



EUROPEAN COMMISSION

Brussels, 15.6.2020
C(2020) 4109 final

Ms Vicky Cann
Corporate European Observatory
Rue d'Edimbourg 26
Brussels 1050 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 2020/490**

Dear Ms Cann,

I refer to your email of 7 April 2020, registered on the same day, by 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

On 27 January 2020 you submitted an initial application for access to, I quote, '[...] a list of all lobby meetings held with [the Directorate-General for Communications Networks, Content and Technology of the European Commission] since 1 January 2019, where the proposed ePrivacy regulation was discussed'. You clarified that, I quote, '[t]he list should include the names of the individuals and organisations attending; the date; and any agendas / minutes / notes produced'. You also explained that your application covers, I quote, '[...] any position papers, emails, or other correspondence which relates to the proposed ePrivacy regulation'.

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

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

On 20 February 2020, the Directorate-General for Communications Networks, Content and Technology informed you that your application covers potentially a large number of documents and proposed, based on Article 6(3) Regulation (EC) No 1049/2001, to limit its scope, so that it would be possible to handle it within the statutory time limits.

On 24 February 2020, you informed the Directorate-General for Communications Networks, Content and Technology that you would like to limit the scope of your application to, I quote, '[...] papers to/from lobbyists, rather than [the Members of the European Parliament], inter-institutional correspondence, etc...'.

The European Commission identified the following documents as falling under the (restricted) scope of your application:

- Joint position paper, dated 2 April 2019, received from the Association of Commercial Television in Europe (ACT) and the Association of television and radio sales houses (EGTA), reference: Ares(2020)1304233 (hereafter 'document 1'),
- Position paper received, dated 13 March 2019, from Digital Europe, reference: Ares(2020)1304288 (hereafter 'document 2'),
- Annex I to Document 2, reference: Ares(2020)1304324 (hereafter 'document 3'),
- Annex II to Document 2, reference: Ares(2020)1304349 (hereafter 'document 4'),
- Position paper received, dated 22 March 2019, from European Broadcaster Exchange, reference: Ares(2020)1304423 (hereafter 'document 5'),
- Executive Summary for the position paper received from the European Smart Energy Solutions Providers (ESMIG), reference: Ares(2020)1304454 (hereafter 'document 6'),
- Position paper received from the European Smart Energy Solutions Providers ESMIG – Suggested amendments, reference: Ares(2020)1304609 (hereafter 'document 7'),
- Position paper from GSMA, the European Telecommunications Network Operators' Association (ETNO) and Cable Europe, reference: Ares(2020)1304666 (hereafter 'document 8'),
- Position paper, dated 6 March 2019, received from Information Technology Industry (ITI), reference: Ares(2020)1304713 (hereafter 'document 9'),
- Position paper received from News Media Europe in September 2019, reference: Ares(2020)1304738 (hereafter 'document 10'),
- Position paper received from Search and Information Industry Association (SIINDA) in July 2019, reference: Ares(2020)1304773 (hereafter 'document 11'),
- Position paper received from SIINDA – update from July 2019, reference: Ares(2020)1304801 (hereafter 'document 12'),
- Industry wide position paper received on 12 December 2019, reference: Ares(2019)7780538 (hereafter 'document 13').

On 11 March 2020, the Directorate-General for Communications Networks, Content and Technology:

- granted full access to documents 3, 4, 6-9, 12 and 13³,
- granted (wide) partial access to documents 1, 2 and 11, with personal data redacted based on the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual),
- refused access to the remaining documents (documents 5 and 10), based on the exception in Article 4(2), first indent, of Regulation (EC) No 1049/2001 (protection of commercial interests of a natural or legal person).

Through 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 or service concerned at the initial stage.

Following this review I inform you that (wide) partial access is confirmed to documents 1, 2 and 11. The undisclosed information included therein requires protection under the above-mentioned exception in Article 4(1)(b) of Regulation (EC) No 1049/2001.

Documents 5 and 10 originate from the third parties. In the context of the above-mentioned review, the European Commission consulted them in line with the provisions of Article 4(4) of Regulation (EC) No 1049/2001.

Partial access is granted to document 5, with the relevant information redacted based on the exception in Article 4(2), first indent, of Regulation (EC) No 1049/2001.

(Wide) partial access is granted to document 10 with the personal data redacted. The underlying exception is provided for in exception in Article 4(1)(b) of Regulation (EC) No 1049/2001.

The detailed reasons are 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’.

³ In the initial reply, the Directorate-General for Communications Networks, Content and Technology provided hyperlinks to documents 8, 9 and 13, which are publically available.

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁴, the Court of Justice ruled that when an application 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 data⁵ ('Regulation (EC) No 45/2001') becomes fully applicable.

As from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) No 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/EC⁶ ('Regulation (EU) No 2018/1725').

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

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'.⁷

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.⁸

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'.⁹

The relevant parts of documents 1, 2, 10 and 11, contain the names, functions, contact details (telephone numbers and email addresses) and handwritten signatures of staff members of the European Commission who do not hold any senior management position. They also include the names of third parties (News Media).

The names⁹ of the persons concerned as well as other data from which their identity can be deduced constitute personal data in the meaning of Article 2(a) of Regulation (EU) No 2018/1725.

⁴ 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.

⁵ Official Journal L 8 of 12.1.2001, p. 1.

⁶ Official Journal L 205 of 21.11.2018, p. 39.

⁷ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

⁸ Judgment of the Court of Justice of 20 May 2003, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁹ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

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.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine of its own motion the existence of a need for transferring personal data.¹⁰ This is also clear from Article 9(1)(b) of Regulation (EU) No 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) No 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 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 weighted the various competing interests.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in the documents concerned has not been established. 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.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by 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

¹⁰ 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.

reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

2.2 Protection of commercial interests of a natural or legal person

Article 4(2), first 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 commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

The limited, undisclosed part of document 5 contains financial information pertaining to explicitly named economic operators. Public disclosure of this information, would undermine the interests of the economic operators concerned, as it would provide insight into the data relating to their business operation and internal strategies.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators concerned.

I conclude, therefore, that access to the undisclosed part of document 5 must be denied based on the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against overriding public interest in disclosure.

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application you argue that, I quote, '[t]here should be no place for lobbying of the [European] Commission that is kept entirely secret, especially when it is by those with commercial interests in a proposed EU regulation. [...] There is a good public interest rationale for the [European] Commission to be fully open with the public about the lobbying that it receives, especially on such a hotly-contested topic as ePrivacy'.

Please note, however, that the Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance¹¹.

Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹².

¹¹ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2104:2250, paragraph 128 (hereafter *Strack v Commission*).

With regard to the information included in the undisclosed part of document 5, such a pressing need has not been substantiated. While I appreciate that there is public interest in the subject matter in question, I consider that the need for full transparency does not outweigh in this case the need to protect the withheld information, pursuant to the exception relating the protection of commercial interests. This is supported by the full or (wide) partial access to the remaining documents falling under the scope of your application.

4. PARTIAL ACCESS

(Wide) partial access is granted to documents 5 and 10, withheld in full at the initial stage.

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
Ilze JUHANSONE
Secretary-General*

¹² *Strack v Commission*, cited above, paragraph 129.