



AFFGEN.2
Head of Division

Brussels, 26 March 2020
eeas.sg.affgen.2 (2020) 1484773

Ms. Margarida da Silva

Subject: Your request for access to documents of 16 January 2020
Our ref: 2020/004

Dear Ms. da Silva,

Thank you for your request for access to documents, which the EEAS has examined in the framework of Regulation (EC) No 1049/2001¹.

After a search in the EEAS filing systems, the document management databases and archives, the EEAS has identified the following documents matching your request, as referenced hereafter:

1. List of Mr. Sabathil's job titles
2. Letter from the Director General for Budget and Administration of the EEAS reminding Mr. Sabathil of his obligations after leaving the Service
3. Decision of the Appointing Authority granting conditional permission to Mr. Sabathil to engage in a post-service occupational activity under Article 16 of the EU Staff Regulations
4. Application and AIPN decision under Article 12(b) of the EU Staff Regulations concerning an outside activity during active service
5. Application and AIPN decision under Article 12(b) of the EU Staff Regulations concerning an outside activity during active service
6. Note to the file Art. 16 SR application

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation").

7. Opinion of the Joint Committee provided in accordance with Article 16 of the EU Staff Regulations on the proposed post-service occupational engagement of Mr. Sabathil
8. Draft contract with EUTOP Berlin GmbH.
9. Revised contract with EUTOP Berlin GmbH. - signed

The EEAS assessed these documents and came to the conclusion that:

- Full access can be given to documents numbered 1-6
- Partial access can be given to document number 7
- Access to documents 8 and 9 should be denied

Certain parts of the document number 7 should be redacted in order to protect the privacy and integrity of Mr. Sabathil and other data subjects on the basis of the exception established in Article 4(1)(b) of Regulation (EC) 1049/2001 (protection of the privacy and integrity of the individual).

Article 4(1)(b) of Regulation (EC) 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’.

Personal data concerning Mr. Sabathil, which are already in the public domain

The EEAS has already communicated to the public certain data concerning Mr. Sabathil before this request for access to documents in relation to his position as Head of Delegation in South Korea (certain identification data, positions held in the EEAS and a short resume of his career).

In order to ensure an adequate level of transparency, the EEAS made public statements in the context of the media interest generated by the ongoing investigation of alleged illegal activities. These communications included some personal data to the extent, which was necessary in order to inform the public about Mr. Sabathil’s administrative situation in relation to the EEAS.

The data which are already in the public domain are therefore not redacted from the above-mentioned documents.

Assessment of the documents and the need to ensure protection of the privacy and integrity

Having examined your application, I would like to inform you that full access is granted to documents no. 1, 2, 3, 4, 5 and 6; partial access is granted to document no. 7, subject to the redaction of personal data on the basis of the exception of Article 4(1)(b) of Regulation (EC) 1049/2001 (protection of the privacy and integrity of the individual), for the reasons set out below.

When assessing a request to public access of documents containing personal data, the EEAS is obliged to strike a balance of interests protected by both the regulation on protection of

personal data – Regulation (EU) 2018/1725² – and the regulation for public access to documents – Regulation (EC) 1049/2001.

The EEAS proceeded to the analysis of the documents in the above-mentioned list and concluded that they contain other personal data than those that the EEAS already communicated to the public. Full disclosure of these documents to the general public would undermine the privacy and integrity of the individual regarding the protection of personal data.

Consequently, the EEAS redacted those personal data that would undermine the privacy and the integrity of Mr Sabathil or other individuals concerned. These are the redacted categories of data:

- Personal data related to his identification numbers in the EEAS system for management of human resources (SYSPER), data linked to Mr. Sabathil's remuneration.
- E-mail addresses and hand-written signatures of staff members intervening in the decision-making. Identification data and contact details of staff members in copy of the decisions.

Application of the Regulation (EU) 2018/1725 on the protection of personal data

In its judgment in the *Bavarian Lager* case³, the Court of Justice ruled that when a request is made for access to documents containing personal data, the regulation on personal data⁴ becomes fully applicable.

It follows that public disclosure of the redacted parts which contain personal data would constitute processing (transfer) of personal data within the meaning of Article 9 of Regulation (EU) 2018/1725. According to Article 9(1) of that 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. Those two conditions are cumulative.⁵ Only if both conditions are fulfilled, the transfer constitutes lawful processing and it can take place.

In consequence, if you wish us to transfer the data redacted from the listed documents, you must provide express and legitimate justification or any convincing argument in order to demonstrate the necessity for the personal data to be transferred in accordance with Article 9(1) of the Regulation (EU) 2018/1725.

² 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 1247/2002/EC, Official Journal L 295 of 21 November 2018 p. 39.

³ Judgment of 29 June 2010, *Commission/Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 63.

⁴ Regulation (EU) 2018/1725 repealed 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 (OJ L 8, 12.1. 2001, p.1).

⁵ See paragraphs 77-78 of the above mentioned judgement in case *Bavarian Lager*, C-28/08 P.

Concerning documents number 8 and 9, our examination concluded that the documents cannot be disclosed at this stage on the basis of the exception under Article 4(4) of Regulation 1049/2001 (third party document), for the reasons set out below.

Article 4(4) of Regulation 1049/2001 provides that “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.”

Both documents contains information the disclosure of which would undermine the privacy of Mr. Sabathil as per Article 4(1)b of the Regulation and the commercial interests of a legal person as per Article 4(2), first indent, of the Regulation. The EEAS is currently consulting the third party in question (EUTOP Berlin GmbH) in order to assess whether the partial or full disclosure of these documents could be granted. You will be informed of the outcome of this consultation in due course.

Conclusion:

Having regard to the arguments explained above, you will find attached to this letter the documents to which full or partial access is granted given the redaction of personal data on the basis of the exception of Article 4(1)(b) of Regulation (EC) 1049/2001 (protection of the privacy and integrity of the individual).

Please note that the EEAS does not assume liability stemming from any reuse. In case of doubt on reuse please do contact the EEAS for prior authorization.

Should you wish this position to be reviewed, you may confirm your initial request within 15 working days.

Yours sincerely,

signed

Gabriele Visentin