**Main issue:**

A large majority of the documents identified in the context of requests for access to documents contain personal data. Consequently, Commission departments must assess constantly whether the personal data contained in the documents requested have to be disclosed or must be withheld pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 and the Data Protection Regulation (EU) 2018/1725. The latter becomes entirely applicable when handling requests for access to documents.

Regulation (EU) 2018/1725 has strengthened the rights and freedoms of data subjects. This Regulation stipulates that an ‘unauthorised disclosure of, or access to, personal data’ constitutes a personal data breach and establishes a set of measures to be taken to manage any such personal data breach.

**What is a personal data breach in access to documents?**

A reply to a request for access to documents constitutes a personal data breach if it unlawfully discloses personal data.

**There are five types of lawful disclosure** of personal data under Regulation (EC) No 1049/2001, namely:

1. The conditions for transmission of personal data of Article 9(1) and (2) of Regulation (EU) 2018/1725 are met (see under type 1 below);
2. The names of public figures acting in a public capacity are disclosed (see under type 2 below);
3. A document containing personal data, which has already been made public lawfully, is transmitted to the applicant (applicable both to applicants residing inside and outside the EU/EEA) (see under type 3 below);
4. The conditions for an international transfer of personal data of Chapter V of Regulation (EU) 2018/1725 are met and the conditions stipulated under point 1 or 2 apply (applicable only if the applicant resides in a third country (outside the EU/EEA) or lodges a request on behalf of an international organisation) (see under type 4 below);
5. The applicant requests access exclusively to his/her own personal data contained in a document. The EU Courts ruled that the disclosure of personal data exclusively concerning the applicant for access in question cannot be refused on the ground that it would undermine the protection of privacy and the integrity of the individual. However, the privacy and integrity of the applicant must be guaranteed in relation to third parties.

- Disclosure of personal data that does not fall under one of these five options is unlawful and constitutes a personal data breach.

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3. Regulation (EU) 2018/1725, Article 3(16) states that ‘personal data breach’ means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed.

4. In case an applicant requests a document disclosed to another applicant in the past, in which personal data of natural persons have not been redacted, as they would have been according to the current administrative practice, please make the necessary redactions following the current practice.

5. Judgement of the General Court of 27 November 2018, VG v European Commission, Joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 54. In this judgment, the General Court confirmed the non-disclosure to the applicant of documents containing his personal data and personal data of third parties, based on the reasoning that it was not possible to separate certain parts of the documents at issue from the other parts, and to regard them as not being covered by the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001, or to separate, from among those documents, which ones contained the personal data at issue relating to the applicant and which contained personal data relating to other third parties (paragraph 73).
The non-objection, or explicit consent, of a data subject to the disclosure of his/her personal data to third parties does not constitute sufficient ground for public disclosure in itself but can be taken into account, if the first condition of Article 9(1)(b) of Regulation (EU) 2018/1725 is met (applicant establishes the necessity for the disclosure for a specific purpose in the public interest).

On type 1:
The following cumulative, successive conditions need to be fulfilled:

- the applicant substantiates a necessity for a specific purpose in the public interest⁶ (demonstrated by express and legitimate justifications or convincing arguments) to obtain access to these personal data; and
- if the applicant has demonstrated such a necessity, there is no reason to think that the transmission would prejudice the legitimate interests of the individuals concerned (for instance, if the data subject has unambiguously given his/her consent or his name is proactively published under the applicable rules⁷); and
- the institution considers the transmission proportionate for the specific purpose brought forward by the applicant, after having demonstrably weighed the various competing interests⁹; and
- no less invasive measures are available, taking into account the principle of proportionality¹⁰.

If all those conditions are met, the data subject(s) concerned should be informed, unless the data subject(s) were already provided with the information, at the time when their personal data were collected/obtained by the controller, that their personal data may be disclosed in such circumstances.

On type 2:

- It applies only when a public figure is acting in a public capacity;
- A non-exhaustive list of the persons who are considered public figures is included in the guidance of the Secretariat-General regarding personal data of third parties and Commission staff members (see under links below);
- In case of doubt, whether a name belongs to a public figure or not, please consult your legal coordinator on access to documents.

On type 3:

Sometimes, applicants request access to documents that are already publicly available (for example, because they are not aware that they are public or because they want an official reply by the Commission). To reconcile the right to the protection of personal data with the right of access to documents (in accordance with Article 9(3) of Regulation (EU) 2018/1725), the Commission transmits (‘re-publishes’) documents and the personal data contained if the document was made publicly available lawfully, irrespective of whether the applicant established any need for the personal data being transmitted.

The fact that a document containing personal data is publicly available on the internet, however, does not mean that it was made public lawfully. Therefore, the Commission when faced with such a request needs to assess the source of publication of the document containing personal data. In general, the following rule applies:

- A document containing personal data can be transmitted to the applicant, if it has been made public by an EU institution, body or agency unless there would be manifest reasons to believe that the publication of personal data contained in the document was not lawful;
- A document containing personal data can be transmitted to the applicant if it has been made public by a public authority of a Member State unless there would be manifest reasons to believe that the publication of personal data contained in the document was not lawful.

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⁶ As specified in Recital 28 of Regulation 2018/1725, ‘[t]he specific purpose in the public interest could relate to the transparency of Union institutions and bodies.’

⁷ This is, for instance, the case as regards the publication of the names of self-employed individuals in the Transparency Register and the Register of Commission Expert Groups and Other Similar Entities.

⁸ If the applicant has not established a need, the institution does not have to examine the absence of any prejudice to the person’s legitimate interests.

⁹ As required by Article 9(1)(b) of Regulation 2018/1725. The proportionality principle implies that the proposed transfer must be set against less invasive measures.

Please note that this general rule applies to the whole context of the personal data concerned, namely the whole document needs to be public. For example, the fact that the names and telephone numbers of Commission staff has been made public does not make the disclosure of the same personal data included in an e-mail or Commission document lawful if these documents themselves are not public.

On type 4:

An international transfer refers to situations where the applicant resides outside the EU/EEA or lodges a request for access on behalf of an international organisation.

Chapter V of Regulation (EU) 2018/1725 provides for a number of scenarios and conditions under which the transfer of personal data to third countries is lawful. However, when applied to the case of requests for access to documents, the Commission has to conduct a case-by-case assessment to determine whether any of the scenarios for international transfer are fulfilled.

The main scenario to fulfil the conditions of Chapter V of Regulation (EU) 2018/1725 in case of access to documents requests is the existence of an adequacy decision based on Article 47(1) of the Regulation. In such case, the transfer can take place where the Commission has previously decided that the third country or international organisation in question ensures an adequate level of protection and where the personal data are transferred solely to allow tasks within the competence of the controller to be carried out. See the list with countries recognised by the Commission as providing adequate protection here: [https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en](https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en).

Please keep in mind that in addition to adequacy the conditions set out under point 1 or 2 of this fiche need to be fulfilled.

Other scenarios and conditions which are less likely but theoretically could apply in case of a request for access to documents are:

- The data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision (Article 50(1)(a) of Regulation (EU) 2018/1725) and the conditions set out under point 1 or 2 of this fiche are fulfilled;
- The transfer is necessary for important reasons of public interest recognised by EU law (Article 50(1)(d) of Regulation (EU) 2018/1725) and the conditions set out under point 1 or 2 of this fiche are fulfilled.

Case-law:

- Case T-121/05, Borax v Commission, judgment of 11 March 2009;
- Case C-28/08 P, Bavarian Lager v Commission, judgment of 29 June 2010;
- Case C-127/13, Strack v Commission, judgment of 2 October 2014;
- Case C-615/13, ClientEarth v EFSA, judgment of 16 July 2015;
- Case T-115/13, Gert-Jan Dennekamp v Commission, judgment of 15 July 2015;
- Case T-300/10, Internationaler Hilfsfonds v Commission, judgment of 22 May 2012;
- Case T-314/16 et T-435/16, VG v Commission, judgment of 27 November 2018;

Reference documents/links:

- Personal data of third parties, see: [https://myintracomm.ec.europa.eu/sg/docinter/Documents/Fiche9-Third-party_names_and_signatures](https://myintracomm.ec.europa.eu/sg/docinter/Documents/Fiche9-Third-party_names_and_signatures);
- Templates of initial replies refusing access to documents (applicant residing inside or outside the EEA) and examples of confirmatory decisions available on the Commission’s access-to-documents webpages on My Intracommm;
- The full text of judgments of the EU Courts can be consulted on the website of the ECJ: [www.curia.eu](http://www.curia.eu).

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