EUROPEAN COMMISSION

Brussels, 2.2.2024
C(2024) 801 final

Ms Helen Darbishire

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 – EASE 2023/5036

Dear Ms Darbishire,

I refer to your email of 1 November 2023, registered on 6 November 2023, 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 handling your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 28 August 2023, you requested access to, I quote:

‘2022 note produced jointly by the Legal Service and the Secretariat General on the efficient handling of access to documents requests. The reference number of this document is given as ARES (2022) 4823096.’

The Secretariat-General of the European Commission identified the following documents as falling under the scope of your request:

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Joint Note LS / SG - Effective and efficient handling of “access to documents” requests, reference Ares (2022)4823096 (‘document 1’), which includes the following annexe:
- Annexe to document 1 - Regulation 1049/2001 Quality Chart - Initial replies to access to documents, reference Ares (2022)4823096 (‘document 2’).

In its initial reply dated 24 October 2023, the Secretariat-General:
- Granted full access to document 2.
- Provided wide partial access to document 1 based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position regarding document 1 essentially claiming that ‘no redacted version of the document ARES (2022)4823096 has been provided.’ In your confirmatory application, you also indicated that, I quote, ‘there is an annex, which contains a “Quality Chart” for “Negative replies for access to documents requests (full or partial)” followed by a ten-point check list’. You further stated that ‘no reference to this Quality Chart is made in the letter to me from the Commission.’

Furthermore, through your confirmatory application you do not contest the possibility of receiving a redacted version of document 1 related to the protection of privacy and the integrity of the individual. You further state that ‘to the extent that ARES(2022)4823096 does contain such personal data, I am most happy to receive a redacted version of the document with those elements redacted.’

In addition, in your confirmatory application, you also would like to receive a clarification from the Commission whether the Secretariat-General ‘did actually intend to grant me full or partial access to the document.’

Your arguments will be addressed in the section below.

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 the review performed at the confirmatory stage, I can inform you that full access is granted to document 2 and wider partial access is granted to document 1, subject to redactions based on the exception of Article 4(1)(b) (protection of the privacy and integrity of natural persons) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning the assessment are set out below.

In your confirmatory application, you state that ‘no redacted version of the document ARES (2022)4823096 has been provided’ and that you ‘have not seen the requested
As stated above, in its initial reply, the Secretariat-General granted full access to document 2 and provided wide partial access to document 1 based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. In this respect, you have received copies of both documents together with the initial reply of the Secretariat-General. It is however true that both of the disclosed documents 1 and 2, as well the reply itself, had reference numbers ARES(2023)7248546. The reason for this is that in the process of registration of the initial reply to your request, the Ares system stamped the released documents 1 and 2, with the reference number of the initial reply ARES(2023)7248546. Thus, number ARES(2023)7248546 and the original number ARES (2022)4823096 on the documents have overlapped and you have received documents 1 and 2 with reference ARES(2023)7248546 instead of reference ARES (2022)4823096.

As stated above, in your confirmatory application you do not contest that parts of the document are covered by the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. However, you ask the Commission to ‘verify to which extent it is the case that the “requested documents contain personal data such as the names, functions, handwritten signatures and contact details of those who do not form part of the senior management of the European Commission.”’

In this respect, the Secretariat-General confirms that document 1 indeed contains personal data such as names, contact details and initials of staff members of the European Commission not holding senior management positions. However, wider access is now granted to document 1, namely to the names of staff members in senior management positions.

In your confirmatory application, you also request a clarification on whether the Secretariat-General ‘did actually intend to grant me full or partial access to the document, as their letter is not completely clear on this point.’ As stated above, the Secretariat-General confirms that full access is granted to document 2 and wider partial access is granted to document 1, subject to the redaction solely of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001.

Moreover, in your confirmatory application, you request the Commission to examine whether the extension of the deadline as per Article 7(3) of Regulation (EC) No 1049/2001 ‘was justified in this case.’ You also request, I quote, ‘when considering this confirmatory application, you also look into whether my right of access to documents and the rules in Regulation 1049/2001 were not breached due to the excessive time taken to respond to a request for just one single document, which should have been easy to locate, given that it had just been shared with the Ombudsman.’

On a preliminary note, please note that the scope of a confirmatory application, as referred to in Article 7(2) of Regulation (EC) No 1049/2001, is limited to asking the institution to reconsider its position in the event of a total or partial refusal at initial stage.
As stated in the reply of the Commission to the recommendations of the European Ombudsman\(^3\), the Commission is striving to ensure that requests are processed within statutory deadlines. However, the number of requests for public access to documents has significantly increased over the last few years, which has caused delays. The Commission has done its best to handle your case within the deadlines provided by the 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’.

As per settled case-law\(^4\), 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\(^5\) (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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’\(^6\). Likewise, in the Psara judgment, the General Court added that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public […]’\(^7\).

As explained to you at initial stage, 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\(^8\) (hereafter ‘Regulation (EU) 2018/1725’).

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\(^3\) Reply of the European Commission to the recommendations of the European Ombudsman related to the time taken by the European Commission to deal with requests for public access to documents. Strategic inquiry: OI/2/2022/MIG.


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


However, the case-law issued concerning 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’.

The names of the persons concerned in this case, 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.

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.

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10 *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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. In fact, you state that you are ‘happy to receive a redacted version of the document with those elements redacted’, thus implying that there is no necessity to have the personal data transmitted. 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. In any event, in your confirmatory application, you only request an ‘access to the parts of this document which are not covered by the personal data protection clauses in Regulation 1049/2001’ and access has already been granted to these parts of document 1.

4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the widest possible partial access has been granted to the documents requested.

5. **REUSE**

You may reuse the documents disclosed, which have been produced by the European Commission, based on the Commission Decision on the reuse of Commission documents. You may reuse these documents free of charge and for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. The Commission does not assume liability stemming from the reuse.
6. **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

Enclosures: 2