



EUROPEAN COMMISSION

Brussels, 23.3.2022  
C(2022) 1946 final

Ms Margarida Da Silva  
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Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION NO (EC) 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2021/5927**

Dear Ms Da Silva,

I refer to your email of 12 December 2021, registered on the same 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<sup>2</sup> (hereafter 'Regulation (EC) No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 7 October 2021, addressed to the Directorate-General for Human Resources and Security, you requested access to, I quote: 'documents which relate to any article 16, article 12B and article 40 (staff regulations) applications made by X<sup>3</sup>.' In particular, you requested 'a note of all X'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 role.'

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<sup>1</sup> Official Journal L 345, 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145, 31.5.2001, p. 43.

<sup>3</sup> In your initial application, you refer to the identified individual (a staff member of the European Commission not holding any senior management position). The name of that individual has been replaced by 'X' in this decision.

On 22 November 2021, the Directorate-General for Human Resources and Security sent you a negative initial reply based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

## **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 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 Human Resources and Security as the European Commission is not in a position to identify the documents falling within the scope of your application without interfering with the right to privacy and data protection based on the exception laid down in Article 4(1)(b) 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 '[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 its judgment in Case C-28/08 P (*Bavarian Lager*)<sup>4</sup>, 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 data<sup>5</sup> (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/EC<sup>6</sup> (hereafter 'Regulation (EU) 2018/1725').

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<sup>4</sup> 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.

<sup>5</sup> Official Journal L 8, 12.1.2001, p. 1.

<sup>6</sup> Official Journal L 295, 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’<sup>7</sup>.

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’<sup>8</sup>.

In the *VG v Commission* judgment, the General Court ruled that even anonymised data should be considered as personal data, if it would be possible to link them to an identifiable natural person through additional information<sup>9</sup>.

In the present case, a clear link to an identifiable person remains, since your request focuses on an identified natural person. Therefore, it is clear that even the mere identification of the documents requested implies the processing of personal data and the information about the existence of documents would constitute processing of personal data, as this information cannot be disassociated from the natural person it concerns.

The identified natural person mentioned in your request does not form part of the senior management of the European Commission in the context of your request.

In your confirmatory request, you challenge this by saying that ‘European Commission considers senior officials to include Directors-General or Deputy Directors-General, Hors Classe Advisors, Directors, Principal Advisers and Heads of Cabinet. This includes officials that were ‘called upon to occupy temporarily such posts in accordance with Article 7(2) of the Staff Regulations and having exercised either of these functions at any time during the last 3 years before leaving the service. In May 2021 X had reportedly become the acting director of directorate C (Markets and cases II Information, Communication and Media). X must then be understood to fall in the senior official category and thus any application for post-public office employment made by him must be subject to extra layers of transparency as per article 16 of the EU Staff Regulations.’

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<sup>7</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>8</sup> Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>9</sup> Judgment of the General Court of 27 November 2018, *VG v Commission*, Joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 74.

I would like to point out that, before leaving the Commission, X was deputising the role of the Director ('acting' Director)<sup>10</sup> and was not acting as an 'ad interim' Director. Acting or deputising Director is not a senior management position, unlike 'ad interim' Director.

Deputising function is based on Article 27 of the Commission Decision of 24 February 2010 amending Rules of Procedure<sup>11</sup>. It can be automatic and it does not imply any financial advantage. On the other hand, the legal basis for the ad interim figure is Article 7(2) of the Staff Regulations<sup>12</sup> and it always requires a decision of the Appointing Authority. The granting of the interim may lead to the payment of a differential allowance.

This is the reason why X's request for post service employment did not figure in the annual Report that the Commission publishes under Article 16(4) of the Staff Regulation, which includes all activities from former senior managers<sup>13</sup>. The report includes a definition of the categories concerned and the definition of Directors states: 'Directors (including officials that have been called upon to occupy temporarily such post in accordance with Article 7(2) of the Staff Regulations) and Principal Advisers, having exercised either of these functions at any time during the last 3 years before leaving the service'.

In the Nowak judgment<sup>14</sup>, the Court of Justice has acknowledged that '[t]he use of the expression "any information" in the definition of the concept of "personal data", within Article 2(a) of Directive 95/46, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it "relates" to the data subject'. As regards the latter condition, it is satisfied where the information, by reason of its content, purpose or effect, is linked to a particular person (emphasis added).

In your confirmatory request, you ask for the partial access to the requested documents by stating that 'it should be completely feasible for the European Commission to protect special categories of personal data while also releasing parts of the documents covered within the scope of my request'.

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<sup>10</sup> Or deputising or 'faisant fonction' in French.

<sup>11</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0138&from=en>

<sup>12</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20140501&from=EN>

<sup>13</sup> The annual reports on the occupational activities of senior official after leaving the service are publicly available on [https://ec.europa.eu/info/publications/occupational-activities-former-senior-officials-annual-report\\_en](https://ec.europa.eu/info/publications/occupational-activities-former-senior-officials-annual-report_en)

<sup>14</sup> Judgment of the Court of Justice of 20 December 2017, *Peter Nowak v Data Protection Commissioner* (Request for a preliminary ruling from the Supreme Court), C-434/16, EU:C:2017:994, paragraphs 34-35.

However, as mentioned, even the mere identification of the documents requested would lead to the identification of the individual person. Establishing a list of requested documents would constitute processing of personal data, thus undermining the protection of privacy and the integrity of the data subject concerned. The stage where the Commission could eventually consider granting partially access to identified documents is therefore not even reached in this case.

The names of the persons 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 (EU) 2018/1725<sup>15</sup>. Applications under Article 12b and authorisations under Article 16 are part of the personal file of the staff member and are accordingly covered by the confidentiality under Article 26 of the Staff regulations.

In this regard, the Secretariat-General would like to emphasise that your request targets personal data that go beyond the data subject's name, surname and function as you requested documents that relate to 'all X'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 role.'

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 by itself the existence of a need for transferring personal data<sup>16</sup>. 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 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,

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<sup>15</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>16</sup> Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

To establish the necessity to have the data transmitted, you argue that, I quote: ‘there is a public interest in understanding how the EU Commission assessed and handled an employment request for such a high level official. This is especially true in a case that involves such a high level official taking up employment in a private company that is active on matters for which the official had been responsible. Citizens have a right to know how the Institutions handle such cases, that transparency and accountability are crucial for the proper implementation of these rules.’

That argument cannot justify the transmission of the personal data at stake, which may fall within the notion of ‘private life’ regardless of whether this data is registered in the context of a professional activity<sup>17</sup>. Following your reasoning, when requesting access to documents concerning personal data, all applicants invoking the principle of transparency in certain sphere of the European Commission’s political competence would gain access to said personal data.

Moreover, the General Court confirmed in the *Psara* judgment that general considerations relating to the public interest in the disclosure of personal data regarding parliamentary mandate holders in order to guarantee the public right to information and transparency do not establish the need for the transfer of the personal data<sup>18</sup>. This conclusion applicable to parliamentary mandate holders is all the more relevant in relation to natural persons who do not form part of the senior management of the European Commission.

You also mentioned that the case has drawn media attention as well as criticism on the part of the European Parliament MEPs, highlighting the data subject’s seniority.

First, as explained above, the data subject did not form part of the senior management of the Commission. In the *Psara* judgment, the General Court has ruled that ‘the classification of the data at issue as personal data cannot be ruled out merely because those data are related to other data which are public, which is the case irrespective of whether disclosure of those data would undermine the legitimate interests of the persons concerned’<sup>19</sup>. Similarly, in this case, the fact that information is already publicly available does not mean that identification of requested documents would not constitute processing of personal data.

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<sup>17</sup> Judgment of the General Court of 19 September 2018, Case T-39/17, *Chambre de commerce et d’industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

<sup>18</sup> Judgment of the General Court of 25 September 2018, *Psara et al. v European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraphs 73-76.

<sup>19</sup> Judgment of the General Court of 25 September 2018, *Psara et al. v European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 53.

Secondly, while the General Court has indeed accepted in *Evropaiki Dynamiki* judgment<sup>20</sup> that disclosure of certain documents cannot be withheld if similar information is also contained in the public domain, the situation is not comparable. The information concerned by your request has not been made public either by the European Commission or by the data subject concerned.

Against this background, the Secretariat-General emphasises that the mere identification of documents in the context of your request entails the processing of personal data, which constitutes an interference with the right to privacy and data protection and is not proportionate and necessary in the public interest.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by the processing of the requested personal data, as there is a real and non-hypothetical risk that the mere identification of documents in the context of your request would harm the privacy and subject the natural person concerned to unsolicited external contacts.

Consequently, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, the European Commission is not in a position to identify the documents requested, as the need to obtain access to the personal data of the data subject concerned 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 the disclosure of the personal data concerned.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

### **4. PARTIAL ACCESS**

Pursuant to Article 4(6) of Regulation (EC) No 1049/2001, ‘If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.’

However, as the Secretariat-General is not in a position to identify the documents that fall within the scope of your confirmatory application without undermining the interests described above, it is neither in a position to consider the possibility of granting partial access to the documents requested.

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<sup>20</sup> Judgment of the General Court of 6 December 2012, *Evropaiki Dynamiki v Commission*, T-167/10, EU:T:2012:651, paragraphs 87-88.

## 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*