EUROPEAN COMMISSION

Brussels, 7.12.2023
C(2023) 8812 final

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 2022/5204

Dear Mr Fanta,

I refer to your email of 28 April 2023, 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 replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 13 September 2022, addressed initially to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to:

‘[…] documents on the internal deliberations within the Commission in 1996 and 1997 on the draft 'Media Ownership Directive'. This is meant to include documents from rounds of consultations with the member states, consultations within the Commission including legal opinions, studies and letters/faxes between members of the Commission and their cabinets, as well as submissions from stakeholders on the draft Directive.’

Your request was subsequently reattributed to the Directorate-General for Communication Networks, Content and Technology.

Given the wide scope of your request, the Directorate-General for Communication Networks, Content and Technology contacted you with a view to finding a fair solution based on Article 6(3) of Regulation (EC) No 1049/2001. The Directorate-General for Communication Networks, Content and Technology provided you with the main categories and sub-categories of documents and the approximate number of documents and pages that had been identified that stage.

You have agreed to limit the scope of your request to the following documents:

- reports from meetings with MS/stakeholders;
- notes to the attention of members of the Commission, DGs, etc;
- letters to other members of the Commission, members states, stakeholders;
- letters, position papers, speeches from Member States.

In its reply of 27 April 2023, the Directorate-General for Communication Networks, Content and Technology identified 22 documents as falling within the scope of your request. It granted wide partial access to them, subject to the redaction of personal data in accordance with Article 4(1)(b) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You mentioned the following:

‘[You] very much appreciate the work of the transparency unit has done in digitizing the documents in question. However, [You] feel that some of the redactions made in the documents are unnecessary and wanted to ask to be given unredacted versions of said documents. This applies in particular to document 5, which contains a personal letter by German Chancellor Helmut Kohl to the President of the European Commission, Jacques Santer. In the letter, the name and handwriting of Helmut Kohl have been redacted. As [the Directorate-General for Communication Networks, Content and Technology] note[s] in [its] letter, redactions of personal information should not apply to senior management, to which [you] would count Chancellor Kohl, and in any case he is deceased, so data protection no longer applies.’

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.

On 17 May 2023, the Secretariat-General sent you a clarification request and asked you to clarify the scope of your confirmatory application, notably whether you would like to
request the review of all the documents identified at initial stage or only of document 5, explicitly mentioned in your application.

By your reply of 17 May 2023, you confirmed that you request the review only of document 5.

Consequently, the scope of the confirmatory decision is circumscribed to this document.

Following the review performed at the confirmatory stage, I would like to inform you that:

- Further partial access is granted to the document. Please note however that some parts in the document should remain redacted based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) 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), 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 (hereafter ‘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’. 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 […]’.

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

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/EC7 (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.

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’8.

The withheld parts of the document contain personal data such as the names and handwritten signature of the representative of Germany who signed the fax document.

The names of the person 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) 2018/17259.

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 data10. 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.

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8 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.
9 European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
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, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the withheld 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. **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 defined 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, partial access has been granted to the document. No further partial access can be granted without undermining the interests described above.
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 Commission*

*Ilze JUHANSONE*

*Secretary-General*

Enclosure: 1