



EUROPEAN COMMISSION

Brussels, 25.10.2019
C(2019) 7860 final

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Barnsley Street
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**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 2019/4664**

Dear [REDACTED],

I refer to your e-mail of 25 September 2019, registered on 26 September 2019, 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 (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 11 August 2019, addressed to the Directorate-General for Justice and Consumers, you requested access to ‘the letter of Italian authorities dated 14 February 2019 sent in the context of EU Pilot 8529/16/JUST’.

The European Commission has identified the following document as falling under the scope of your request:

- Letter of 14 February 2019 from the Italian Ministry of Foreign Affairs replying to an information request by the European Commission regarding EU Pilot procedure 8525/16/JUST, reference Ares(2019)5446572.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

In its initial reply of 25 September 2019, the Directorate-General for Justice and Consumers informed you that, it had consulted the Italian authorities, from whom the document originated, in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001. The Italian authorities objected to disclosure of the requested document based on Article 4(3), first indent (protection of the decision-making process) of Regulation (EC) No 1049/2001. Taking into account the reply from the Italian authorities, the Directorate-General for Justice and Consumers refused access to the document on the same basis.

In 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 concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of the Directorate-General for Justice and Consumers to refuse access to the requested document, based on the exceptions of Article 4(3), first subparagraph (protection of the decision-making process) and in addition of Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), third indent (protection of the purpose of the investigations) of Regulation (EC) No 1049/2001, for the reasons 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 ‘access to a document is refused 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’.

In Case C-28/08 P (*Bavarian Lager*),³ 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 data⁴ (‘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/EC⁵ (hereafter ‘Regulation (EU) 2018/1725’).

³ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59.

⁴ OJ L 8, 12.1.2001, p. 1.

⁵ OJ L 205, 21.11.2018, p. 39.

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 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’⁶.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

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’.⁷

The requested document includes the name, the function and the contact details of the natural person of the Italian national authority. It also contains biometric data, namely its handwritten signature.

This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 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) 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 on its own motion the existence of a need for transferring personal data.⁸ This is also clear from Article 9(1)(b) of Regulation (EU) 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) 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.

⁶ *Bavarian Lager*, cited above, paragraph 59.

⁷ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁸ 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.

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 weighed the various competing interests.

In your confirmatory application, you do not refer in any way to the personal data included in the requested document, nor do you put forward any arguments to establish the necessity to have the personal data included in the document transmitted for a specific purpose in the public interest. 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 subject concerned would be prejudiced by disclosure of the personal data reflected in the document, as there is a real and non-hypothetical risk that such public disclosure would harm its privacy and subject it 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 reason to think that the legitimate interests of the individual concerned would not be prejudiced by disclosure of the personal data concerned.

2.2. Protection of the purpose of investigations and of the decision-making process

Article 4(2), third 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 [...] the purpose of inspections, investigations and audits.'

Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

Without prejudice to the question whether an overriding public interest in releasing the document can be identified (which is the subject of point 3 below), I would like to underline that the investigative activities in EU Pilot procedure 8525/16/JUST, in the context of which the requested document was sent to the European Commission, are still ongoing and could lead to the opening of infringement proceedings under Article 258 Treaty on the Functioning of the European Union.

Under these circumstances, there is a real and non-hypothetical risk that early disclosure of the document pertaining to the administrative file of on-going case would adversely affect the ongoing investigation and its follow-up. In order for the European Commission to be able to carry out its tasks, the confidentiality of the exchanges with the Member State concerned throughout the different stages of the procedure shall be guaranteed until the case has been definitively closed.

For this reason, the European Commission must refuse access to the requested document, which is relevant for the ongoing EU Pilot procedure based on the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

In Case T-306/12 (*Spirlea*), the General Court recognised the importance of ‘an atmosphere of mutual trust between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute, without it being necessary to initiate an infringement procedure under Article 258 TFEU, which would be likely to lead to the dispute being brought before the Court’⁹.

Public disclosure of the requested document, while the EU Pilot procedure is still ongoing, would, indeed jeopardise the atmosphere of mutual trust between the European Commission and the Italian authorities and the chances of an amicable settlement of the dispute. In this sense, public disclosure would also jeopardise the decision-making process of the European Commission.

I conclude, therefore, that further access to the requested document must be denied based on the exception laid down in the third indent of Article 4(2) and in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, namely it must in this case outweigh the interest protected by virtue of the third indent of Article 4(2) and of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

In your confirmatory application, you do not invoke any overriding public interest that would warrant the public disclosure of the document concerned. Consequently, I carried out my own assessment as regards the possible existence of such public interest.

Following that assessment, I have not been able to identify any elements capable of demonstrating the existence of any possible overriding public interest in disclosing the refused elements that would outweigh the interests protected by the third indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

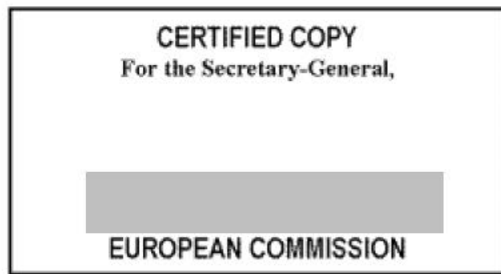
To the contrary, I consider that in this specific case, the public interest is better served by protecting the purpose of the ongoing investigation and the decision-making process with the aim to reach conformity with EU law of the legal framework in the Member State concerned, as this constitutes the ultimate purpose of the European Commission's investigations.

⁹ Judgment of the General Court of 25 September 2014, *Darius Nicolai and Mihaela Spirlea v European Commission*, T-306/12, EU:T:2014:816, paragraph 57, confirmed by the Judgment of the Court of Justice of 11 May 2017 in Case C-562/14 P, *Kingdom of Sweden v European Commission*, EU:C:2017:356.

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

[Redacted Signature]
[Redacted Name]

Two horizontal grey rectangular redaction boxes stacked vertically, used to redact the signature and name of the official representing the Commission.