



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

Brussels, 27 May 2021  
HR/GI

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**Subject: Your application for access to documents – Ref /GestDem No 2021/2227**

Dear Ms Da Silva,

I refer to your e-mail, dated 12 April 2021 registered the same date under reference number 2021/2227, 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 Carles Esteva Mosso, Deputy Director-General State aid at DG Competition. In particular, I request a note of all Mr. Esteva Mosso'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 (“Regulation 1049/2001”).

I understand that your request refers to documents relating, firstly, to the new role and new professional activity of Mr Carles ESTEVA MOSSO 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 Esteva Mosso 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 Esteva Mosso (hereafter “document 1”);
- a declaration form submitted by Mr Esteva Mosso, registered under reference Ares(2021)1475511 in the framework of Article 16 SR (hereafter “document 2”),
- Opinion of DG COMP and Cabinet (hereafter “document 3”),
- Opinion of the Secretariat General registered under reference Ares(2021)1964485 (hereafter “document 4”),
- Opinion of the Legal Service registered under reference Ares(2021)2085345 (hereafter “document 5”),
- Opinion of COPAR registered under reference Ares(2021)2434701 (hereafter “document 6”),
- a document with observations submitted by Mr Esteva Mosso (hereafter “document 7”),
- a decision of the Appointing Authority of 9 April 2021 concerning the declaration of the intention to engage in an occupational activity submitted by Mr Esteva Mosso, registered under reference Ares(2021)2442540 in the framework of Article 16 SR (hereafter “document 8”).

## **1. ASSESSMENT AND CONCLUSIONS**

Regulation 1049/2001 provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions, and limits defined in the Regulation.

According to its Article 2(3), the Regulation *"shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession"*. According to its Article 3(a), a document is *"any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"*.

I regret to inform you that I have to refuse access to the requested documents, based on the exceptions laid down in the Article 4(1)(b) (protection of privacy and the integrity of the individual) and the second subparagraph of Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

The detailed reasons underpinning my assessment are set out below.

### **1.1. Protection of privacy and the integrity of the individual and transmission of personal data**

Article 4(1)(b) of Regulation 1049/2001 provides that *"[t]he 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"*.

In accordance with paragraph 1 of Article 26 SR, which aims inter alia to safeguard the privacy and integrity of present and former Commission staff, the 'personal file' of an individual includes:

- a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- b) any comments by the official on such documents.

As is obvious from the titles of the requested documents, they form part of the personal file of the concerned official, which contains the documents concerning his administrative status or are inextricably linked with it. In particular, documents 2 and 8 form part of the personal file of the staff member concerned. Documents 1, 3, 4, 5, 6, and 7 are inextricably linked with the administrative status of the person concerned since they reflect the career history or are internal opinions of the services that were taken into account by the Appointing Authority for its decision of 9 April 2021 concerning the declaration of the intention to engage in an occupational activity submitted by Mr Esteva Mosso.

In accordance with paragraph 8 of Article 26 SR, “[t]he personal file shall be confidential and may be consulted only in the offices of the administration or on a secure electronic medium”. It is clear from this provision, that the European Commission is bound to protect the content of its staff member’s personal file in an enhanced way.

I also note that the case-law of the EU Courts on public access to documents holds that in the absence of express provisions in Regulation 1049/2001, which would provide for its primacy over other regulations relating to a particular area of Union law (such as, e.g., the Staff Regulations), it is necessary to ensure such an application of each of the two set of rules, which is compatible with that of the other<sup>2</sup>.

In the light of the above, I consider that the requested documents as a whole fall under the scope of the exception provided in Article 4(1)(b) of Regulation 1049/2001, which must be interpreted taking into account the principle of confidentiality of the personal files of members of the staff provided under Article 26 SR. Consequently, I consider that the disclosure to the public of the eight documents falling under the scope of your request would seriously undermine the privacy of the individual concerned within the meaning of Article 4(1)(b) of Regulation 1049/2001.

Moreover, I consider that public disclosure of the requested documents would infringe the legislation regarding the protection of personal data under the provisions of 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 (“Regulation 2018/1725”).

In case C-28/08 P (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 2018/1725 becomes fully applicable<sup>4</sup>.

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<sup>2</sup> See judgment of 12 November 2015 in joined cases T-515/14 and T-516/14, *Alexandrou v Commission*, ECLI: EU:T:2015:844, paragraphs 69, with further references.

<sup>3</sup> Judgment of 29 June 2010, 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 45/2001, which was repealed by Regulation 2018/1725. In accordance with Article 99 of that latter Regulation, references to Regulation 45/2001 should be construed as references to Regulation 2018/1725. However, please note that the case law issued with regard to Regulation 45/2001 remains relevant for the interpretation of Regulation 2018/1725.

Article 3(1) of Regulation 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*)<sup>5</sup>, “*there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life*”. The notion of personal data covers both the factual elements concerning the professional activity of the staff member concerned as well as the internal assessment and the final decision concerning his declaration of intention to engage in an occupational activity. In addition, the names of the person concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation 2018/1725.

Therefore, all the requested documents (1 to 9) as a whole fall under the scope of the exception provided in Article 4(1)(b) of Regulation 1049/2001, which must be interpreted taking into account Regulation 2018/1725.

Pursuant to Article 9(1)(b) of Regulation 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 2018/1725, can the transmission of personal data occur.

In case C-615/13 P (*ClientEarth*)<sup>6</sup>, the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data. This is also clear from Article 9(1)(b) of Regulation 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 2018/1725, the European Commission has to examine the further conditions for the 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 weighed the various competing interests.

In your request you did not establish the necessity of having the data transferred. Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001,

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<sup>5</sup> Judgement of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v Österreichischer Rundfunk and Others, Neukomm, and, Lauermann v Österreichischer Rundfunk*, ECLI:EU:C:2003:294, paragraph 73.

<sup>6</sup> Judgement of 16 July 2015, C-615/13P, *ClientEarth and Pesticide Action Network Europe (PAN Europe) v European Food Safety Authority*, ECLI:EU:C:2015:489, paragraph 47.

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 in your request.

## **1.2. Protection of the decision-making process**

The second subparagraph of Article 4(3) of Regulation 1049/2001 provides that *‘[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure’*.

As for the opinions of the DG COMP and Cabinet, the Secretariat General, the Legal Service and COPAR, as well as correspondence between the Commission services and Mr Esteva Mosso (documents 3, 4, 5, 6, and 7), in addition to the protection of personal data, the second subparagraph of Article 4(3) of Regulation 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. The abovementioned documents contains opinions for internal use. Their disclosure would reveal individual preliminary views of different services concerning the declaration of the intention to engage in an occupational activity submitted by Mr. Esteva Mosso and which were taken into account by the Appointing Authority in its decision of 9 April 2021. Consequently, the disclosure of these documents would seriously undermine the institution’s decision-making process. In particular in a case where the decision-making process at stake relates to the confidentiality of the personal files of staff members in the meaning of Article 26 SR.

The Commission’s services must be able to explore all possible options in preparation of their final decision free from external pressure. The staff in different Directorates-General should not be exposed in their individual opinions on specific decisions to be adopted by the Appointing Authority. If individual preliminary opinions by EU staff in different Directorates-General were disclosed, it would make them more hesitant to express their opinions freely for fear of public disclosure or pressure. Therefore, public disclosure of the requested documents would seriously undermine the effectiveness of the Commission’ decision-making process, also for future similar cases. The capacity of EU staff to express their opinions freely must be preserved, to avoid the risk that disclosure would lead to future self-censorship, which would ultimately affect the quality of the internal decision-making of the Commission.

It follows that the European Commission cannot grant public access under Regulation 1049/2001 to the documents containing preliminary opinions for internal use, even after the decision of the Appointing Authority was taken.

The exception laid down in Article 4(3) of Regulation 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 request, you do not invoke any overriding public interest, nor have I been able, based on the elements at my disposal, to establish the existence of any possible overriding public interest in disclosure of the requested documents. In consequence, I

consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the protection of Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

The fact that the documents do not relate to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness, provides further support to this conclusion.

Therefore, I conclude that the refusal of access to the abovementioned documents 3, 4, 5, 6 and 7 is justified also on the basis of the exception laid down in the second subparagraph of Article 4(3) of Regulation 1049/2001.

## **2. PARTIAL ACCESS.**

While I have also considered the possibility of granting partial access on the basis of Article 4(6) of Regulation 1049/2001, I have concluded that this would equally undermine the protection of personal data. It follows from the assessment made above that the documents which fall within the scope of your request are manifestly and entirely covered by the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the second subparagraph of Article 4(3) (protection of the closed decision-making process) of Regulation 1049/2001. Also, no meaningful partial access could be granted since you requested documents concerning a clearly identified natural person.

## **3. TRANSMISSION OF INFORMATION ON PERSONAL DATA**

Against this background, in order to try address your query to the extent possible, I have also considered the possibility of sharing with you some additional general information on the process to which your request relates. However, as explained above, information on the Article 16 SR declaration submitted by Mr Esteva Mosso and the corresponding Decision by the Appointing Authority are considered personal data, therefore the sharing of them has to respect the provisions for the transmission of personal data pursuant to Regulation 2018/1725.

In your request, you did not establish the necessity of having the data transferred for a specific purpose in the public interest, which constitutes the first condition to be met pursuant to Article 9(1)(b) of Regulation 2018/1725. As per established case law (Case C-615/13 P ClientEarth), the Commission does not have to examine by itself the existence of a need for transferring personal data. As the necessity has not been established in your request, the Commission does not have to examine the second condition foreseen in Article 9(1)(b) of Regulation 2018/1725, whether the data subject's legitimate interests might be prejudiced and the proportionality of such transmission.

Consequently, I conclude that, pursuant to Article 9(1)(b) of Regulation 2018/1725 no additional information on personal data regarding the requested occupational activity by Mr Esteva Mosso can be provided, as the need to obtain access thereto for a purpose in the public interest has not been substantiated in your request.

## **4. MEANS OF REDRESS.**

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the European 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:

European Commission

Secretariat-General

Transparency, Document Management & Access to Documents (SG.C.1)

BERL 7/076

B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

(e-signed)

Gertrud INGESTAD