



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR HEALTH AND FOOD SAFETY

The Director-General

Brussels,
Ares(2019)8762235

***By registered letter with
acknowledgment of receipt***

Aisha DOWN
Emerika Bluma 8,
Sarajevo
Bosnia and Herzegovina

Advance copy by email:

ask+request-7431-cc2b8206@asktheeu.org

Dear Ms Down,

Subject: Your application for access to documents – Ref GestDem 2019/6298

We refer to your email dated 4 November 2019 in which you make a request for access to documents, registered on the same date under the above-mentioned reference number.

We further refer to our e-mail dated 25 November 2019, extending the time limit for responding to your request, pursuant to Article 7(3) of Regulation (EC) No 1049/2001.

1. SCOPE OF YOUR REQUEST

Based on Regulation (EC) No 1049/2001¹, you requested access to:

All documents from the expert panels that evaluated Everis's Implementation Analysis for the EU's track and trace system for tobacco products, including: all submissions, all comments, and minutes of the panels.

2. IDENTIFICATION AND ASSESSMENT OF THE RELEVANT DOCUMENTS

The documents you requested contain information related to several third parties. Therefore, the third parties have been consulted in accordance with Regulation (EC)

¹ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

No 1049/2001, in order to assess whether an exception to the right of access to documents is applicable.

Having examined the document requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, and having considered the opinion of the third party, we have concluded that the document may be partially disclosed. Some parts of the documents have been redacted as their disclosure is prevented by an exception to the right of access laid down in Article 4 of this Regulation.

Several pages have been removed from the documents, since they do not contain comments or changes from the expert panel and thereby fall outside the scope of the request.

3. Reason for partial disclosure

a) Protection of the privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data - Article 4(1)(b) of Regulation (EC) No 1049/2001

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

The applicable legislation in this field is 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/EC² ('Regulation 2018/1725').

Some of the documents to which you request access contain personal data; in particular names and e-mail addresses, by which it would be possible to identify the person in question and this would constitute a violation of European Union legislation regarding the protection of personal data.

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.³

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, the Data Protection Regulation becomes fully applicable⁵.

² Official Journal L 205 of 21.11.2018, p. 39.

³ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Nowak v Data Protection Commissioner*, request for a preliminary ruling, ECLI:EU:C:2017:994, paragraphs 33-35.

⁴ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd.*, EU:C:2010:378, paragraph 59.

⁵ Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

Pursuant to Article 9(1)(b) of Regulation 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 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established 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 request, 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.

Consequently, we 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 disclosure of the personal data concerned.

b) Protection of the commercial interests of a legal person - Article 4(2), first indent, of Regulation (EC) No 1049/2001

The redacted parts of the documents contain also commercially sensitive business information, such as the names and addresses of companies. The third parties in question, after having been consulted pursuant to Article 4(4) of regulation (EC) No 1049/2001, have objected to the full disclosure of these documents invoking the argument that disclosing the company names would undermine the protection of the companies’ commercial interests. Therefore, having considered the opinion of the third parties, we came to the conclusion that the exception laid down in Article 4(2), first indent, of Regulation (EC) 1049/2001 applies partially to the concerned documents.

4. Overriding public interest

The exceptions to the right of access provided for in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosing the requested document. In your application, you did not submit any grounds concerning a public interest on the basis of which the interests protected in Regulation (EC) No 1049/2001 would have to be overridden, and we could not identify any such ground either. In these circumstances, we have to conclude that there is no evidence of an overriding public interest in disclosure, in the sense of Regulation (EC) No 1049/2001.

5. Means of redress

In case you would disagree with this assessment, you are entitled, in accordance with Article 7(2) of Regulation (EC) No 1049/2001, to submit 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 Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Brussels
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Anne Bucher

Enclosure: - List of identified documents;
 - 18 fully or partially disclosed documents.