



CONSILIUM

**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

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Brussels, 2 April 2014

Ms Vicky Cann

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Ref. 09/c/01/14

Dear Ms Cann,

Please find enclosed the reply from the Council to your confirmatory application dated 10 February 2014.

Pursuant to Article 8(1) of Regulation 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court or to make a complaint with the Ombudsman. The conditions for doing so are laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union, respectively.

Yours sincerely,

Reijo KEMPPINEN

Enclosure

**REPLY ADOPTED BY THE COUNCIL ON 1 APRIL 2014
TO CONFIRMATORY APPLICATION No 09/c/01/14,
made by e-mail on 10 February 2014,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents regarding investigations into the conduct of
Ms Gayle Kimberley in relation to her paid work as a lobbyist for Swedish Match
and her involvement in the Dalligate affair**

The Council has considered this confirmatory application under 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 (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant requests *"all documents relating to any investigations the Council has conducted into the conduct of Gayle Kimberley in relation to her paid work as a lobbyist for Swedish Match and her involvement in the Dalligate affair "*.
2. In its reply dated 31 January 2014, the General Secretariat replied that documents belonging to personal files of officials contain personal data within the meaning of Regulation 45/2001. In respect of the specific request, it concluded that *"the public interest in having access to information about the administrative status of Ms Kimberley (and possible outside activities carried out while working for the Council) does not, on balance, prevail over the interest of Ms Kimberley to protect personal data of that nature as may be contained in documents in her personal file"*. The General Secretariat accordingly informed the applicant that pursuant to Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and integrity of the individual) it was unable to accede to the request.

3. In the confirmatory application dated 10 February 2014, the applicant asks the Council to reconsider this position. The applicant claims that the "*Dalligate scandal (...) ultimately led to the departure of a European Commissioner*" and that it is therefore "*legitimate and very much within the public interest*" to ask for information from the Council about investigations into this affair. The applicant also underlines that it is not appropriate to apply a "*blanket ban*" to the release of the requested information and asks the Council to establish a list of documents falling within the request.
4. The Council has considered this confirmatory application in the light of the applicant's arguments and, having thoroughly re-examined the request, the Council has come to the following conclusions.
5. The fact of knowing whether investigations are conducted by an institution in respect of one of its officials is a serious matter which - if communicated to the public - may cause substantial harm to the integrity of that official. In that respect it is also underlined that any documents of such nature held by the General Secretariat belong to the personal files of the official and cover matters related, *inter alia*, to the official's individual personal circumstances, administrative status, contact details and relations with the employer.
6. Such documents thus contain personal data within the meaning of Article 2(a) of 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 data¹. The dissemination of such data – including by disclosure to the public – falls within the definition of 'processing of personal data', for the purposes of that Regulation. In that regard it is also underlined that personal data concerning the possible breach by an official of his or her duties under the Staff Regulations or concerning other possible offences are to be regarded as particularly sensitive.

¹ OJ L 8, 12.1.2001, p. 1.

7. Article 4(1)(b) of Regulation (EC) No 1049/2001 lays down a specific exception which obliges the institution to refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data.
8. According to case-law, no automatic priority can be conferred on the objective of transparency over the right to protection of personal data². Furthermore, where a request based on Regulation (EC) No 1049/2001 seeks to obtain public access to documents including personal data, the provisions of Regulation (EC) No 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof³.
9. The Council has consulted Ms Kimberley on whether she could consent to the communication of any of her personal data. Ms Kimberley explicitly objected to the transfer of any of her personal data to recipients other than Community institutions and bodies.
10. The Council has therefore balanced the legitimate interests of Ms Kimberley against the public interest in obtaining information of the type requested about Ms Kimberley.
11. The Council has assessed the request for access in full consideration of the principles underlying Regulation (EC) No 1049/2001 and the aim of ensuring the widest possible public access to documents, including what it understands to be the public interest in asking for information from the Council about possible investigations conducted by the Council as regards *"Gayle Kimberley in relation to her paid work as a lobbyist for Swedish Match and her involvement in the Dalligate affair"*, in the light of the requirements of Regulation (EC) No 45/2001 including the need to establish the necessity of the transfer of personal data.

² Case C-92/09 and C 93/09 Volker und Markus Schecke and Eifert [2010] ECR I-0000.

³ Case C-28/08 P Commission v Bavarian Lager [2010] ECR I-0000.

12. As a preliminary point, the Council notes that, in replies to previous related requests, its General Secretariat has already confirmed that Ms Kimberley is an official of the Council and it has provided a list of posts occupied by Ms Kimberley in the General Secretariat of the Council.
13. The Council recognises that the allegations made against former Commissioner Dalli have raised awareness about administrative procedures within the European Union institutions that are of interest to the public. However, after careful consideration, the Council does not consider that the public interest in gaining access to Ms Kimberley's personal data prevails over the interest in protecting Ms Kimberley's privacy and integrity under Article 4(1)(b) of Regulation (EC) No 1049/2001, in conjunction with Articles 8 and 18 of Regulation (EC) No 45/2001.
14. In respect of the applicant's request for the Council to provide "*a list of documents that fall within this request*" the Council notes that - in line with the above conclusions - the interest in protecting Ms Kimberley's privacy and integrity, on balance, prevails over the public interest in having access to any to such information of the type requested as may be contained in documents in her personal file. The establishment of a list of documents, and the communication thereof to the public constitutes in itself "processing of personal data", as defined by Regulation (EC) No 45/2001. As it is clear that the identification of any documents which the Council may hold in respect of the specific request would reveal personal information which the Council is obliged to protect, such identification of documents with the aim of communication to the public is also prohibited under Regulation (EC) No 45/2001.
15. In that respect it is recognised in case-law that in replying to a request for public access, the institution cannot be obliged to respond in a way which would necessitate disclosure of the very information that it is deemed to protect, as that would undermine the purpose of the exception upon which it relies⁴.

16. It follows from the above that, exceptionally, the Council is not in a position to provide the applicant with a list of documents or to acknowledge whether it holds documents corresponding to the applicant's request. Partial access pursuant to Article 4(6) of Regulation 1049/2001 therefore cannot be considered.
17. The Council therefore confirms that pursuant to Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and integrity of the individual) it is unable to accede to the applicant's request.
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