



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
HUMAN RESOURCES AND SECURITY  
The Director-General

Brussels, 8 December 2020  
HR/GI

Ms Belén BALANYÁ  
CEO  
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1050 Brussels  
By email: [ask+request-8701-200643d1@asktheeu.org](mailto:ask+request-8701-200643d1@asktheeu.org)

**Subject: Your application for access to documents – Ref /GestDem No 2020/6446**

Dear Ms Balanyá,

I refer to your e-mail, dated 26 October 2020 and registered on 27 October 2020 under reference number 2020/6446, in which you make a request for access to documents.

*Your request concerns "[...] documents which relate to any article 16, article 12B and article 40 (staff regulations) applications made by Klaus Dieter-Borchardt, former Deputy Director General of DG Energy. In particular, I request a note of all Mr. Dieter-Borchardt's job titles at the Commission including dates held; copies of any application(s) that he has made under article 12b, 16 and 40 to undertake a new professional activity; and all documents (correspondence, emails, meeting notes etc) related to the authorisation of the new role or roles."*

I have examined your request under the provisions of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

I understand that your request refers to documents relating, firstly, to the new role and new professional activity of Mr Klaus-Dieter BORCHARDT after leaving the service in line with Article 16 of the Staff Regulations<sup>1</sup> (SR). And, secondly, we understand that you refer to the requests submitted by Mr Borchardt in the context of Article 12b SR in relation with Article 40 SR, that means a request to perform an outside activity (Article 12b SR) while on leave on personal ground (Article 40 SR).

In this context, the documents identified in the framework of your request are:

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<sup>1</sup> Consolidated text: Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community

- a document extracted from the relevant staff database listing the job titles of Mr Borchardt;
- a declaration form submitted by Mr Borchardt on 28 August 2020 in the framework of Article 16 SR and the related decision from the Appointing Authority;
- e-mail exchanges within Commission services and between Commission services and Mr Borchardt pertaining to the underlying internal procedures concerning this type of requests for authorisation.

In accordance with Article 4(1)(b) of Regulation (EC) No 1049/2001, it is the Commission's obligation to ensure that the privacy and the integrity of the EU staff member concerned, including in his professional capacity, are correctly protected. The documents you requested contain personal data relating to the past and present occupational activities of Mr Borchardt, the disclosure of which would entail a transmission of personal data falling under the provisions of Regulation (EU) 2018/1725<sup>2</sup>.

In the case *EC v Bavarian Lager*<sup>3</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EU) 2018/1725 becomes fully applicable<sup>4</sup>. Pursuant to Article 9(1)(b) of that Regulation, personal data shall only be transferred to recipients if they established the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

In your request you did not establish the necessity of having the data transferred and I consider that the legitimate interests of the individual concerned would be prejudiced by the disclosure of his personal data. Consequently, I consider that the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 applies to all the identified documents.

As for the correspondence between the Commission services and Mr Borchardt, in addition to the protection of personal data, the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 applies. That exception is related to the protection of the Commission's decision-making process even after the decision of the Appointing Authority has been taken. As no overriding public interest in disclosure has been identified in the present case, that exception to the right of access cannot be waived.

While I have also considered the possibility of granting partial access on the basis of Article 4(6) of Regulation (EC) No 1049/2001, I have concluded that this would equally undermine the protection of personal data.

Against this background, in order to address your query to the extent possible, and after having consulted and with the agreement of Mr Borchardt, I can nevertheless provide you with the following general information on the process to which your request relates.

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<sup>2</sup> Regulation (EU) No 2018/1725 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 (OJ L 295, 21.11.2018, p. 39).

<sup>3</sup> Judgment of 29 June 2010, Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, ECLI:EU:C:2010:378, paragraph 59.

<sup>4</sup> This judgment specifically cited Regulation (EC) No 45/2001, which was repealed by Regulation (EU) 2018/1725. In accordance with Article 99 of that latter Regulation, references to Regulation (EC) No 45/2001 should be construed as references to Regulation (EU) 2018/1725.

On 28 August 2020, Mr Borchardt submitted a declaration to engage in a remunerated occupational activity after leaving the Commission, pursuant to Article 16 SR.

In his 28 August 2020 declaration, he requested to perform a remunerated occupational activity for a period of 2 years, with option for extension, as of 1 October 2020, as a self-employed consultant on all aspects of EU Law and Policy, providing services, via his own company, exclusively to the law firm Baker & McKenzie.

Following the consultation process required for this type of request, the Appointing Authority gave its approval to carry out this occupational activity, subject to strict compliance with certain conditions aimed at preventing any potential conflict of interest.

It is worth noting that some of the conditions laid down in the decision are in line with the spontaneous commitments which Mr Borchardt already assured in his Art 16 SR declaration that he was willing to adhere to. In addition, he provided a list of all the files and projects for which he had been responsible during his last 3 years at the Commission. The Appointing Authority took note of his commitment not to perform any consultancy services on those projects without any limit in time, as well as to refrain from providing consulting services to Baker & McKenzie in matters or cases in which the Commission is party, and to refrain from exploiting insights of confidential nature in policy, strategy or internal processes that he had acquired in the line of services and that have not yet been public or are not commonly available in the public domain.

The specific restrictions aiming at preventing any actual, potential or perceived conflict of interests that may rise in the framework of the authorized activity imposed by the Appointing Authority decision can be described as follows:

- to refrain from engaging, during the first 12 months after leaving the service, in any lobbying or advocacy vis-à-vis staff of the Commission on behalf of his company, or its clients, on matters for which he was responsible during the last 3 years in the service (in accordance with the third paragraph of Article 16 SR);
- not to engage in the first 2 years after having left the service in professional contacts, including contacts aiming notably at lobbying and advocacy with staff members of DG ENER on behalf of Baker & McKenzie or its clients;
- not to work on or give advice, during the first 2 years after having left the service, to Baker & McKenzie or its clients on all specific files and projects for which he was responsible during the last 3 years in the service (including those listed in his declaration to the Appointing Authority);
- to make it clear to his interlocutors that the approved activity is carried out in his personal capacity, not representing in any way the position or interests of the Commission. In this context, he should refrain from associating his former position at the European Commission with his new role and tasks within Baker & McKenzie or its clients.

As established by the Appointing Authority's decision, these conditions, shall, as well, apply to any other potential activity he could undertake via his company during the first 2 years after leaving the service - for which he was reminded he would need to submit another Article 16 SR declaration to receive separate clearance. In this context, Mr Borchardt was informed that further restrictions on his future activities could be introduced upon assessment of the Appointing Authority.

Mr Borchardt was also reminded that he remained bound by the statutory obligation to refrain from any unauthorised disclosure of information received in the line of duty during his work at the Commission, unless that information has already been made public or is accessible to the public (Article 17 of the Staff Regulations). This statutory obligation also entails to refrain from exploiting insights of confidential nature in policy, strategy or internal processes that he may have acquired in the line of service and that have not yet been public or are not commonly available in the public domain. In this context he was also reminded that, under Article 339 of the Treaty on the Functioning of the European Union, the officials and other servants of the Union are required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Additionally, he was also reminded that even after his duties have ceased he continued to be bound, under the first paragraph of Article 16 of the Staff Regulations, by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits from any new employer or its clients. The Appointing Authority further clarified, that this includes refraining from advising or working on behalf of his new employer or its clients on particular files or matters (for example: contracts, grants, cases, claims, investigations, ongoing legislative procedures), in which Mr Borchardt participated personally and substantially and that would entail relying upon information received in the line of duty that have not been made public. It also includes the duty to avoid any situation that might create a risk of real, potential or perceived conflict of interests.

Furthermore, I can provide you with the information on the last post held by Mr Borchardt with regard to the relevant period assessed as regards any potential conflict of interest in the framework of Article 16 of the Staff Regulations. Between October 2017 and September 2018 he had the position of Director of Directorate B in DG ENER; while, between October 2018 and September 2020, he was Deputy Director-General of DG ENER (as well as acting Director of Directorate B between January 2019 and January 2020).

I would like to remind you that CEO remains subject to the provisions of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation<sup>5</sup>) according to which personal data must, *inter alia*, be processed fairly and lawfully and subject to the unambiguous consent of the data subject concerned.

Finally, please be informed that a copy of this letter will be sent to the person concerned.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make 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:

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<sup>5</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

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](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

(e-signed)

Gertrud INGESTAD