b) of Regulation 45/2001, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.⁵ Only if both conditions are fulfilled, and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the personal data be transferred.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access.⁶

²Judgment in *Bavarian Lager*, C-28/08 P, EU:C:2010:378

³Regulation (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.

⁴See *inter alia*, judgment in *Österreichischer Rundfunk*, C-465/00, EU:C:2003:294, paragraph 73.

⁵Judgment in *Bavarian Lager*, EU:C:2010:378, paragraphs 77-78.

⁶Judgments in *Bavarian Lager*, EU:C:2010:378, paragraphs 77 and 78, *Strack*, C-127/13 P, EU:C:2014:2250, paragraphs 107 and 108; and also *Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 85.

In the above-mentioned *Bavarian Lager* ruling, the Court of Justice has clarified that the necessity of the transfer must be demonstrated *by express and legitimate justifications or convincing arguments*.⁷

In your initial application you did not indicate any grounds to substantiate the necessity of the requested documents, constituting personal data, other than the *right of access to documents in the EU treaties, as developed in Regulation 1049/2001*.

In your confirmatory application, you merely state that access is requested to the documents in question *[i]n view of transparency and accountability* without substantiating your claim any further.

However, pursuant to settled case-law, a general interest of the public in obtaining access to documents cannot be equated with a *need* to obtain personal data⁸.

Neither in your initial request nor in your confirmatory application, have you therefore established the necessity of disclosing the above-mentioned documents, constituting personal data, as required by the above-mentioned case-law. Indeed, you do not demonstrate that the transfer is the most appropriate of the possible measures for attaining your objective and that it is proportionate to that objective.

Against this background, I must conclude that the disclosure of the requested documents cannot be considered as fulfilling the requirement of Regulation 45/2001.

Consequently, the exception provided by Article 4(1)(b) of Regulation 1049/2001 applies in this instance, as there is no need to publicly disclose the documents, which constitute personal data, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(b) of Regulation 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In this instance, since you know the identity of the person referred to within the requested documents, I consider that these documents, in their entirety, constitute personal data of that individual within the meaning of Regulation 45/2001.

Consequently, partial access is not possible given the fact that the documents concerned are entirely covered by the exception provided under Articles 4(1)(b) as explained above.

⁷Judgment in *Bavarian Lager*, EU:C:2010:378, paragraph 78.

⁸Judgments in *Strack*, EU:C:2014:2250, paragraph 108; and *ClientEarth*, C-615/13 P, EU:C:2015:219, paragraphs 51-52.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

For the Commission
Alexander ITALIANER
Secretary-General

