



EUROPEAN COMMISSION

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Mr Alvaro Merino
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Spain

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory applications for access to documents under Regulation
(EC) No 1049/2001 – GESTDEM 2018/6966**

Dear Mr Merino,

I refer to your emails of 20 March 2019, registered on the same date, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’). Please accept our apologies for the late reply, due to the consultations with the author of most of the documents at issue.

1. SCOPE OF YOUR APPLICATION

On 26 December 2019, you submitted an initial application for access to documents under Regulation (EC) No 1049/2001 to the Secretariat-General of the European Commission, in which you requested access to ‘a list of all lobby meetings held by the commissioner in charge of Better Regulation, Inter-institutional Relations, the Rule of Law and the Charter of Fundamental Rights, Frans Timmermans or any other member of its Cabinet with any organisation representing churches and/or religious communities since 2014 onwards, including all emails, minutes/, reports or any other briefing papers related to all those meetings’.

This application was registered under reference number GESTDEM 2018/6966.

In their initial reply dated 27 February 2019, the Secretariat-General of the European Commission has identified the following documents as falling within the scope of your request:

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

² Official Journal L 145 of 31.5.2001, p. 43.

- Invitation for a meeting addressed to the First-Vice President of the European Commission Frans Timmermans on behalf of ‘La Conférence des Rabbins européens auprès des institutions européennes’ and related correspondence, 5 November 2014, reference Ares(2014)3679961 (hereafter ‘document 1’);
- Invitation for a meeting addressed to the First-Vice President of the European Commission Frans Timmermans on behalf of the Archbishop of Canterbury, 14 January 2015, reference Ares(2015)154384 (hereafter ‘document 2’);
- Answer to the invitation for a meeting with the Archbishop of Canterbury, 16 January 2015, reference Ares(2015)190135 (hereafter ‘document 3’);
- Follow-up of the meeting between the First-Vice President of the European Commission Frans Timmermans and a representative of the European Jewish Congress and related correspondence, 12 May 2015, Ares(2015)2007576 (hereafter ‘document 4’);
- Invitation addressed to the First-Vice President of the European Commission Frans Timmermans on behalf of Herbert Reul (MEP) for a meeting with Cardinal Gerhard Ludwig Muller, prefect of the Congregation for the Doctrine of the Faith of the Roman Catholic Church, 12 November 2015, reference Ares(2015)5037670 (hereafter ‘document 5’);
- Answer to the invitation for a meeting between the First-Vice President of the European Commission Frans Timmermans and Cardinal Gerhard Ludwig Muller, 20 November 2015, reference Ares(2015)5244860 (hereafter ‘document 6’);
- Thank you letter from Cardinal Gerhard Ludwig Muller, 22 February 2016, reference Ares(2016)909308 (hereafter ‘document 7’);
- Email sent to the First-Vice President of the European Commission Frans Timmermans in relation to his visit to the Vatican City by Cardinal Gerhard Ludwig Muller, 13 July 2016, reference Ares(2016)3383412 (hereafter ‘document 8’);
- Invitation for a meeting addressed to the First-Vice President of the European Commission Frans Timmermans on behalf of His Eminence Cardinal Reinhard Marx, Archbishop of Munich and Freising, and President of the Commission of the Bishops’ Conferences of the European Community (COMECE), 18 December 2015, reference Ares(2015)5959474 (hereafter ‘document 9’);
- Thank you letter from a representative of the World Jewish Congress, 12 June 2017, reference Ares(2017)2929237 (hereafter ‘document 10’);
- Thank you letter from a representative of the Commission of the Bishops’ Conferences of the European Union’s (COMECE) in relation to the meeting between the First-Vice President of the European Commission Frans Timmermans and Cardinal Bassetti, 3 May 2018, reference Ares(2018)2360814 (hereafter ‘document 11’);
- Email and documents sent by a representative of the Commission of the Bishops’ Conferences of the European Union (COMECE), 28 September 2017, reference Ares(2017)4741497 (hereafter ‘document 12’).

The Secretariat-General of the European Commission:

- Granted wide partial access to documents 1 to 11, subject only to the redactions of personal data, in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- Partially refused access document 12, on the basis of Article 4(2), first indent of Regulation (EC) No 1049/2001 (protection of commercial interests of a legal person).

Through your confirmatory application, you request a review of this position and question the absence of a list of lobby meetings.

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 fresh review of the reply given by the Directorate-General and/or directorates of the Secretariat-General concerned at the initial stage.

Against this background, the European Commission has carried out a renewed, thorough search for the documents requested. Following this renewed search, I confirm that the European Commission does not hold any list of lobby meetings that would correspond to the description given in your application.

Indeed, as specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. I would like to refer in this respect to the judgment of the Court of Justice in Case C-127/13 P (*Strack v European Commission*), according to which ‘[n]either Article 11 of Regulation 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist’.³

The above-mentioned conclusion has been confirmed in Case C-491/15 P (*Typke v European Commission*), where the Court of Justice held that ‘the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and [...] Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist. It follows that, [...], an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001’.⁴

Furthermore, the General Court held in Case T-468/16 (*Verein Deutsche Sprache v European Commission*) that there exists a presumption of lawfulness attached to the

³ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

⁴ Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

declaration by the institution asserting that documents do not exist.⁵ This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence.⁶ The Court of Justice, ruling on an appeal in Case C-440/18 P, has recently confirmed these conclusions.⁷

Given that the European Commission does not hold any list of lobby meetings corresponding to the description given in your application, it is not in a position to fulfil this part of your request.

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, ‘as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed’. According to Article 4(5) of Regulation 1049/2001, ‘a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement’.

Under the provisions of Article 4(4) of Regulation (EC) No 1049/2001, a renewed consultation of the third party author, namely the Commission of the Bishops’ Conferences of the European Union, was initiated by the Secretariat-General at the confirmatory stage. The third party did not oppose disclosure of document 12, subject only to the redactions of personal data,

Having carried out a detailed examination of the documents requested and taking into account the result of the third-party consultation, I am pleased to inform you that further access is granted to documents 1, 2 and 12, subject only to the redactions of personal data, in accordance with 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.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘the 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*),⁸ 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

⁵ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v European Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁶ Ibid.

⁷ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18P, EU:C:2019:77, paragraph 14.

⁸ Judgment of the Court of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59 (hereafter ‘*Bavarian Lager*’).

Community institutions and bodies and on the free movement of such data⁹ (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 the above-mentioned 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.¹⁰

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

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

The requested document includes the names, surnames, contact details (direct telephone numbers, office and email addresses), functions and handwritten signatures of staff members of the European Commission and of the European Parliament not holding any senior management position. They include also the names and surnames of third parties who are not considered as public figures (members of organisations representing churches and religious communities). This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) No 2018/1725 and in the sense of the *Bavarian Lager* judgment¹¹.

On the contrary, the names and surnames of public figures, such as Members of the European Parliament, Cardinals, Archbishop of Canterbury, the Archbishop of Canterbury’s Representative to the EU, Grand Rabbin de Bruxelles, present in some of the requested documents, can be disclosed.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, can the transmission of personal data occur.

Furthermore, 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.¹² This

⁹ Official Journal L 8 of 12.1.2001, p. 1.

¹⁰ Official Journal L 205 of 21.11.2018, p. 39.

¹¹ *Bavarian Lager*, cited above, paragraph 70.

¹² Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*,

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.

In your application, 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 subject's legitimate interests might be prejudiced.

In this context, I would like to point out that the right to the protection of the privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of the processes within the Institutions of the EU. The legislator has not given any of these two rights primacy over each other, as confirmed by the *Bavarian Lager* case-law referred to above¹³.

Based on the information at my disposal, I note that there is a risk that the disclosure of the names of the individuals appearing in the requested document would prejudice the legitimate interests of the third-parties concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9(1)(b) of Regulation (EU) 2018/1725, 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 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 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 examined the possibility of granting (further) partial access to the documents concerned.

Further partial access is granted to documents 1, 2 and 12, subject only to the redaction of personal data. For the reasons explained above, no meaningful further partial access to the

C-615/13 P, EU:C:2015:489, paragraph 47.

¹³ *Bavarian Lager*, cited above, paragraph 56.

remaining partially disclosed documents is possible without undermining the interests described above.

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
Martin SELMAYR
Secretary-General*

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION