



EUROPEAN COMMISSION
Secretariat-General

Directorate C – Transparency, Efficiency & Resources
The Director

Brussels
SG.C.1/

By registered mail with AR

Mr Carlo Martuscelli
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Subject: Your application for access to documents – GESTDEM 2022/0840

Dear Mr Martuscelli,

I refer to your request of 8 February 2022, in which you make a request for access to documents, registered on 9 February 2022 under the above-mentioned reference number.

1. SCOPE OF YOUR REQUEST

You request access to “all documents related to Commission President Ursula von der Leyen's videoconference with the CEO of Moderna on November 26, 2021, as well as all documents related to her videoconference with the CEO of Pfizer, also on November 26, 2021.”

You mention in your request that you are looking in particular for:

- “agendas, meetings, verbatim reports, transcripts etc, that would provide a record of the proceedings of these videoconferences;
- all correspondence sent or received in preparation for these videoconferences;
- all documents prepared or received as a follow up to these videoconferences.”

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

The Secretariat-General of the European Commission has identified one document as falling under the scope of your request:

- E-mail exchange between President von der Leyen's Cabinet members, ref Ares(2022)1028006 – 11/02/2022.

I can inform you that wide partial access can be granted to the above-mentioned document, subject to the exceptions laid down in Article 4(1)(b) (protection of personal data) and Article 4(3) second subparagraph (protection of the closed decision-making process) of Regulation (EC) No 1049/2001.

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*)¹, 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 data² (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/EC³ (hereafter “Regulation (EU) 2018/1725”).

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”.⁴

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

¹ 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.

² OJ L 8, 12.1.2001, p. 1.

³ OJ L 295, 21.11.2018, p. 39.

⁴ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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”.⁵

The identified document contains personal data such as names of Commission staff members not pertaining to the senior management and names of other natural persons.

The names⁶ of the persons concerned, as well as other data from which their identity can be deduced (e.g. specific functions), undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

2.2. Protection of the closed decision-making process

The second subparagraph of Article 4(3) of Regulation (EC) No 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.’

Part of the document contains the views of a Member of the Cabinet with regard to a procedural aspect pertaining to the meeting. The withheld information represents an individual appreciation of the author in relation to the organisation of the meeting, appreciation whose disclosure would seriously compromise decision-making process within the European Commission. In this respect, we note that in Case T-18/15 (*Philip Morris Ltd*)⁷ the General Court pointed out that “the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process”.

Disclosure of views of this nature would deter staff from making such remarks independently and without being unduly influenced by the prospect of wide disclosure exposing the institution of which they are part. On this basis, I must conclude that, in accordance with the provisions of the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, it is not possible to provide access to a part of the document falling within the scope of your request.

⁵ 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.

⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

⁷ Judgement of the General Court of 15 September 2016, *Philip Morris Ltd v European Commission*, T-18/15, ECLI:EU:T:2016:487, paragraph 87

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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 if 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 data⁸. 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, 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 for access to documents, you do not put forward any arguments to establish the necessity to have the data 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 subjects’ legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the requested documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

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.

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 the disclosure of the personal data concerned.

With regard to the exception laid down in Article 4(3) second subparagraph of Regulation 1049/2001, it 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.

I note however that you do not put forward any elements to demonstrate the existence of an overriding public interest in disclosure of the documents requested. Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the independence of the Commission's decision-making process grounded in Article 4(3) of Regulation 1049/2001.

The fact that the document requested was not drafted in the framework of the Commission's legislative activities, for which the Court of Justice has acknowledged the existence of wider openness⁹, provides further support to this conclusion.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, partial access has been granted to the document requested. No further partial access can be granted without undermining the interests protected by Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3) second subparagraph (protection of closed decision-making process) of Regulation (EC) No 1049/2001.

Please note that this document was drawn up for internal use under the responsibility of the relevant members of the Cabinet. It solely reflects the author's account of the interventions made and does not set out any official position of the third parties to which the document refers, which was not consulted on its content. It does not reflect the position of the Commission and cannot be quoted as such.

5. MEANS OF REDRESS

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.

⁹ Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, ECLI: EU:C:2010:376, paragraph 60

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Unit C.1. 'Transparency, Document Management and Access to Documents'
BERL 7/076
B-1049 Brussels,

or by email to: sg-acc-doc@ec.europa.eu.

Yours sincerely,

Tatjana Verrier
Director

Enclosure: Document ref Ares(2022)1028006 – 11/02/2022

