



## EUROPEAN COMMISSION

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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° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2015/6581**

Dear Ms Cann,

I refer to your e-mail of 27 January 2016, registered on 28 January 2016, in which you submit a confirmatory application 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> ('Regulation 1049/2001').

#### **1. SCOPE OF YOUR REQUEST**

In your initial application of 14 December 2015, addressed to the Directorate-General for Human Resources and Security (DG HR), you requested access to *all documents which relate to any Staff Regulations applications made by Yves Madre to work for Farm Europe. In particular, [you requested] copies of any application(s) that he has made to undertake a new professional activity at Farm Europe; and all documents (correspondence, emails, meeting notes etc [...]) related to the authorisation of this new role.*

The Commission has identified the following documents as falling under the scope of your request:

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

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

- (1) Application form submitted by Mr Madre on 24 August 2015 and registered on 1 September 2015, relating to the authorisation to engage in a remunerated occupational activity as a contributor to the think tank Farm Europe ('Document 1');
- (2) The related decision of approval from the Appointing Authority of 16 October 2015 ('Document 2'); and
- (3) E-mail exchanges during the period of 1 September 2015 and 16 October 2015 within the Commission services or between the latter and Mr Madre, pertaining to the underlying internal procedures concerning the above-mentioned request for authorisation.

These documents were drafted in the framework of the procedure under Article 16 of the Staff Regulations<sup>3</sup>, which provides as follows:

*An official shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.*

*Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof using a specific form. If that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the appointing authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit. The appointing authority shall, after consulting the Joint Committee, notify its decision within 30 working days of being so informed. If no such notification has been made by the end of that period, this shall be deemed to constitute implicit acceptance.*

*In the case of former senior officials as defined in implementing measures, the appointing authority shall, in principle, prohibit them, during the 12 months after leaving the service, from engaging in lobbying or advocacy vis-à-vis staff of their former institution for their business, clients or employers on matters for which they were responsible during the last three years in the service. In compliance with Regulation (EC) No 45/2001 of the European Parliament and of the Council, each institution shall publish annually information on the implementation of the third paragraph, including a list of the cases assessed.*

In its initial reply of 19 January 2016, DG HR refused access to the requested documents pertaining to the procedure under Article 16 of the Staff Regulations which led to the approval of Mr Madre's request for authorisation to engage in a remunerated

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<sup>3</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Official Journal 45, 14.6.1962, p. 1385. Last amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 (OJ L 287, 29.10.2013, p. 15)

occupational activity as a contributor to the think tank *Farm Europe*. DG HR's full refusal to disclose the requested documents was based upon the exceptions under Article 4(1)(b) and Article 4(3), second subparagraph of Regulation 1049/2001, for the protection of respectively the privacy of the individual and the decision-making process.

DG HR nevertheless provided general information on the said procedure. It explained that Mr Madre had submitted a declaration dated 24 August 2015 in the framework of the procedure provided under Article 16 of the Staff Regulations, which was registered on 1 September 2015, in order to engage in a remunerated occupational activity as a contributor to the think tank *Farm Europe*. It further indicated that following this procedure, the Appointing Authority, after having determined that the said activity would not lead to any conflict with the legitimate interests of the Commission, had given its approval on 16 October 2015.

Through your confirmatory application you request a review of the refusal to disclose the requested documents, notwithstanding the information provided. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of DG HR to refuse access to the requested documents pursuant to the exceptions of Article 4(1)(b) (protection of the privacy and integrity of the individual) of Regulation 1049/2001, read in conjunction with Article 26 of the Staff Regulations, as explained below.

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

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.*

Article 2(a) of Data Protection Regulation 45/2001<sup>4</sup> ('the Data Protection Regulation') provides that *'personal data' shall mean any information relating to an identified or identifiable person [...]*.

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

The Court of Justice has confirmed in case C-465/00 (*Rechnungshof*)<sup>5</sup>, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of “private life”*.

The former Commission official's request for authorisation of activities after his departure from the Commission based on Article 16 of the Staff Regulations, as well as the related correspondence with the Commission, clearly contain information constituting personal data within the meaning of Article 2(a) of the Data Protection Regulation.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable. This means that the necessity to disclose the personal data must be established and that there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. These two conditions are cumulative<sup>6</sup>.

In this instance, the concerned documents were drafted in the framework of the procedure provided under Article 16 of the Staff Regulations. Since you know the identity of the person who made the application under that provision and the present decision will be publicly accessible in the askthEU website, I consider under these circumstances that the documents as in their entirety contain information constituting personal data of that person.

The decision of approval from the Appointing Authority of 16 October 2015 forms part of the personal file of the former official concerned within the meaning of Article 26 of the Staff Regulations. The remaining documents are part of the procedure leading to the adoption of that decision and are inextricably linked to it.

In accordance with Article 26 of the Staff Regulations, which aims *inter alia* to safeguard the privacy and integrity of present and former Commission staff, the personal file of Commission officials and other Commission staff shall be confidential. Article 26 of the Staff Regulations also clarifies that the 'personal file' of an individual include:

*(a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;*

*(b) any comments by the official on such documents.*

Therefore the requested documents as a whole fall under the scope of the exception provided in Article 4(1)(b) of Regulation 1049/2001, which must be interpreted taking into account Regulation 45/2001 and the principle of confidentiality of the personal files of members of the staff provided under Article 26 of the Staff Regulations.

Pursuant to settled case-law, the European Court of Justice has acknowledged that it is open to the EU institution concerned, in accordance with Article 4 of Regulation 1049/2001, to base its decisions for refusing access to documents on general

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<sup>5</sup> Judgment of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Österreichischer Rundfunk*, ECLI:EU:C:2003:294, paragraph 73.

<sup>6</sup> Judgment of 29 June 2010, C-28/08 P, ECLI:EU:C:2010:378, paragraphs 77-78.

presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature in several cases.<sup>7</sup>

Since all the documents falling under the scope of your request are of the same nature and, in the present circumstances, all the information they contain constitutes personal data forming part of, or being inextricably linked to his personal file falling under Article 26 of the Staff Regulations, the Commission is entitled to assume, without undertaking any concrete and individual examination of each of the documents, that their disclosure would, in principle, seriously undermine the privacy of the individual concerned within the meaning of Article 4(1)(b) of Regulation 1049/2001<sup>8</sup>.

In your confirmatory application, you raise the issue of a possible irregularity regarding the procedure which led to the authorisation by the Appointing Authority of the former official's occupational activity, after leaving the service, within FarmEurope. You state indeed that [your] *evidence indicates that Mr Madre was involved in FarmEurope from May 2015, if not before. There are then important questions to be asked as to why authorisation was apparently only sought in August 2015 [...]*.

You further argue that the release of the requested documents would permit to ascertain:

- *what date Mr Madre declared as to when his work first started at FarmEurope;*
- *what exchanges there were between Mr Madre and the Commission about this matter and why he did not apply before August, considering he was already familiar with the process to apply for authorisation for new roles;*
- *whether Mr Madre sought authorisation for the role independently, or in response to a prompt from the Commission; [and]*
- *what investigations the Commission has done into whether Article 16 of the Staff Regulations has been breached in this case [...]*

Against this background, I consider nevertheless that you have not established the necessity for disclosure of the personal data at issue within the meaning of Article 8(b) of Regulation 45/2001 as required by settled case law. Indeed, the Court of Justice held that in order for the condition of necessity laid down by Article 8(b) of Regulation 45/2001, which is to be interpreted strictly, to be fulfilled, *it must be established that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant's objective, and that it is proportionate to that objective*<sup>9</sup>.

In the present case, whereas you have provided reasons underlying your request for the transfer of the personal data which could, *prima facie*, possibly be legitimate, you have

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<sup>7</sup> See, *inter alia*, *Commission v. EnBW*, judgment of 27 February 2014, in case C-365/12P, ECLI:EU:C:2014:112.

<sup>8</sup> See by analogy, *Alexandrou*, judgment of 12 November 2015 in joined cases T-515/14 and T-516/14, ECLI:EU:T:2015:844, paragraphs 69 and following.

<sup>9</sup> See *Bavarian Lager*, *op.cit.* paragraph 78.

not established the required proportionality of such transfer. Moreover, I do not consider that the requested transfer would constitute the most appropriate measure with regard to your objective of ascertaining that the procedure provided by Article 16 of the Staff Regulations was properly implemented in this file. Nor is it possible to ascertain that the legitimate rights of privacy of the person concerned would not be prejudiced, for the reasons set out below.

In the *Dennekamp* judgment, the General Court held that *the distinction [...] in the case of public figures between the public and private spheres is relevant for the purposes of determining the degree of protection of personal data to which they are entitled under the rules in Regulation 45/2001, even if that regulation does not contain any such rule. Public figures have chosen to expose themselves to scrutiny by third parties, particularly the media and, through them, by a lesser or greater general public depending on the policy area, even if such a choice in no way implies that their legitimate interests must be regarded as never being prejudiced by a decision to transfer data relating to them. Thus, public figures have generally already accepted that some of their personal data will be disclosed to the public, and may even have encouraged or made such disclosure themselves. It is necessary therefore to take that environment into account when assessing the risk of the legitimate interests of public figures being prejudiced in the context of the application of Article 8(b) of Regulation 45/2001, and in weighing those interests against the necessity of transferring the personal data requested.*

In this instance, the concerned former official cannot however be regarded as a 'public figure' within the meaning of the above-mentioned judgment.

I consider moreover that the disclosure of the requested documents would not be proportionate to your objective of ascertaining that the procedure provided by Article 16 of the Staff Regulations was properly implemented in this file.

The confirmation that an investigation was launched by the Investigation and Disciplinary Office ('IDOC') in this specific case on 10 July 2015 is indeed sufficient to meet this objective, without prejudice to the outcome of this investigation which was closed on 4 December 2015.<sup>10</sup>

This conclusion is further supported by the fact that, to achieve the necessary balance with Regulation 45/2001, the Staff Regulations provide for the annual publication of specific information pertaining to the implementation of the said Article 16 concerning former senior managers engaging in activities which could entail lobbying or advocacy towards the Commission. Article 16, fourth paragraph, states indeed that *each institution shall publish annually information on the implementation of the third paragraph, including a list of the cases assessed.* That provision only envisages the annual publication of summary information, as opposed to the public disclosure of the underlying correspondence between the former official concerned and the Commission.

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<sup>10</sup> The mission of IDOC is indeed to ensure compliance by (former) officials and other agents with their obligations as laid down in the Staff Regulations (SR) by conducting administrative inquiries and disciplinary procedures in a fair, transparent and timely manner.

Against this background, I must conclude, in this instance, that the public disclosure of the requested documents is prevented by the exception for the privacy and integrity of the individual provided for in Article 4(1)(b) of Regulation 1049/2001, read in conjunction with Article 26 of the Staff Regulations.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,<sup>11</sup> provides further support to this conclusion.

### **3. PARTIAL ACCESS**

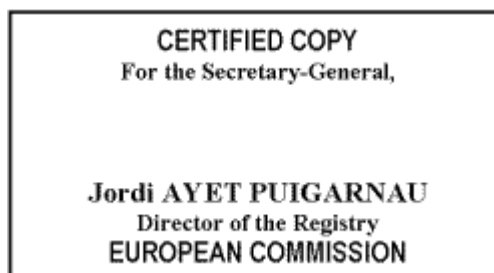
In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, partial access is not possible given the fact that the documents concerned are entirely covered by the exception provided under Articles 4(1)(b) as explained above.

### **4. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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*  
*Alexander ITALIANER*  
*Secretary-General*



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<sup>11</sup> Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, ECLI:EU:C:2010:376, paragraphs 53-55 and 60, case *Commission v Bavarian Lager, op.cit.*, paragraphs 56-57 and 63.