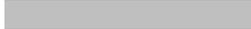




EUROPEAN COMMISSION

Brussels, 29.11.2018
C(2018) 8197 final


EUobserver
Rue Montoyer 18B
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Belgium

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

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GestDem 2018/4724**

Dear ,

I refer to your e-mail of 30 October 2018, registered on the same day, 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 (hereinafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 6 September 2018, registered under reference GestDem 2018/4724 and dealt with by the Office for the Administration and Payment of Individual Entitlements, you requested access to documents which would contain information on ‘all trips made by John Dalli outside the European Union and to Cyprus, Germany and Malta during his time as a member of the Commission’.

The Office for the Administration and Payment of Individual Entitlements (PMO) has identified, as falling within the scope of your request, administrative documents containing information on the missions of John Dalli outside of the European Union, and to Cyprus, Germany and Malta, while he was a member of the Commission.

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

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

In its initial reply dated 23 October 2018, the Office for the Administration and Payment of Individual Entitlements fully refused access to these documents on the grounds of the protection of privacy and the integrity of the individual laid down in Article 4(1) (b) of Regulation 1049/2001.

Through your confirmatory application, you request a review of the refusal to disclose those documents and you put forward a series of arguments in support of your request. These have been taken into account in my assessment, of which the results are detailed below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the decision of the Office for the Administration and Payment of Individual Entitlements to refuse access to the documents identified under your request on the basis of Article 4(1) (b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual). Please find the detailed reasons for the refusal under point 2.1 below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1) (b) of Regulation 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’.

The documents identified concern personal data regarding daily allowances and mission-related expenses of a former Member of the Commission³. Indeed, any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data⁴. In addition, they contain the names, telephone numbers and addresses of staff members of the Commission. Please note that this information is to be considered as personal data within the meaning of Article 2(a) of Regulation 45/2001⁵, which defines it as ‘any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity’.

³ See, to that effect, Judgement of the General Court in Cases T-639/15 to 666/15 and T-94/16, *Maria Psara and Others v European Parliament*, ECLI:EU:T:2018:602, paragraphs 110 and 111.

⁴ Judgment of the Court of Justice of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, ECLI:EU:T:2018:560, paragraphs 33-35.

⁵ Judgment of the General Court of 19 September 2018 in Case T-39/17, *Port de Brest v Commission*, ECLI:EU:T:2018:560, paragraphs 43-44.

It follows that public disclosure of the above-mentioned personal information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation (EC) No 45/2001 (hereafter ‘Regulation 45/2001’)⁶.

In its judgment in the *Bavarian Lager* case⁷, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable⁸. According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Regulation 45/2001 thus makes the transfer of personal data subject to two cumulative conditions being satisfied⁹.

It follows that the person requesting such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might hamper the legitimate interests of the data subject¹⁰.

Hence, Article 8(b) of the above-referred Regulation requires the institution in receipt of the application for access to make an assessment of the necessity of the transfer of the personal data in the light of the applicant's objective. To satisfy the requirement for necessity, which is to be interpreted strictly, the applicant must show that the transfer of personal data is the most appropriate of the possible measures for attaining its objective and that it is proportionate to that objective, which requires the applicant to provide express and legitimate reasons to that effect¹¹.

In your confirmatory application, you underline that your request for access forms part of a journalistic inquiry concerning a person ‘who was named in an [OLAF] investigation’. You also state that ‘the fact that [Mr Dalli] had taken the European Commission to the European Court of Justice also means that he casts himself into the public spotlight’.

The reasons you submit in support of your request, which are abstract and general in nature, do not justify the need to transfer the requested personal data of the person concerned, let alone its proportionality.

⁶ 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, Official Journal L 8 of 12 January 2001, page 1.

⁷ Judgment of the Court of 29 June 2010 in Case C-28/08 P, *Commission v the Bavarian Lager Co. Ltd*, ECR 2010 I-06055.

⁸ *Ibid*, paragraph 63.

⁹ Judgement of the Court of 16 July 2015 in Case C-615/13P, *ClientEarth v EFSA*, EU:C:2015:489, paragraph 46.

¹⁰ *Ibid*, paragraph 47.

¹¹ Judgement of the General Court of 15 July 2015 in Case T-115/13, *Dennekamp v Parliament*, EU:T:2015:497, paragraphs 54 and 59 and Cases T-639/15 to 666/15 and T-94/16, *Psara and Others v European Parliament* (cited above), paragraph 72.

Indeed, a general reference to the purpose of a journalistic investigation or the wish to verify ‘elements of a larger story’ do not reflect any express and legitimate need to get the personal data transferred. Similarly, an abstract reference to OLAF investigations in the past does not demonstrate the necessity for such a transfer. I would like to refer in this respect to the *Psara* ruling, in which the General Court stated that a reference to ‘many instances of fraud [...] confirmed or alleged in past years’ cannot justify the need for the transfer of personal data¹².

Consequently, I consider that the publication of the personal data contained in the documents identified would go beyond what is necessary for attaining the objectives underpinning a journalistic investigation and is therefore disproportionate to that purpose.

Since the conditions laid down in Article 8(b) of Regulation 45/2001 are cumulative, there is no need to examine whether the transfer of the requested personal data could affect the legitimate interests of the data subject. Nevertheless, please note that it cannot be assumed that such transfer would not prejudice the legitimate rights of the persons concerned.

In light of the above, I must conclude that the transfer of the requested personal data through the disclosure of the documents identified under your request cannot be considered as fulfilling the requirements of Regulation 45/2001.

Please note that the exception laid down in Article 4(1) (b) of Regulation 2001 does not need to be balanced against any overriding public interest in disclosure.

Finally, I would like to point out that the person concerned has not been a Member of the Commission since 2012. Whilst the current Commission has committed to publishing regularly overviews of mission expenses per Member¹³, these rules were not applicable at the time Mr Dalli was part of the Commission, and they cannot be applied retro-actively.

3. NO PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have also considered whether partial access could be granted to the documents identified under your request, for instance by redacting all personal data appearing therein.

In this respect, I note, however, that your objective is to have access to documents relating to the expenditure of an identified individual, Mr John Dalli. It is clear that the disclosure of a version of the documents requested from which all personal data would have been redacted, i.e. all data linked to the expenditure of Mr Dalli, would have deprived the access to these documents of any useful effect in the light of this objective. Similarly, as your request relates specifically to Mr Dalli, an identified individual, it would not have been possible to safeguard the interests of this individual by solely redacting his name. Therefore, no meaningful partial access is possible without undermining the protection of personal data of Mr Dalli.

¹² Cases T-639/15 to 666/15 and T-94/16, *Psara and Others v European Parliament*, paragraphs 79 and 84.

¹³ Article 6(2) of the Commission Decision of 31.1.2018 on a Code of Conduct for the Members of the European Commission, C(2018) 700 final.

Consequently, the requested documents are covered in their entirety by the exception laid down in Article 4(1) (b) of Regulation 1049/2001.

4. 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