Dear Sir,

Subject: Your application for access to documents – GESTDEM 2024/0167

We refer to your request for access to Commission documents registered on 11 January 2024 under the above-mentioned reference number.

You request access to:

- The Ad-hoc Ethical Committee opinion concerning post-mandate activities planned by former Commissioner Kroes of 3 November 2015, reference Ares(2015)4890376 […].
- The exchange of letters between President Jean-Claude Juncker and former Commissioner Neelie Kroes regarding the request for post-mandate activities on which the above-mentioned opinion was made.’

The following documents fall within the scope of your application:

- Ad-hoc Ethical Committee opinion, 6 November 2015, Ares(2015)4890376 (hereafter ‘document 1’);
- reply from Ms Kroes to former President Juncker, 11 December 2015, Ares(2024)697400 (hereafter ‘document 3’).

Since document 3 originates from a third party, the originator of the document has been consulted.

Following an examination of the documents under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents and taking into account the opinion of the third party, I regret to inform you that your application cannot be granted, as disclosure is
prevent the right of access laid down in Article 4(1)(b) (protection of privacy and integrity) of Regulation (EC) No 1049/2001.

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)\(^1\), 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\(^2\) (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the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/EC\(^3\) (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.

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’\(^4\).

As regards in particular document 1, the use of the expression ‘any information’ in the definition of the concept of ‘personal data’ reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it ‘relates’ to the data subject\(^5\). Consequently, opinions of the ethical committee on former Commissioners’

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compatibility with envisaged activities constitute personal data in the meaning of Regulation (EU) 2018/1725.

The documents which you seek to obtain contain information with regard to an application that former Commissioner Kroes has withdrawn. Withdrawn applications only reflect initial intentions of former Commissioners. These personal intentions of former Commissioners who have subsequently changed their mind and could not raise any potential conflict of interest or incompatibility could not possibly violate their duty to behave with integrity and discretion as required by Article 245 of the Treaty on the Functioning of the European Union and thus negatively affect the Commission's reputational image. For that reason, they cannot be released as their release would harm the privacy and integrity of the Commissioners by making known to the public information on intentions of post mandate professional activities not materialised.

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 your application you argue that ‘[s]ince the investigation conducted by OLAF in this case has now been concluded, and the former Commissioner has, according to a press release she has sent to press, been cleared of any wrongdoing, there is no reason to keep these documents confidential’.

In this regard, there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by the disclosure of the documents in question, as there is a real and non-hypothetical risk that such public disclosure would harm her privacy and subject her to unsolicited external contacts.

Former Vice-President Kroes has objected to disclosure by explaining that she had not been allowed to publicly defend herself during the OLAF investigation in order not to jeopardize the investigation as such, and that this fact had taken an intense toll on her personally. This also had had a huge impact on her personal reputation, which was only partly repaired after OLAF’s investigation had ended without recommending any actions to be taken in her regard. The news of her being cleared of all allegations had not received the same public attention as when the OLAF investigation was opened or ongoing. Once the OLAF investigation was closed, Ms Kroes issued indeed a press release in order to inform the media and public. Any further disclosure after the end of the independent investigation by OLAF would seriously affect her integrity and privacy.
We have considered whether partial access could be granted to the documents requested. It is, however, not possible to grant access to an expunged version of the documents, as they are entirely covered by the exception.

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 Secretary-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 Bruxelles

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

Yours faithfully,

Tatjana VERRIER