Mr Alexander Fanta

Decision of the European Commission pursuant to Article 4 of the Implementing Rules to Regulation (EC) No 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2021/5292

Dear Mr Fanta,

I refer to your e-mail dated 14 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 (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in the handling of your request.

1. Scope of Your Request

In your initial application of 31 August 2021, registered under reference GestDem 2021/5292 and dealt with by the Directorate-General for Communication Networks, Content and Technology, you requested access to the following documents:

- Internal documents discussing a possible 'right to repair' of electronic devices dating from since January 1st, 2021;

- Documents from stakeholders concerning a possible "right to repair" since the beginning of 2021, including minutes of meetings, e-mails and other documents [...]’.

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The Directorate-General for Communication Networks, Content and Technology identified the following documents as falling partially within the scope of your request:

- Minutes of the Meeting between DG CONNECT and BEUC, 26 January 2021, Circular Electronics Initiative (‘CEI’) (‘Document 1’)
- DG JUST - DECIDE fiche: Promoting sustainability in consumer after-sales and a new consumer right to repair (‘Document 2’)
- Email exchanges between DG CONNECT and DG JUST between 5 and 14 July 2021 regarding the CEI Communication Outline (‘Document 3’)
- Minutes of the Directors meeting on the CEI and the Right to Repair on 9 March 2021 (‘Document 4’)
- Summary of the bilateral discussion with DG JUST on the Right to Repair, 21 April 2021 (‘Document 5’)
- Minutes of the bilateral discussion with DG JUST on the Right to Repair, 21 April 2021 (‘Document 6’)
- Minutes of the Right to Repair Study Kick off meeting, 30 April 2021 (‘Document 7’)
- Minutes of the Second Joint Discussion on the CEI, 18 May 2021 (‘Document 8’)
- Minutes of CAB-DG working level meeting, 10 June 2021 (‘Document 9’)
- Email exchanges between 25 June 2021 and 2 July 2021 regarding the DG CONNECT comments to DG JUST (‘Document 10’)
- Terms of Reference for the Study on the CEI Right to Repair (‘Document 11’)
- CEI Communication potential outline- draft (‘Document 12’)
- Roadmap - Communication on the CEI (‘Document 13’)
- Study on a Right to Repair for electronics, Task Clarification Note (‘Document 14’)
- Note to Cabinet Breton (‘Document 15’)

In its initial reply, the Directorate-General for Communication Networks, Content and Technology granted partial access to Document 2, and fully refused access to Documents 1 and 3 to 15 on the grounds of the protection of the decision-making process (Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001).

Through your confirmatory application, you request a review of the refusal to disclose the documents identified under your application.

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 inform you that full access is granted to documents 4, 6, 11, 12, 13 and 14. Wide partial access can be granted to documents 1, 2, 3, 5, 7, 8, 9, 10 and 15 subject only to the redaction of personal data, which is redacted on the basis of the exception 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. Parts of documents 8 and 9 have been removed as they fall outside the scope of your request.
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*)\(^3\), 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\(^4\) (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 \(^5\) (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’\(^6\).

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’\(^7\).

Documents 1, 2, 3, 5, 7, 8, 9, 10 and 15 contain personal data such as name, initials, functions, email address of persons who do not form part of the senior management of the European Commission.

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\(^6\) *European Commission v The Bavarian Lager judgment*, cited above, paragraph 59.

\(^7\) 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.
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.

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.

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8 European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
Consequently, the Secretariat-General concludes 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.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered whether partial access could be granted to the document identified under your request.

However, no further partial access is possible without undermining the interests laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against overriding public interest in disclosure.

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 European Commission
Ilze JUHANSONE
Secretary-General

Enclosures: [15]