



EUROPEAN COMMISSION

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OUT OF SCOPE

CEO
Rue d'Edimbourg 26
1050 Brussels
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 2018/5806**

Dear ,

I refer to your e-mail of 27 November 2018, registered on the next 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 documents (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 6 November 2018, addressed to the Directorate-General for Communications Networks, Content and Technology, you requested access to to the following document:

- Mission letter with the subject 'Request for an interview for DIGITALEUROPE's Study on the Digitalisation of Europe.[...]' sent as an annex by PricewaterhouseCooper to Roberto Viola on 08 August 2017 related to Digital Europe – Towards an EU trusted digital framework – contribution for the first EU digital summit – Tallinn, 29 September 2017.

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

At the initial stage, the Directorate-General for Communications Networks, Content and Technology identified the document requested, originating from a third party, as falling under the scope of your request.

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, with regard to 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. In accordance with this provision, the Directorate-General for Communications Networks, Content and Technology consulted the third party author of the document (DIGITALEUROPE), who objected to the disclosure. In its initial reply of 27 November 2018, taking into account the position of the author, the Directorate-General for Communications Networks, Content and Technology refused access to the documents on the basis of Article 4, paragraph 2, third indent of Regulation (EC) No 1049/2001 (protection of commercial interests, including intellectual property).

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 of the European Commission conducts a fresh review of the reply given by the relevant Directorate-General at the initial stage.

The document identified as falling under the scope of your request originates from a third party, PricewaterhouseCoopers, which is not the author of the said document.

As indicated above, the third party author objected to disclosure at the initial stage in the light of Article 4(2) of Regulation (EC) No 1049/2001. It indicated that disclosure could potentially undermine commercial interests and intellectual property, more specifically alleging that their ‘contractor’s (PricewaterhouseCoopers) prime tool for executing the study mentioned in the letter would be exposed to public scrutiny’.

Under the provisions of Article 4(4) of Regulation (EC) No 1049/2001 and with a view to taking into account the arguments put forward in your confirmatory application, a renewed consultation of the third party author and of the originator was initiated by the Secretariat-General on 4 December 2018 and 21 December 2018, respectively.

The third party author maintained its opposition to the disclosure of the document, based on the exception invoked already at the initial stage, adding that the mission letter was meant to reach out to other industry leaders, and not to be sent to Roberto Viola. They also argue that the applicant may have illegitimate interests in using the information in the mission statement in an attempt to undermine and damage DIGITALEUROPE’s reputation. The third party originator, PricewaterhouseCoopers, stated that ‘the [d]ocument under the scope of the [a]pplication originated from and is signed by DIGITALEUROPE. Also, the [d]ocument was sent by [...] firm to the [r]ecipient but on

behalf of DIGITALEUROPE. [...] firm is therefore not able to take position and to decide on the disclosure of the [d]ocument to a third party. The decision remains of the sphere of competence of DIGITALEUROPE’.

Having carried out a detailed examination of the document requested, taking into account the result of the third party consultations at initial and confirmatory levels, I can inform you that partial access is granted to this document after the redaction of personal data, as explained below. Please note, however, that the actual transmission of the document is subject to the absence of a request by the third party originator for interim measures, as referred to in paragraph 4.

3. 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 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*),² 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 data³ (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/EC⁴ (hereafter ‘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’⁵.

² Judgment of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59.

³ Official Journal L 8 of 12.1.2001, p. 1.

⁴ Official Journal L 205 of 21.11.2018, p. 39.

⁵ Cited above, paragraph 59.

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

The requested document includes the name and surname of the sender, as well as a handwritten signature, which constitutes biometric data. This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) No 2018/1725.

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 your confirmatory request, you state that you do not need to have the personal data transferred to you. In addition, based on the information at my disposal, there is a risk that the disclosure of the handwritten signature appearing in the requested document would prejudice the legitimate interests of the person concerned.

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 disclosure of the personal data concerned.

4. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR

According to Article 5(5) and (6) of the detailed rules of application of Regulation (EC) No 1049/2001⁶, ‘[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.’

⁶ Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), Official Journal L 345 of 29.12.2001, p. 94.

At confirmatory level, PricewaterhouseCooper stated that '[t]he decision remains of the sphere of competence of DIGITALEUROPE', and at initial and confirmatory level DIGITALEUROPE objected on the grounds that it would undermine the protection of commercial interests, including intellectual property.

Since the decision to grant partial access is taken against the objection of the third party author expressed at initial and confirmatory levels, the Commission will inform the third party originator and the author of its decision to give partial access to the document requested. The Commission will not grant such partial disclosure until a period of ten working days has elapsed from the formal notification of this decision to the third party author, in accordance with the provisions mentioned above.

This time period will allow the third party author to inform the Commission whether it intends to object to the partial disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the third party author has not signalled its intention to avail itself of the remedies at its disposal, the Commission will forward the redacted document to you.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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

Enclosures: 1