



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

Directorate C - Transparency, Efficiency & Resources
The Director

Brussels,
SG.C/MIA

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Subject: Your application for access to documents in accordance with Regulation 1049/2001– Ref. GestDem 2022/3988 and 2022/4237

Dear Mr Teffer,

I refer to your e-mails dated 11 July 2022 and 22 July 2002, registered on the same dates under the above-mentioned references.

In your e-mails, you request access to:

‘The letter sent by the European Commission to the former European Commissioner Neelie Kroes, about media reports on her work for Uber.’ (GESTDEM 2022/3988).

‘The letter received by the European Commission from the former European Commissioner Neelie Kroes, about media reports on her work for Uber. This letter was received this month, July 2022.’ (GESTDEM 2022/4237)

The Commission confirms that an exchange of letters with the former Member of the Commission has taken place. However, it is unfortunately not possible to grant access to these documents at this stage.

1. Exception of Article 4(3) first subparagraph

Article 245 of the Treaty on the Functioning of the European Union (TFEU) stipulates that ‘the Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising there from and in particular their duty to behave with integrity and

discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits’.

According to Articles 245 TFEU, in the event of a serious breach of these obligations, the Court of Justice may, on application by the Council or the Commission, rule that the Commissioner concerned be compulsorily retired or deprived of his right to a pension or other benefits instead.

In addition to this provision, the Code of Conduct for the Members of the Commission foresees the possibility for the Commission, after consultation of the Independent Ethical Committee, to formally express a ‘reprimand’ against a Commissioner or former Commissioner and make it public.

Against this background, the Commission has started an assessment of the allegations reported by the media concerning the relations of Former Vice-President Kroes with the company UBER and to establish the facts.

Article 4(3), first subparagraph, of Regulation 1049/2001 provides that [a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if the disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The administrative procedure for the examination of the above-mentioned allegations is ongoing. In the framework of this ongoing procedure, disclosure of individual documents exchanged between the Commission and Former Vice-President Kroes which form part of the file would lead to external interference with the ongoing internal processes. Moreover, external pressure with regard to specific steps during the preliminary stages of the ongoing procedure would be detrimental to the sound handling of this file by the Commission and would undermine the right of the Commission to protect its margin of manoeuvre and ability to take a decision on this matter once the examination has been concluded.

Access to individual documents or parts thereof during the ongoing examination would therefore seriously undermine the proper handling of the preliminary administrative procedure and be contrary to the public interest of an independent establishment of the facts and an independent evaluation of the file by the Commission without interference from third parties.

It would also impact the right to be heard of the person concerned during the administrative procedure if parts of the file, or parts of documents in the file, were to be disclosed to the public and become subject of public discussion. The disclosure of confidential information provided by the individual concerned in the ongoing administrative procedure might also impact the cooperation with the Commission in order to establish the facts. This could also be the case of other individuals and entities that might be asked to provide information in the course of the examination of this matter by the Commission.

The reality of this risk is demonstrated by the public discussion which followed the publication of the allegations in the media and the calls addressed to the Commission by

some parties to take sanctions against Former Vice-President Kroes on the basis of these media reports. Providing access to parts of the file in this context would negatively impact the procedure.

Disclosure of the requested documents and parts thereto would also be detrimental to the capacity of the Commission to decide on further steps in the procedure, e.g. the possibility to seek independent advice by the Ethical Committee or the follow-up once the fact have been established.

The Court of Justice has confirmed that to determine the scope of Regulation (EC) No 1049/2001, account must be taken of relevant sectorial rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were gathered. In this case, the administrative procedure is regulated by the Treaty provisions and the Code of Conduct for Commissioners.

In this regard, neither the Treaties nor the Code of Conduct make provision for any specific entitlement to access the documents that belong to the ongoing administrative file, or parts thereof.

Therefore, access to the documents cannot be granted, at this stage, based on Article 4(3), first subparagraph.

2. Exception of Article 4(1)(b) and Article 4(2), first indent

In addition, significant parts of the requested documents to which you request access, are covered by the exceptions foreseen in Article 4(1)(b) and Article 4(2), first indent of Regulation 1049/2001, as explained below.

Please note as well that data related to professional activities is considered to be part of the private life of an individual. Substantial parts of the data contained in the requested documents is related to professional activities of Former Vice-President Kroes and is therefore, personal data.

Other parts of the text of the requested documents contain information revealing the identity, e-mail addresses, postal addresses, telephone numbers and other personal data of several individuals including Former Vice-President Kroes. The documents also include personal data of Commission staff not occupying any senior management position, or of individuals working for private entities, together with the name of the organisation they represent and their position therein.

Even if you point out in your application that you are not interested in having access to personal data, the Commission must invoke this exception in so far the personal data in question covers substantial parts of the documents in question. All this information constitutes personal data that is covered by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, as explained below.

In its judgment in case C-28/08P (Bavarian Lager)¹, the Court of Justice ruled that where a request based on Regulation (EC) No 1049/2001 seeks access to documents containing data of personal nature, the provisions of the data protection regulations become fully applicable.

The applicable legislative text in this regard is Regulation (EU) 2018/1725². Article 3(1) of that regulation provides that ‘personal data’ means any information relating to an identified or identifiable natural person [...]’. The Court of Justice has clarified that any information which, by reason of its content, purpose or effect, is linked to a specific person must be considered as personal data.

As explained above, the withheld documents and parts thereof contain elements, which undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) No 2108/1725, as they reveal information about identified or identifiable persons.

The disclosure of those parts of the requested documents could also have a negative impact on the right of other legal entities mentioned in the documents.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission must only examine the other conditions for the lawfulness of the processing of personal data if the first condition is met, namely if the recipient has established that it is necessary for this data to be transmitted for a specific purpose of public interest. It is only in this case that the European Commission must examine whether there are reasons to believe that such transmission could harm the legitimate interests of the data subject and, if so, establish the proportionality of the transmission of the data of personal character for that specific purpose, after balancing, in a verifiable manner, the various competing interests.

Furthermore, following constant case law, ‘if the condition of necessity is to be fulfilled, it must be established that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant's objective, and that it is proportionate to that objective, which means that the applicant must submit express and legitimate reasons to that effect’³

As explained above, I consider that in the present case the necessity of disclosing the aforementioned personal data to you, has not been established.

¹ Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, European Commission v the Bavarian Lager Co. Ltd, (ECLI:EU:C:2010:378), paragraph 63.4

² Regulation (EU) No 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 (repealing Regulation (EC) No 45/2001), Official Journal L 295, 21.11.2018, p. 39–98.

³ Judgment of the Court of 15.07.2015 in Case T-I 15/13, Dennekamp v. Parliament.

I would also like to point out that the personal professional information provided to the Commission by Former Vice-President Kroes has been communicated within the specific context related to the examination of the possible incompatibility of her professional activities with her legal obligations under Article 17(3) of the Treaty on European Union (TEU), 245 of the Treaty on the Functioning of the European Union (TFEU) and the Code of Conduct for Members of the Commission. It is for the Commission as independent institution to establish whether a conflict of interest or any other incompatibility has arisen during the period during which the media reports refer to alleged breaches by Former Vice-President Kroes of her obligations.

In this respect, there is no reason why personal data and information provided by Former Vice-President Kroes on a confidential basis, should be made available to any third person or to the public.

Consequently, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the requested documents, 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 disclosure of their personal data.

As regards the exception laid down in Article 4(2) first indent and Article 4(3), first subparagraph of Regulation 1049/2001] of Regulation 1049/2001, they 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.

In your application you have brought forward arguments on a public interest for the disclosure of the documents requested. You point out that:

‘...[T]he media reports suggested that Kroes may have broken the principles of the Code of Conduct for the Members of the European Commission, in particular article 11. It is therefore in the public interest that citizens can see the European Commission acts swiftly and decisively on establishing whether that is the case. Publication of the letter may also reassure citizens that the Commission president is ensuring the proper application of the Code of Conduct, as is required by article 13.1 ... ‘

The alleged public interest in obtaining the documents, to which you refer in your application, cannot be based on the alleged breaches reported by media. It is up to the Commission as independent institution to carry out its tasks and examine the alleged facts as stated above.

On the contrary, I recall that public access to individual documents or parts thereto during this ongoing administrative procedure would seriously undermine the proper handling of the procedure and be contrary to the public interest to reach an independent establishment of the facts and an independent evaluation of the documents that are part of the file by the Commission without interference from third parties. It would also impact

the right to be heard of the person concerned during the administrative procedure if parts of the file, or the file in its entirety, were to be disclosed to the public and become subject to public discussion before the Commission has been able to examine this matter and decide on it. Disclosure during the ongoing procedure could also prevent other persons or entities that the Commission might decide to ask for information from cooperating.

Consequently, based on the information at my disposal, I have not been able to identify a public interest capable of overriding the interests protected by Article 4(2), first indent, and Article 4(3), first subparagraph of Regulation 1049/2001. I conclude therefore that the protection of the Commission's decision-making process and of commercial interests concerned in the sense of the Regulation prevail in this case.

Finally, in accordance with Article 4(6) of Regulation 1049/2001, I have assessed whether partial access can be granted to the documents requested. However, it appears that no meaningful partial access can be granted to the requested documents without jeopardising the very interest that the above-mentioned exceptions aim to protect.

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.

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
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Brussels

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

Yours sincerely,

Tatjana VERRIER

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