EUROPEAN COMMISSION

Brussels, 29.5.2020
C(2020) 3649 final

Mr Samuel Stolton
Euractiv Brussels
International Press Centre,
Boulevard Charlemagne 1,
1049 Brussels, Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001 [1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2019/6277**

Dear Mr Stolton,

I refer to your letter of 7 January 2020, registered on the same day, in which you submitted 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 [2] (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for this late reply.

1. SCOPE OF YOUR REQUEST

In your initial application of 4 November 2019, addressed to the Directorate-General for Communications Networks, Content and Technology (hereafter: DG CNECT), you requested access to, I quote:

- 'A list of all meetings held between DG CNECT and US Deputy Assistant Secretary of State for Cyber and International Communications and Information Policy, Robert Strayer, over the past year. The list should include the dates of the meetings, the individuals present, as well as the issues discussed.
- Detailed minutes of the above meetings.

[1] OJ L 345, 29.12.2001, p. 94.
[2] OJ L 145, 31.5.2001, p. 43.

- All correspondence (i.e. any emails, correspondence, telephone call notes, and/or text messages including WhatsApp exchanges) between DG CNECT (including the Commissioner and the Cabinet) and Mr. Strayer or a representative of his, over the past year'.

The following documents have been identified as falling under the scope of your request at initial stage:

- Email correspondence (ranging from 01/02/2019-26/02/2019) with US authorities concerning a meeting held on 25 February 2019 between the Director-General of DG CNECT and the US authorities, reference Ares(2020)106777 of 8 January 2020, hereafter 'document 1';

- Back to office report prepared for the same meeting, reference Ares(2020)106777 of 8 January 2020, hereafter 'document 2';

- Back to office report prepared for a meeting held on 27 September 2019 between the Director-General of DG CNECT and Mr. Robert Strayer, reference Ares(2020)106777 of 8 January 2020, hereafter 'document 3'.

In its initial reply of 16 December 2019, the Directorate-General for Communications Networks, Content and Technology refused access to these documents based on the exception of Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position.

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 concerned at the initial stage.

As a preliminary remark, I would like to underline that document 1 contains internal exchanges between Commission officials and US representatives as regards the organisation of a meeting. Please note that these exchanges are of a short-lived nature within the meaning of Article 4 of the Commission Decision of 23 January 2002[3]. Article 4, paragraph 2 of this decision provides as follows: '[…] a document drawn up or received by a Commission department must be registered if it contains important information which is not short-lived and/or may involve action or follow-up by the Commission or one of its departments. […]'.

[3] Commission Decision 2002/47/EC, ECSC, Euratom of 23 January 2002 amending its Rules of Procedure, L 21, 23.1.2002, p.23.

Emails exchanges regarding logistical arrangements for the organisation of a meeting normally do not contain important information that may involve a follow-up by the institution. I note that even if this document was registered at the time by the competent Commission department, this does not erase its short-lived nature.

Furthermore, I note that this document does not reveal any matter of particular importance for the topic you are interested in; instead, it simply reveals the way in which this particular meeting was organised within the institution by the agents involved, in an informal setting (via emails).

I confirm that these exchanges do not reveal any important information in relation to the content of the meeting they were intended to prepare, namely information on the issues to be discussed, lines to take or any other information of substantive nature you might be interested in. Therefore, I note that the disclosure of this document would not contribute meaningfully to the public debate and would not guarantee the principle of openness within the meaning of Recital 2 of Regulation (EC) No 1049/2001, according to which the latter is a tool to enable citizens to participate more closely in the decision-making process and to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system. Consequently, I consider that this document, by not serving this function, does not fall within the scope of the request pursuant to Regulation (EC) No 1049/2001.

Consequently, the following review will focus on the assessment performed at initial stage by the Directorate-General for Communications Networks, Content and Technology as regards documents 2 and 3.

Following this review, performed at confirmatory stage, I regret to inform you that I have to refuse access to documents 2 and 3, based on the exceptions of Article 4(1)(a) third indent (protection of the public interest as regards international relations) and Article 4(1)(b) (protection of personal data) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the public interest as regards international relations

Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the public interest as regards […] international relations […]'.

The Court of Justice stressed in the *In 't Veld* ruling that the institutions 'must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest'[4].

[4] Judgment of the Court of Justice of 3 July 2014, *Council* v *In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

Consequently, 'the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exception […] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'.[5]

Furthermore, it has been recognised that Article 4(1)(a) third indent can be invoked if it is clear that disclosure would harm the EU's international relations with third countries[6] or if it would complicate or undermine the EU's negotiating position in international negotiations[7].

Documents 2 and 3 contain internal comments and information shared in confidentiality by representatives of the Government of the United States, which were not meant for public disclosure. Document 2 contains remarks made by Mr Roberto Viola and by representatives of the United States to the EU staff concerning the topic of 5G deployment and the security of 5G networks. It contains explanations by the Federal Communications Commission on 5G deployment in the US and presents some of the concerns of the United States concerning the topic of the security of 5G networks.

Document 3 also contains information on cybersecurity and reflects positions about coordinated action of the EU and the United States vis-à-vis third countries.

Please note that it is not possible to give more details about the documents justifying the need for confidentiality, without disclosing their content and, thereby, depriving the exception of its very purpose.

Currently, all of the world's leading economies, i.e. including the USA and the EU, are advancing in 5G deployment. This involves significant investments from market players but also significant efforts from governments, in order to ensure the security of 5G networks and to avoid cyber-attacks.

The EU plays a particularly important role in ensuring high standards of security of 5G networks across the EU and coordinated approaches among Member States.

In this context, it is of crucial importance that the EU maintains good relations with third countries and its partners implicated in the secure deployment of 5G infrastructures.

Establishing and protecting a sphere of mutual trust in the context of international relations relating to the deployment of 5G is a very delicate exercise.

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5 Judgment of the General Court of 25 April 2007, *WWF European Policy Programme* v *Council*, T-264/04, EU:T:2007:114, paragraph 40.

6 Judgment of the Court of First Instance of 7 February 2002, *Kuijer* v *Council*, T-211/00, EU:T:2002:30 paragraphs 62-65.

7 Judgment of the Court of first Instance of 25 April 2007, *WWF European Policy Programme* v *Council*, case T-264/04, EU:T:2007:114, paragraph 41.

I note that revealing the details of documents 2 and 3, would jeopardise the possibility of frank and sincere exchanges between the European Commission and the United States, in the framework of ongoing discussions[8] on the topic, by making the United States representatives naturally more guarded about sharing information and positions with EU staff in the future.

Furthermore, these documents contain information, which is not public and which the European Commission received from the third country on a confidential basis. Disclosure of this information, against express statements of the providing party, would undermine the relation of trust with the parties thus negatively affecting the international relations of the EU.

Therefore, I came to the conclusion that public access to documents 2 and 3 would pose a risk to the public interest as regards the protection of the international relations. Given the importance of the subject matter, the potential involvement of third countries and media attention to the file, I consider this risk as reasonably foreseeable and not purely hypothetical.

2.2. 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*) [9], 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 [10] (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 [11] (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.

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8 Notably following the meeting between the President of the European Commission and the President of the United States in Davos of 21 January 2020.

9 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.

10 OJ L 8, 12.1.2001, p. 1.

11 OJ L 295, 21.11.2018, p. 39.

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' [12].

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' [13].

Documents 2 and 3 contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission. Moreover, they contain the personal data of third parties, who are not considered as public figures, acting in their public capacity.

The names [14] 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 [15]. 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.

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

13 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.

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

15 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.

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 confirmatory 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 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 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 also that Article 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 do 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, no meaningful partial access is possible, as the whole content of documents 2 and 3 is covered by the exceptions protecting international relations and personal data, provided for, respectively, in Article 4(1)(a), third indent and Article 4(1)(b) of Regulation (EC) No 1049/2001, for the reasons set out in the corresponding sections above.

Consequently, partial access is not possible considering that the documents requested are covered in their entirety by the invoked exceptions to the right of public 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,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Ilze JUHANSONE
Secretary-General