



EUROPEAN COMMISSION

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Ms Greta Rosén Fondahn  
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Spain

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory applications for access to documents under Regulation (EC) No 1049/2001 – GESTDEM 2022/1117, GESTDEM 2022/1626, GESTDEM 2022/1675, GESTDEM 2022/1677 and GESTDEM 2022/1788**

Dear Ms Rosén Fondahn,

I refer to your e-mails of 8, 22 and 29 April as well as 5 and 10 May 2022, registered on, respectively, 8 and 25 April as well as 3, 5 and 10 May 2022, in which you submitted confirmatory applications in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (hereinafter ‘Regulation (EC) No 1049/2001’).

**1. SCOPE OF YOUR REQUESTS**

As an introductory remark, please note that you can find a full list of documents held by the European Commission and corresponding to the descriptions of documents provided by you in each of the applications in question enclosed with this decision.

As regards the individual treatment of each application by the European Commission services concerned at the initial stage, its outcome is recalled in the corresponding sections below.

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<sup>1</sup> Official Journal L 345, 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145, 31.5.2001, p. 43.

### **1.1. GESTDEM 2022/1117**

In your initial application of 23 February 2022, addressed to the Directorate-General for Communications Networks, Content and Technology and registered under reference GESTDEM 2022/1117, you requested access to, I quote:

‘documents which contain the following information: All declarations of independence (DOI) submitted by Type A members of the High-Level Expert Group on the Impact of the Digital Transformation on EU Labour Markets (E03606)’.

In its initial reply of 6 April 2022, the Directorate-General for Communications Networks, Content and Technology informed you that it had identified nine documents held by the European Commission and falling within the scope of your application.

Following an assessment of the documents under the provisions of Regulation (EC) No 1049/2001, the Directorate-General for Communications Networks, Content and Technology refused you access thereto, based on the exception to the right of access laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

### **1.2. GESTDEM 2022/1788**

In your initial application of 22 March 2022, addressed to the Directorate-General for Agriculture and Rural Development and registered under reference GESTDEM 2022/1788, you requested access to, I quote:

‘documents which contain the following information: All declarations of independence (DOI) submitted by Type A members of the:

- Expert group for technical advice on organic production (E02522),
- Task Force Rural Africa – strengthening our partnership in food and farming (E03579)’.

In its initial reply of 22 April 2022, the Directorate-General for Agriculture and Rural Development informed you that it had identified 24 documents held by the European Commission and falling within the scope of your application.

Following their assessment of the documents under the provisions of Regulation (EC) No 1049/2001, the Directorate-General for Agriculture and Rural Development refused you access thereto, based on the exception to the right of access laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

### **1.3. GESTDEM 2022/1675**

In your initial application of 22 March 2022, addressed to the Directorate-General for Financial Stability, Financial Services and Capital Markets Union and registered under reference GESTDEM 2022/1675, you requested access to, I quote:

‘documents which contain the following information: All declarations of independence (DOI) submitted by Type A members of the Commission Informal Expert Group High Level Forum on Capital Markets Union (E03692)’.

In its initial reply of 26 April 2022, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union informed you that it had identified 12 documents held by the European Commission and falling within the scope of your application.

Following an assessment of the documents under the provisions of Regulation (EC) No 1049/2001, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union refused you access thereto, based on the exception to the right of access laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

### **1.4. GESTDEM 2022/1677**

In your initial application of 22 March 2022, addressed to the Directorate-General for Research and Innovation and registered under reference GESTDEM 2022/1677, you requested access to, I quote:

‘documents which contain the following information: All declarations of independence (DOI) submitted by Type A members of the:

- Expert Group on Venture Philanthropy and Social Investments (E03495),
- Commission expert group: Mission Board for climate-neutral and smart cities (E03667),
- Horizon 2020 Commission Expert Group to advise on specific ethical issues raised by driverless mobility (E03659),
- Horizon 2020 Expert Group for the mid-term review of the Contractual Public-Private Partnerships (cPPPs) (E03538),
- European Innovation Council (EIC) High Level Expert Group (E03465)’.

Further to a partial reattribution of your application to the European Innovation Council and Executive Agency for Small and Medium-sized Enterprises, in its initial reply of 29 April 2022, the Directorate-General for Research and Innovation informed you that it had identified 34 documents held by the European Commission and falling within the part of the scope of your application under its remit.

Following an assessment of the documents under the provisions of Regulation (EC) No 1049/2001, the Directorate-General for Research and Innovation refused you access thereto, based on the exception to the right of access laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

### **1.5. GESTDEM 2022/1626**

In your initial application of 22 March 2022, addressed to the Directorate-General for Justice and Consumers and registered under reference GESTDEM 2022/1626, you requested access to, I quote:

‘documents which contain the following information: All declarations of independence (DOI) submitted by Type A members of the Expert Group on liability and new technologies (E03592)’.

In its initial reply of 5 May 2022, the Directorate-General for Justice and Consumers informed you that access to the documents requested had to be refused, based on the exception to the right of access laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In your respective confirmatory applications, you request a review of the above-mentioned positions of the Directorate-General for Communications Networks, Content and Technology, Directorate-General for Agriculture and Rural Development, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, Directorate-General for Research and Innovation and Directorate-General for Justice and Consumers.

## **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 by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that access to the documents requested has to be refused on the grounds of the exception to the right of access laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, for the reasons set out below.

### *Protection of privacy and the integrity of the individual*

Article 4(1)(b) of Regulation (EC) No 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 its judgment in Case C-28/08 P (*Bavarian Lager*)<sup>3</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, 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<sup>4</sup> (hereinafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by 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/EC<sup>5</sup> (hereinafter ‘Regulation (EU) 2018/1725’).

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’<sup>6</sup>.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’<sup>7</sup>.

The documents requested contain personal data such as the names, surnames, professional background, membership information, information on financial interests, information on intellectual property, public statements and positions, information on interests of immediate family members and handwritten signatures of the Type A members of the closed High-Level Expert Group on the Impact of the Digital Transformation on EU Labour Markets (E03606), Expert group for technical advice on organic production (E02522), Task Force Rural Africa – strengthening our partnership in food and farming (E03579), Commission Informal Expert Group High Level Forum on Capital Markets Union (E03692), Commission expert group:

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<sup>3</sup> Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereinafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>4</sup> Official Journal L 8, 12.1.2001, p. 1.

<sup>5</sup> Official Journal L 295, 21.11.2018, p. 39.

<sup>6</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>7</sup> Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

Mission Board for climate-neutral and smart cities (E03667), Horizon 2020 Commission Expert Group to advise on specific ethical issues raised by driverless mobility (E03659) and Horizon 2020 Expert Group for the mid-term review of the Contractual Public-Private Partnerships (cPPPs) (E03538), Expert Group on liability and new technologies (E03592) who are neither public figures acting in a public capacity nor members of the senior management of the European Commission.

The names of the persons concerned, namely the members of the expert groups and their family members, as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725<sup>8</sup>.

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

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data<sup>9</sup>. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

In order to establish the necessity to have the personal data contained in the documents requested transmitted, you argue that ‘[t]he requested information is necessary for a specific public interest [as y]ears may pass between initial conceptual discussions in expert groups to negotiations of regulations in trilogues [and] an expert group may close before the outputs of the group have ceased to impact policy making. For journalists, civil society and citizens trying to scrutinise actions of the Commission and other EU institutions in their entirety, it is crucial to be able to access declarations of independence of expert groups members – even of recently closed groups’.

You further elaborate that ‘Commission expert groups also play a significant and specific role within EU policy making. While Type A members are appointed in their own capacity, they also have unique access to shape the direction of Commission policy. It is therefore important for the public to be able to analyse composition of expert groups systematically and

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<sup>8</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>9</sup> Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

retroactively – not least for the public to be able to duly confide in the decisions of the Commission and its expert groups’.

As a general note, the rules on setting up and administering Commission expert groups are laid down in Commission decision C(2016) 3301 final of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups<sup>10</sup> (hereinafter ‘Decision’).

With regard to the ‘composition of expert groups’, referred to in your confirmatory applications and quoted above, the Decision contains specific provisions in this respect. Notably, its Article 8, entitled ‘Composition of expert groups’, implies that the concept of the ‘composition of expert groups’ entails solely the categorisation of members of Commission expert groups, understood as their adherence to the specific membership type (Type A, B, C, D and E). Article 23 of the Decision, entitled ‘Publication of data related to the composition of expert groups’, ensures that the public is granted unconstrained access to the information on the composition of Commission expert groups within the meaning of the above-mentioned provision, as it provides that ‘the name of Type A, B, C and E members shall be published on the Register of expert groups’ along with the name of the country represented by Type D members. Indeed, this information is accessible via the publicly available Register of Commission Expert Groups and Other Similar Entities<sup>11</sup> (hereinafter ‘Register’), where it is retained for five years after a given expert group’s closure.

As regards further transparency requirements related to the operation of Commission expert groups, according to Article 11(1) of the Decision, ‘[i]n order to ensure [...] public confidence in the Commission’s activities, individuals applying to be appointed as Type A members of expert groups or sub-groups shall disclose any circumstances that could give rise to a conflict of interest. In particular, all Commission departments shall require those individuals to submit a declaration of interests (‘DOI’) form on the basis of the standard DOI form, as set out in Annex 4 [...]’. As you rightly state in your confirmatory applications, the subsequent Article 11(6) of the Decision provides that these ‘DOI forms shall be made publicly available on the Register of expert groups, where the experts in question are Type A members of an expert group [...]’.

Please note, however, that the above-mentioned Annex 4 to the Decision, which serves as a template for the ‘Standard declaration of interests (DOI) form for individuals applying to be appointed as members of expert groups or sub-groups in a personal capacity’, contains the following clause: ‘Your DOI form shall be made publicly available on the Register [...], as long as you are appointed as member of the expert group or sub-group in a personal capacity’. Indeed, this Annex provided the basis for the formulation of the declarations of interests of Type A members of Commission expert groups concerned by your access to documents applications, as contained in the documents requested.

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<sup>10</sup> Available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2016\)3301&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2016)3301&lang=en)

<sup>11</sup> Available at: <https://ec.europa.eu/transparency/expert-groups-register/screen/home?lang=en>

Consequently, by signing and submitting her or his declaration of interests including the above-mentioned clause, each of the former members of the Commission expert groups concerned authorised the European Commission to keep her or his declaration of interests public only for as long as he or she was a member of the Commission expert group concerned. Understandably, each time a given Commission expert group closed, the persons previously acting as its members ceased to do so. Accordingly, the European Commission systematically removed their declarations of interests from the Register.

In addition, please note that the personal data contained in declarations of interests of Type A members of Commission expert groups are processed by the European Commission in accordance with the record of processing DPR-EC-01066 on the selection of members of Commission expert groups and other similar entities<sup>12</sup>. The record requires that a dedicated privacy statement be one of the annexes to the call for applications for members of Commission expert groups.

This privacy statement describes to potential applicants how their personal data is treated during the selection process and, should they be appointed as members or observers, which personal data is made publicly available on the Register. Notably, it states that '[w]hen a group is closed down, it remains published in the Register of expert groups for five years, with the indication 'Closed'. Those types of personal data other than the declarations of interests of members appointed in personal capacity that were published while the group was active remain visible on the Register [...] during these five years. On the contrary, the said declarations of interests are removed from the Register after closure of a group and are therefore not public anymore'.

With regard to the justification of your request for access to the personal data contained in the documents requested, please note that in the Secretariat-General's opinion, the above-mentioned arguments do not demonstrate the necessity for transmission of these personal data, as the Secretariat-General does not find the purpose of this transmission in the alleged public interest to be sufficiently specific, as required by Article 9(1)(b) of Regulation (EU) 2018/1725.

Indeed, as ruled by the Court of Justice in its judgment in the above-cited *Bavarian Lager* case, for the European Commission to be able to weigh up the various interests of the parties concerned (the data subjects and the data requestor), the necessity of a transfer of the personal data concerned must be established by means of providing an 'express and legitimate justification or any convincing argument'<sup>13</sup>.

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<sup>12</sup> Available on the Register of the Data Protection Officer at: <https://ec.europa.eu/dpo-register/detail/DPR-EC-01066.3>

<sup>13</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 78.



This ‘threshold’ was subsequently confirmed by the General Court, which found ‘general considerations’, such as the requestor’s belief that the personal data concerned represent a public interest, to be insufficient to warrant a transmission of these data<sup>14</sup>.

Moreover, the General Court specified that, apart from establishing a specific purpose in the public interest, the applicant must explain particularly how the disclosure of the personal data is the most appropriate measure to achieve that specific purpose<sup>15</sup>.

In the confirmatory access to documents application registered under the reference GESTDEM 2021/2490, which you mention in your confirmatory applications, the applicant established how the transmission of the personal data was the most appropriate measure to achieve the specific purpose in the public interest pursued by them. However, in your confirmatory applications at issue, you do not put forward any specific purpose in the public interest that can justify the transmission of the personal data.

The fact that in order to demonstrate the necessity for having the personal data concerned transmitted to you, you put forward the exact same arguments in each of the confirmatory access to documents applications at issue – concerning declarations of interests by members of several European Commission expert groups, active in various policy areas – provides further proof that the purpose for which you wish to obtain these data cannot be considered as ‘specific’ within the meaning of Article 9(1)(b) of Regulation (EU) 2018/1725.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes 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.

Having considered the above-mentioned arguments, the Secretariat-General concludes that the condition enshrined in Article 9(1)(b) of Regulation (EU) 2018/1725 – namely the existence of a necessity to have the personal data transmitted for a specific purpose in the public interest – is in the present case not fulfilled.

At the same time, the Secretariat-General finds the information available on the Register, published in line with the transparency requirements set out in the Decision, as an adequate means for the purpose of analysis of the ‘composition of expert groups systematically and retroactively’ as put forward in your confirmatory applications.

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<sup>14</sup> Judgment of the General Court of 23 November 2011, *Dennekamp v Parliament*, T-82/09, EU:T:2011:688, paragraphs 30-34.

<sup>15</sup> Judgment of the General Court of 6 April 2022, *Hans-Wilhelm Saure v European Commission*, T-506/21, EU:T:2022:225, paragraphs 36-37.

Consequently, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, public access to the documents requested cannot be granted, 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 the disclosure of the personal data concerned.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception enshrined therein to be set aside by an overriding public interest.

### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting you partial access to the documents requested.

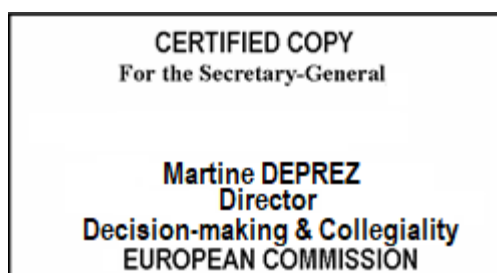
However, for the reasons explained above, no meaningful partial access to these documents is possible undermining the interests protected by Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

Consequently, the Secretariat-General has come to the conclusion that the documents are entirely covered by the invoked exception to the right of access.

### **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*

Enclosures: 1