Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – GESTDEM 2022/3144

Dear Mr Teffer,

I refer to your e-mail of 22 June 2022, registered on 24 June 2022, in which you submitted 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 (hereinafter ‘Regulation (EC) No 1049/2001’).

I apologise for the delay in the handling of your confirmatory application.

1. **SCOPE OF YOUR REQUEST**

In your initial application of 31 May 2022, you requested access to, I quote:

‘Members of the Regulatory Scrutiny Board are required to make a declaration of commitment to act independently in the public interest and to declare any interests, which might be considered prejudicial to his/her independence.

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

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All declarations of interests done by current and past members of the Regulatory Scrutiny Board since the RSB was established in 2015.

In its initial reply of 22 June 2022, the Regulatory Scrutiny Board (‘RSB’ hereafter) informed you, as regards the declarations of commitment of the Members of the Regulatory Scrutiny Board under Article 4.1 of the Decision setting up the Regulatory Scrutiny Board, that the Commission did not hold any documents corresponding to the description given in your application.

As regards the declarations of interests done by current and past members of the Regulatory Scrutiny Board since the RSB was established in 2015, the Regulatory Scrutiny Board informed you that your request could not be handled, as handling your request – including the confirmation of the existence of documents falling under the scope of your request or not, and any identification of (a) document(s) covered by your request (if any) – is prevented by the Data Protection Regulation. Access was refused 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 indicate that your request is related ‘to the declaration on the commitment to act independently in the public interest, which members are required to make BEFORE taking office’ and refers to a requirement of a general nature and not to specific requirements under Article 4.1 of the Decision setting up the Regulatory Scrutiny Board. You also indicate that ‘[t]his requirement is cited in vacancy notices such as the ‘Publication of a vacancy for a Member of the Regulatory Scrutiny Board at grade AD 14 (Principal Adviser)’ published in the Official Journal of the European Union on 11.12.2020 (COM/2020/10398 - (2020/C 428 A/01))’.

You therefore request a review of the above-mentioned position of the Regulatory Scrutiny Board regarding the declarations made by its Members before taking office.

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 services concerned at the initial stage.

I would like first to clarify that, in accordance with Article 3 of the Decision setting up the Regulatory Scrutiny Board, the Board of the Regulatory Scrutiny Board consists of seven members: a Commission Director-General who chairs the Board, three high-level Commission officials, and three experts recruited from outside the Commission. All members work for the Board full-time, with no other policy responsibilities, for a non-renewable term of three years, which can be extended by up to one year under exceptional circumstances.

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The Board acts independently from the policy-making departments and from any European institution, body, office, or agency.

As a general note, please be informed that information on the members of the RSB as well as their CVs are available on the RSB website. The members of the RSB who were appointed from high-level Commission officials have not had to fill in a new declaration on their commitment to act independently in the public interest. Upon their recruitment as RSB members, the Commission officials continue to be bound by the obligations laid down in the Staff Regulation (‘SR’ hereafter) and in particular, in Articles 11 and 11a of the SR without a need to make a new declaration of commitment.

Following the review of your application, the Secretariat-General has to inform you that, for the members of the RSB who are appointed from Commission officials, the European Commission does not hold any documents that would correspond to the description provided in your application, as clarified by your confirmatory application.

As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

The General Court held in Case T-468/16 (Verein Deutsche Sprache v Commission) that there exists a presumption of lawfulness attached to the declaration by the institution asserting that documents do not exist. This presumption continues to apply unless the applicant can rebut it by relevant and consistent evidence. The Court of Justice, ruling on an appeal in Case C-440/18 P, has confirmed these conclusions.

As explained above, there is no declaration of commitment made by the high-level Commission officials that are members of the RSB upon recruitment to the RSB.

As regards the declarations of commitment of the experts recruited from outside the Commission, the Secretariat-general has identified the following documents:

1. Declaration Conflict of interest by candidates (Articles 11 and 11a of the Staff Regulations and Articles 11 of the Conditions of Employment of Other Servants-CEOS) signed on 15/05/2016 by Mr Nils Björksten.

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5 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.
7 Ibid.
2. Declaration Conflict of interest by candidates (Articles 11 and 11a of the Staff Regulations and Articles 11 of the Conditions of Employment of Other Servants-CEOS) signed on 6/02/2017 by Ms Isabelle Schömann.

3. Declaration Conflict of interest by candidates (Articles 11 and 11a of the Staff Regulations and Articles 11 of the Conditions of Employment of Other Servants-CEOS), signed by Mr Andreas Kopp.

4. Declaration Conflict of interest by candidates (Articles 11 and 11a of the Staff Regulations and Articles 11 of the Conditions of Employment of Other Servants-CEOS) signed on 12/02/2021 by Ms Dorota Denning.

5. Declaration Conflict of interest by candidates (Articles 11 and 11a of the Staff Regulations and Articles 11 of the Conditions of Employment of Other Servants-CEOS) signed on 15/09/2021 by Mr Antonio Nicita.

6. Declaration Conflict of interest by candidates (Articles 11 and 11a of the Staff Regulations and Articles 11 of the Conditions of Employment of Other Servants-CEOS) signed on 24/05/2022 by Mr Philippe Mengal.

I am pleased to inform you that partial access has been granted to documents 1 to 6, subject to the redaction of personal data on the grounds of the exception to the right of access laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, for the reasons set out below. Documents 1 to 5 contain, besides the declaration of conflict of interest signed by the person concerned, the part of the form used by the administration to identify potential or actual conflict of interest in relation to the position offered. Since that part is completed by the service requiring the recruitment as part of the administrative file, it is out of scope of the present request. Therefore, it was removed from the pdf documents 1, 2, 3 and 5 and, in case of document 4, removed and redacted.

*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)\(^9\), 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 data10 (hereinafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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’11. Likewise, in the Psara judgment, the General Court added that Article 4(1)(b) ‘establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public […]’12.


However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

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’14.

Documents 1 to 6 contain personal data such as the names and surnames of family members, handwritten signatures, contact details (address, e-mail address and phone number), personal identification numbers and information on the existence or absence of financial, professional, and other personal interests of natural persons. The information above, concerning the RSB members who are experts recruited from outside the Commission and, as the case may be, of their family members, 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) 2018/172515.

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11 European Commission v The Bavarian Lager judgment, cited above, paragraph 59.
14 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.
15 European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
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. 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 confirmatory application, 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 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.

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.

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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 enshrined therein to be set aside by an overriding public interest.

4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting you further partial access to the documents requested.

However, the remaining redacted parts cannot be disclosed as their disclosure would harm the interests protected by Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

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,

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**CERTIFIED COPY**

For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

For the Commission

Ilze JUHANSONE
Secretary-General

Enclosures: [6]