



EUROPEAN COMMISSION  
SECRETARIAT-GENERAL

Directorate C - Transparency, Efficiency & Resources  
**The Director**

Brussels  
SG.C.1

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by email: ask+request-10563-  
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**Subject: Your application for access to documents – GESTDEM 2022/0490**

Dear Sir,

We refer to your e-mail of 19 January 2022 in which you make a request for access to documents, registered on 21 January 2022 under the above-mentioned reference number.

**1. SCOPE OF YOUR REQUEST**

You request access to, I quote: ‘All documents related to the drafting of Commission Decision (EU) 2021/2121 of 6 July 2020 on records management and archives (C/2020/4482), including but not limited to:

- Any document containing an evaluation or assessment of the implementation of Decision 2002/47/EC, ECSC, Euratom (including but not limited to REFIT or other Better Regulation tool)
- Any document containing an evaluation or assessment of the implementation of Decision 2004/563/EC, Euratom (including but not limited to REFIT or other Better Regulation tool)
- The European Data Protection Supervisor opinion with recommendations from 3 March 2020 (as mentioned in recital 26 of Decision (EU) 2021/2121)
- Any assessment of the draft version(s) of Decision (EU) 2021/2121 by the Regulatory Scrutiny Board
- Any impact assessment of the draft version(s) of Decision (EU) 2021/2121

- Any internal consultations concerning draft versions of Commission Decision (EU) 2021/2121
- Any e-mails, minutes, progress reports, and other documents concerning draft versions of Commission Decision (EU) 2021/2121’.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001**

The Secretariat-General of the European Commission has identified the following documents as falling under the scope of your request:

- (1) email Ares(2020)159783 ‘Draft Decision on records management and archives’ sent on 10 January 2020 by the Director SG.C to the Deputy Secretary-General and the other Directors of the Secretariat-General;
- (2) draft Decision attached to the note Ares(2020)159783;
- (3) note Ares(2020)830488 ‘Interservice consultation on the draft Decision and Implementing Rules on Records Management and Archives’ sent on 10 February 2020 by the Secretary-General to the Head of Cabinet of the President;
- (4) note Ares(2020)961770 ‘Interservice consultation on the draft Decision and Implementing Rules on Records Management and Archives’ sent on 14 February 2020 by the Secretary-General to the Directors-General and Heads of Service;
- (5) note Ares(2020)1041505 ‘Consultation on the draft Decision and Implementing Rules on Records Management and Archives’ sent on 18 February 2020 by the Commission to the European Data Protection Supervisor;
- (6) letter Ares(2020)1361756 ‘EDPS comments on the draft European Commission's Decision and Implementing Rules on Records Management and Archives’ sent on 3 March 2020 by the European Data Protection Supervisor to the Commission;
- (7) enclosure of the letter Ares(2020)1361756;
- (8) email Ares(2020)1411738 ‘FW: ISC/2020/00857 - Records management and archives’ sent on 6 March 2020 by Commission’s Data Protection Officer;
- (9) email Ares(2020)2531349 ‘RE: Ares(2020)1411738 - FW: ISC/2020/00857 - Records management and archives’ sent on 13 March 2020 to Commission’s Data Protection Officer;
- (10) draft Decision (version of 13 May 2020) attached to Ares(2020)2531349;
- (11) document ‘Derogations from the Rights of data subjects for archiving in the public interest. Feasibility assessment regarding pseudonymisation, necessity assessment and proportionality assessment’ attached to Ares(2020)2531349;

- (12) document ‘Modifications following EDPS recommendations of 3 March 2020, and DPO comments of 6 March 2020, on the draft Commission Decision on Records Management and Archiving’ attached to Ares(2020)2531349;
- (13) resume of the Interservice Consultation ISC/2020/00857, extracted from DECIDE;
- (14) Excel sheet resuming all the answers by consulted directorates-general to the Interservice Consultation ISC/2020/00857, extracted from DECIDE;
- (15) document attached to the answer to the Interservice Consultation sent by DG AGRI, extracted from DECIDE;
- (16) document attached to the answer to the Interservice Consultation sent by DG CNECT, extracted from DECIDE;
- (17) another document attached to the answer to the Interservice Consultation sent by DG CNECT, extracted from DECIDE;
- (18) document attached to the answer to the Interservice Consultation sent by DG AGRI, extracted from DECIDE;
- (19) note Ares(2020)1286999 ‘Interservice consultation on the draft Decision and Implementing Rules on Records Management and Archives – DG COMP comments’ sent on 2 March 2020 by the Director ‘Horizontal Management’ of DG COMP to the Secretary-General;
- (20) document attached to the answer to the Interservice Consultation sent by DG-EDIT, extracted from DECIDE;
- (21) document attached to the answer to the Interservice Consultation sent by DG DIGIT, extracted from DECIDE;
- (22) document attached to the answer to the Interservice Consultation sent by DG EAC, extracted from DECIDE;
- (23) document attached to the answer to the Interservice Consultation sent by DG ECFIN, extracted from DECIDE;
- (24) document attached to the answer to the Interservice Consultation sent by DG ENER, extracted from DECIDE;
- (25) email attached to the answer to the Interservice Consultation sent by DG HR, extracted from DECIDE;
- (26) document attached to the answer to the Interservice Consultation sent by DG HR, extracted from DECIDE;
- (27) draft decision with comments attached to the answer to the Interservice Consultation sent by DG HR, extracted from DECIDE;
- (28) draft decision with other comments attached to the answer to the Interservice Consultation sent by DG HR, extracted from DECIDE;

- (29) document attached to the answer to the Interservice Consultation sent by the JRC, extracted from DECIDE;
- (30) draft decision with comments attached to the answer to the Interservice Consultation sent by the JRC, extracted from DECIDE;
- (31) document attached to the answer to the Interservice Consultation sent by DG MARE, extracted from DECIDE;
- (32) document attached to the answer to the Interservice Consultation sent by DG MOVE, extracted from DECIDE;
- (33) document attached to the answer to the Interservice Consultation sent by the OP, extracted from DECIDE;
- (34) another document attached to the answer to the Interservice Consultation sent by the OP, extracted from DECIDE;
- (35) document attached to the answer to the Interservice Consultation sent by DG REGIO, extracted from DECIDE;
- (36) document attached to the answer to the Interservice Consultation sent by DG SANTE, extracted from DECIDE;
- (37) another document attached to the answer to the Interservice Consultation sent by DG SANTE, extracted from DECIDE;
- (38) document attached to the answer to the Interservice Consultation sent by the SJ, extracted from DECIDE;
- (39) draft Decision with comments attached to the answer to the Interservice Consultation sent by the SJ, extracted from DECIDE;
- (40) note Ares(2020)2923153 'Interservice consultation on the draft Decision and Implementing Rules on Records Management and Archives' sent on 5 June 2020 by the Secretary-General to the Directors-General and Heads of Service;
- (41) draft Decision attached to the note Ares(2020)2923153;
- (42) adoption sheet Ares(2020)3313327 signed on 25 June 2020 by the Secretary-General;
- (43) draft Decision attached to the adoption sheet Ares(2020)3313327.

Please be informed that there are no documents on 'evaluation or assessment of the implementation of Decision 2002/47/EC, ECSC, Euratom' or Decision 2004/563/EC, Euratom'. There are no documents either on 'assessment of the draft version(s) of Decision (EU) 2021/2121 by the Regulatory Scrutiny Board or impact assessment'. No such evaluation/assessment took place and an impact assessment was not required.

I can inform you that wide partial access is granted to the requested documents only subject to redactions due to the protection of personal data as per point (b) of Article 4(1) of Regulation (EC) No 1049/2001 for the reasons set out below.

Please note that most of these documents are preliminary drafts, which do not reflect the position of the Commission and cannot be quoted as such.

Please note that a document originating from a third party (the European Data Protection Supervisor) is disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released document/documents without the agreement of the originator, who may hold an intellectual property right on it. The European Commission does not assume any responsibility from their reuse.

## **2.1. Protection of the 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>1</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>2</sup> (hereafter ‘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>3</sup> (hereafter ‘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>4</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

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<sup>1</sup> Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>2</sup> OJ L 8, 12.1.2001, p. 1.

<sup>3</sup> OJ L 295, 21.11.2018, p. 39.

<sup>4</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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>5</sup>.

The requested documents contain personal data such as:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- handwritten signatures of natural persons;
- indication of administrative entity allowing identification of natural persons.

The names<sup>6</sup> of the persons concerned 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.

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>7</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.

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.

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<sup>5</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.

<sup>6</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>7</sup> Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

In your request for access to documents, 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 subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the requested 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 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 point (b) of Article 4(1) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined 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, I have considered the possibility of granting (further) partial access to the documents requested.

However, for the reasons explained above, no wider partial access is possible without undermining the interests described above.

### **5. MEANS OF REDRESS**

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 Brussels,

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu).

Yours sincerely,

Tatjana VERRIER