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

Subject: Your confirmatory applications for access to documents under Regulation (EC) No 1049/2001 – EASE 2023/6011

Dear Mr Dohle,

I am writing in reference to your confirmatory application registered on 15 November 2023, submitted 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’).

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

1. Scope of Your Request

In your initial application of 12 October 2023, registered on 15 October 2023, you requested access to, I quote:

‘[…] documents which contain the following information: All documents/data about the assignment of [X\(^3\)], a former National Security Council aide from Washington, at the European Commission, working in DGs Relex and

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3 In your initial application, you referred to an identified individual who cannot be considered as neither a public figure acting in a public capacity nor a member of the senior management of the Commission in the context and scope of your request. For personal data protection reasons, the name of this individual has been replaced by ‘X’ in this decision.
Enlargement. […] Especially where it concerns, but not limited to, the role and responsibilities as well as contractual matters about this assignment.’

Given the subject matter of your application, its processing at the initial stage was attributed to the European Commission’s Directorate-General for Human Resources and Security.

In its reply to your initial application, dated 8 November 2023, the Directorate-General for Human Resources and Security informed you that:

‘your request cannot 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.’

In this regard, the Directorate-General for Human Resources and Security explained that:

‘Information about the existence of documents falling under the scope of your request, formulated in relation to an identified or identifiable natural person, and their identification, if any, constitutes processing of personal data and reveals information relating to an identified or identifiable natural person (personal data).’

In your confirmatory application, you request the European Commission (the ‘Commission’) to review the above-mentioned position of the Directorate-General for Human Resources and Security. You support your request with arguments which are addressed below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001 AND REGULATION (EU) 2018/1725

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 to the initial application, issued by the Commission service responsible.

Following this review, I regret to inform you that the Secretariat-General cannot confirm nor deny the existence of any documents held by the Commission and falling within the scope of your request, which concerns possible documents on a specific natural person. By confirming or denying the existence of such documents the Secretariat-General would disclose personal data which could reveal (to the public at large) the existence or not of an employment relationship between said person and the Commission, which would unduly undermine the protection of the privacy and the integrity of the individual concerned.

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Indeed, as already explained to you by the Directorate-General for Human Resources and Security in its reply to your initial application, information about the existence of documents falling within the scope of an application for access to documents which is formulated in such a way that it relates to an identified or identifiable natural person, reveals information relating to that identified or identifiable natural person, which constitutes processing of personal data within the meaning of the relevant provisions of Article 3 of Regulation (EU) 2018/1725⁵.

In this respect, please note that in its judgment in Case C-28/08 P (Bavarian Lager)⁶, 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 data⁷ (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’ ⁸.

In the VG v European Commission judgment, the General Court ruled that even anonymised data should be considered as personal data, if it would be possible to link them to an identifiable natural person through additional information⁹.

In the present case, a clear link to an identifiable person remains since your request focuses on an identified natural person. Therefore, the disclosure of any information about the existence of any documents falling within the scope of your application, would constitute processing of personal data, as this information cannot be disassociated from the natural person it concerns.

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⁵ Please note that a mere mentioning of the name and surname of an identified natural person concerned by an application for access to documents in the Commission’s reply to such an application also constitutes processing of personal data within the same meaning of Regulation (EU) 2018/1725.


⁸ European Commission v The Bavarian Lager judgment, cited above, paragraph 59.

In your confirmatory application, you claim that:

‘[...] the exception to protect personal privacy does not apply to public officials when they are acting in an official capacity. This means, in our understanding, that documents relating to their work are not exempt from public access.’

In this context, please note that, as confirmed by the Court of Justice in the Rechnungshof case, ‘[...] the expression ‘private life’ must not be interpreted restrictively and that “there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life”’\(^{10}\). Moreover, in the \textit{VG v Commission} judgment, the General Court ruled that ‘in addition to names, information concerning the professional or occupational activities of a person can also be regarded as personal data’\(^{11}\).

In this respect, you also state that:

‘The current request concerns a public official acting in official capacity, i.e. on assignment for the US State Authorities.’

Please note that to balance the need for transparency with that of protection of personal data mentioned in Article 9(3) of Regulation (EU) 2018/1725 and after weighing up the interests of data subjects with those of transparency in Article 9(1)(b) thereof, the Commission decided to implement wider transparency to Commission members part of the senior management and to Commissioners and members of their Cabinets, considering that disclosing their name and function would not prejudice their legitimate interests.

Moreover, following the judgment in \textit{Bavarian Lager}\(^{12}\) and the guidance by the European Data Protection Supervisor, the Commission decided to apply a wider standard of transparency to public figures acting in a public capacity, which includes people holding a public mandate and involving public resources.

For all other cases and types of personal data, the Commission considers that the balancing favours, by default, protection of personal data and it is for the recipient to establish that transmission is necessary for a specific purpose in the public interest.

The Secretariat-General would like to point out that contrary to what you claim in your confirmatory application, the identified natural person mentioned in your request cannot be considered as a public figure acting in a public capacity in the context and scope of your request.

\(^{10}\) Judgment of the Court of Justice of 20 May 2003, \textit{Rechnungshof and Others v Österreichischer Rundfunk}, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

\(^{11}\) \textit{VG v European Commission} judgment, cited above, paragraph 64.

\(^{12}\) \textit{European Commission v The Bavarian Lager} judgment, cited above.
In fact, the present post of the identified natural person mentioned in your request cannot be considered as an argument that this individual was a public figure acting in a public capacity within the scope and in the context of your request.

Please note that, 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.

To establish the necessity to have the said personal data transmitted to you, you argue that, I quote:

‘Considering the fact that concerned public official was involved in the US lobby regarding the Romanian Children File, we consider transparency in the public interest. There is, among other things, a necessity to be transparent about which post(s), fields of interests this public servant dealt with, and during which timeframe.’

The Secretariat-General considers that this argument cannot justify the transmission of the personal data at stake since abstract and generic arguments are not sufficient to establish the necessity of the transmission of personal data, let alone its proportionality. Moreover, according to the case-law in the Psara judgment, abstract and general references to possible wrongdoings cannot justify the need for the transmission of the personal data.

In this context, it must be also recalled that, as ruled by the General Court, ‘general considerations’, such as the requestor’s belief that the personal data concerned represent a public interest, are insufficient to warrant a transmission of these data. Likewise, so are – according to the Court of Justice – general references to ‘transparency’.

The fact that to further substantiate the necessity to have the personal data concerned transmitted, you put forward arguments of a general nature, proves that the purpose for which you wish to obtain these data cannot be considered as ‘specific’ within the meaning of Article 9(1)(b) of Regulation (EU) 2018/1725.

Indeed, as mentioned above, for an institution to be able to weigh up the various interests of the parties concerned by a request to transmit personal data, the necessity of such a transfer must be established by means of providing an ‘express and legitimate justification or any convincing argument’.

Therefore, as regards the justification of your request for having the personal data concerned transmitted to you, in the Secretariat-General’s opinion, the above-mentioned arguments do not demonstrate the necessity for transmission of these personal data, as the Secretariat-General does not find the purpose of this transmission in the alleged public interest to be sufficiently specific, as required by Article 9(1)(b) of Regulation (EU) 2018/1725.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the Commission must assess 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 Commission must examine if 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. As already explained above, in the present case, the condition enshrined in Article 9(1)(b) of Regulation (EU) 2018/1725 is not fulfilled.

Consequently, the Secretariat-General considers that a necessity to have the said personal data transmitted to you for a specific purpose in the public interest – within the meaning of Article 9(1)(b) of Regulation (EU) 2018/1725 – has not been established.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by the processing of the request, 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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17 Judgment in ClientEarth v European Food Safety Authority, cited above, paragraphs 51-52.

18 European Commission v The Bavarian Lager judgment, cited above, paragraph 78.
For the reasons explained above, the Secretariat-General cannot confirm nor deny the existence of any documents held by the Commission and falling within the scope of your request as the need to obtain access to the personal data resulting from the handling of your request, for a specific purpose in the public interest, has not been substantiated and there are reasons to assume that the legitimate interests of the individual concerned would be prejudiced by disclosure of the personal data concerned.

3. 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 TFEU.

Yours sincerely,

For the Commission
Ilze JUHANSONE
Secretary-General

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
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EUROPEAN COMMISSION