



EUROPEAN INNOVATION COUNCIL AND SMES EXECUTIVE AGENCY (EISMEA)

The Director

Brussels,
eisma.c.02.3(2022)6026935

Ms Greta Rosén Fondahn
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Spain

Sent only by-email to: ask+request-10869-0636212c@asktheeu.org

Subject: Your confirmatory application for access to documents – Ref. Ares(2022)3505505 of 06/05/2022 – EISMEA’s Decision

Dear Ms Rosén Fondahn,

I refer to your email of 5 May 2022 in which you submitted to the European Innovation Council and SMEs Executive Agency (EISMEA) a confirmatory application, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereinafter ‘Regulation (EC) No 1049/2001’). This request was registered on 6 May 2022 under the above mentioned Ares reference number. Your request is part of a bulk request and of subsequent confirmatory applications relating to a large number of similar documents, addressed to European Commission Services (with references GESTDEM 2022/1117, GESTDEM 2022/1626, GESTDEM 2022/1675, GESTDEM 2022/1677 and GESTDEM 2022/1788).

1. SCOPE OF YOUR REQUEST

In your initial request of 22 March 2022 addressed to the Directorate-General for Research and Innovation of the European Commission and registered under reference GESTDEM 2022/1677, you requested amongst others access to:

“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) [...]*
- European Innovation Council (EIC) High Level Expert Group (E03465)”.*

¹Official Journal L 145, 31.5.2001, p. 43.

Further to a partial reattribution of your application to EISMEA², my services have identified the following documents held by the Agency and falling within the part of the scope of your application under the remits of the Agency:

1. for the Expert Group on Venture Philanthropy and Social Investments (E03495):
10 declarations of interests.
2. for the European Innovation Council (EIC) High Level Expert Group (E03465):
17 declarations of interests.

Following an assessment of the documents under the provisions of Regulation (EC) No 1049/2001, in its initial reply of 20 April 2022³, the Agency refused you access thereto, invoking the exception to the right of access laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 for ‘the protection of privacy and the integrity of the individual’.

In your confirmatory application you request a review of that decision in order to be granted partial access to the identified declarations of interests (redacting the handwritten signatures) by putting forward additional argumentation.

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

Following the review of the initial reply and the arguments you have put forward in your confirmatory application, I regret to inform you that access to the documents requested and identified in **Annex 1** has to be refused on the grounds of the exception to the right of access laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 for ‘the protection of privacy and the integrity of the individual’, 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*)⁴, 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 data⁵ (hereinafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

It must be noted that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data

² Based on Article 7(4) of the Commission Implementing Decision (EU) 2021/173 of 12 February 2021 the European Innovation Council and SMEs Executive Agency (EISMEA) is entrusted since 1 April 2021 with the implementation of the *EIC (pilot) legacy* activities which was implemented by the European Commission under the *Horizon 2020 programme* (Regulation (EU) No 1291/2013 of 11 December 2013 (OJ L 347, 20.12.2013, p. 104); Council Decision 2013/743/EU of 3 December 2013 (OJ L 347, 20.12.2013, p. 965)).

³ Ares(2022)3110182.

⁴ 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.

⁵ Official Journal L 8, 12.1.2001, p. 1.

by the Union institutions, bodies, offices and agencies and on the free movement of such data⁶ (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*’⁷.

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*’⁸.

The documents you request access to 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 Commission Expert Group on Venture Philanthropy and Social Investments (E03495) and the closed European Innovation Council (EIC) High-Level Expert Group (E03465) of the European Commission, who are neither public figures acting in a public capacity nor members of the senior management of the European Commission or the Agency.

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) 2018/1725⁹.

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, the transmission of personal data can 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 data¹⁰. This is also clear from

⁶ Official Journal L 295, 21.11.2018, p. 39.

⁷ *European Commission v The Bavarian Lager judgment*, cited above, paragraph 59.

⁸ 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.

⁹ *European Commission v The Bavarian Lager judgment*, cited above, paragraph 68.

¹⁰ 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.

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 transmitted which is contained in the documents requested, 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 interests 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 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 groups¹¹ (hereinafter 'Commission Decision'), also applicable to the Commission experts groups (E03495 and E03465) concerned by your access to documents application.

With regard to the 'composition of expert groups', referred to in your confirmatory application and quoted above, the Commission 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 (i.e. Type A). Article 23 of the Commission 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 [...] members shall be published on the Register of expert groups'*. Indeed, this information is accessible via the publicly available Commission Register of Commission Expert Groups and Other Similar Entities¹² (hereinafter 'Commission Register'), under the direct responsibility of the European Commission, and retained for five years after the closure of an expert group.

As regards further transparency requirements related to the operation of Commission expert groups, according to Article 11(1) of the Commission 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 application, the subsequent

¹¹ 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).

¹² Available at: <https://ec.europa.eu/transparency/expert-groups-register/screen/home?lang=en>.

Article 11(6) of the Commission 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 Commission 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’* of the European Commission, 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 application, as contained in the documents requested.

Consequently, by signing and submitting the 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 Commission 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 the European Commission of processing DPR-EC-01066 on the selection of members of Commission expert groups and other similar entities¹³. 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 Commission 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’*.

As already mentioned previously, EISMEA is entrusted only since 1 April 2021 with the implementation of the EIC (pilot) legacy activities¹⁴, previously implemented by the Commission under the Horizon 2020 programme¹⁵. Therefore, the Agency only has access to the archives of the declarations of interest falling under its remits which were processed (i.e. collected, published and archived) under the responsibility of the Commission.

¹³ Available on the Register of the Data Protection Officer of the European Commission at: <https://ec.europa.eu/dpo-register/detail/DPR-EC01066.3>.

¹⁴ Article 7(4) of the Commission Implementing Decision (EU) 2021/173 of 12 February 2021.

¹⁵ Regulation (EU) No 1291/2013 of 11 December 2013 (OJ L 347, 20.12.2013, p. 104); Council Decision 2013/743/EU of 3 December 2013 (OJ L 347, 20.12.2013, p. 965).

With regard to the justification of your request for access to the personal data contained in the documents requested, please note that in the Agency's opinion, the above mentioned arguments do not demonstrate the necessity for transmission of these personal data, as the Agency 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 Agency 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*'¹⁶.

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 data¹⁷.

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 purpose¹⁸.

In the confirmatory access to documents application registered by the European Commission under the reference GESTDEM 2021/2490, which you mention in your confirmatory application, 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 application 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 the confirmatory access to documents applications addressed to the Agency and the European Commission – concerning declarations of interests by members of several closed 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 Agency 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 Agency 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 Agency concludes that the condition enshrined in Article 9(1)(b) of Regulation (EU) 2018/1725 – namely the existence of a necessity

¹⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 78.

¹⁷ Judgment of the General Court of 23 November 2011, *Dennekamp v Parliament*, T-82/09, EU:T:2011:688, paragraphs 30-34.

¹⁸ 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.

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 Agency finds the information available on the Commission Register, published in line with the transparency requirements set out in the Commission 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 application.

Consequently, the Agency 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 Agency 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 without undermining the interests protected by Article 4(1)(b) of Regulation (EC) No 1049/2001 for ‘the protection of privacy and the integrity of the individual’.

Consequently, the Agency has come to the conclusion that the documents requested 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 to the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

We kindly ask you to acknowledge receipt of this reply by sending an email to EISMEA-LEGAL-ADVICE@ec.europa.eu.

Yours sincerely,

Jean-David MALO

(e-signed)

Enclosure: List of identified documents