



EUROPEAN COMMISSION  
SECRETARIAT-GENERAL

The Secretary-General

Brussels,  
SG.B.4/VD/bb - sg.dsg2.b.4(2015)4350499

*By registered mail:*

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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT  
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2015/3298**

Dear Mr Zinser,

I refer to your letter of 12 August 2015, registered on 19 August 2015, 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<sup>2</sup> ("Regulation 1049/2001").

**1. SCOPE OF YOUR REQUEST**

In your initial application of 16 June 2015, addressed to the Directorate-General for Justice and Consumers (DG JUST), you requested access to documents containing information on the preparation of the Practice Guide for the application of the Brussels IIa Regulation.<sup>3</sup>

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

<sup>3</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338/1 of 23.12.2003.

The Commission has identified the following documents as falling under the scope of your request:

- (1) Terms of Reference "Revision of practice guides": Judicial cooperation in civil matters in the EU – A guide for legal practitioners and Practice Guide for the application of the Brussels II a Regulation, ARES (2012) 624911 ("document 1");
- (2) Specific offer submitted by the contractor for the revision of the practice guides, dated 17 October 2012, ARES (2012) 1226242 ("document 2").
- (3) Contrat spécifique JUST/2012/JCIV/FW/0007 – A1 mettant en application le Contrat-cadre JLS/2008/A5/LOT1/01/TIPIK; ARES (2015) 3223342 ("document 3");
- (4) Contrat-Cadre de Services – Contrat JLS/2008/A5/01/Lot1/Ecriture et graphisme, ("document 4");

In the framework of the Civil Justice Programme 2012, the Commission decided to update and republish two practice guides for law practitioners. To that end, and on the basis of the framework contract between the Commission and the contractor (document 4), the Commission issued in 2012 the terms of reference (document 1) for the revision of the 2006 Practice Guide for the application of the new Brussels II a Regulation. The offer that was submitted by the contractor was listed as document 2 and the specific contract for the services signed with the external contractor in question as document 3.

In its initial reply of 31 July 2015, DG JUST provided wide partial access to documents 1 and 2 and refused access to document 3 and 4 based on the exception of Article 4(2) first indent (protection of commercial interests) of Regulation 1049/2001. DG JUST also provided you with a copy of the 2006 version of the guide that was under revision.

Through your confirmatory application you ask that your *original request is fully answered* and that the Commission *discloses fully the contract details and the directions given*.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I am pleased to inform you that partial access is granted to document 4.

As regards document 2 and the redacted parts of documents 1 and 3, I regret to inform you that I have to confirm the initial decision of DG JUST to (partially) refuse access, based on the exceptions of Article 4(2) first indent (protection of commercial interests) and Article 4(1)(b) (protection of personal data) of Regulation 1049/2001, for the reasons set out below.

## **2.1. Protection of privacy and the integrity of the individual**

Article 4(1)(b) of Regulation 1049/2001 provides that access to documents is refused where disclosure would undermine *the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*.

All of the requested documents contain names, e-mail addresses and functions of natural persons. In your confirmatory application you do not appear to contest the redaction of personal data from documents 1 and 3.

In any event, I would like to inform you that in its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001<sup>4</sup> (hereafter 'Data Protection Regulation') becomes fully applicable<sup>5</sup>.

Article 2(a) of the Data Protection Regulation provides that '*personal data*' shall mean *any information relating to an identified or identifiable person [...]*. According to the Court of Justice, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life"*<sup>6</sup>. The names<sup>7</sup> of the persons concerned as well as their e-mail addresses and functions (from which their identity can be deduced), undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

Pursuant to Article 8(b) of Regulation 45/2001, the Commission can only transmit personal data to a recipient subject to Directive 95/46/EC if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.<sup>8</sup>

In addition, based on the information at my disposal, there is no reason to think that the legitimate rights of the individuals concerned would not be prejudiced by the transfer of their personal data.

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<sup>4</sup> 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, OJ L 8 of 12 January 2001, page 1.

<sup>5</sup> Judgment of the Court of Justice of 29 June 2010 in Case C-28/08P, *Commission v Bavarian Lager*, paragraph 63.

<sup>6</sup> Judgment of the Court of Justice of 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v Österreichischer Rundfunk and Others*, paragraph 73.

<sup>7</sup> Judgment of the Court of Justice of 29 June 2010 in Case C-28/08P, *Commission v Bavarian Lager*, paragraph 68.

<sup>8</sup> *Idem*, paragraphs 77 and 78.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

Therefore, in accordance with Article 4(1)(b) of Regulation 1049/2001, access to the personal data contained in documents 1-4 above has to be refused, as the release thereof would prejudice the privacy and integrity of the individuals concerned.

## **2.2. Protection of commercial interests of a natural or legal person**

Article 4(2), first indent, of Regulation 1049/2001 provides that the *institutions shall refuse access to a document where disclosure would undermine the protection of (...) commercial interests of a natural or legal person, including intellectual property.*

The terms of reference (document 1) have been fully disclosed to you, subject to redactions of personal data only.

The specific offer submitted by the contractor (document 2) is three-page document, listing, in a form of a table, the specific tasks and activities that the external contractor proposed to carry out for the revision of the two guides. I note that the part concerning the revision of the civil justice practitioners' guide is outside the scope of your request. As regards the part pertaining to the revision of the guide for the application of the Brussels II a Regulation, the table lists all the activities and tasks that the contractor is proposing to implement and their respective prices per unit, including the total price, as well as the global price for the revision of the guide in question.

The limited information redacted from the specific contract (document 3) concerns the price agreed for the implementation of the contract, as well as contract details and financial information of the external contractor.

Finally, the information redacted from the framework contract (document 4) concerns contact and financial information of the contractor, as well as the technical offer made by the contractor (Annex II).

As explained above, the parts withheld from documents 2, 3 and 4 reflect sensitive commercial information about the contractor concerned and the contractual relationship between the external contractor and the Commission, such as detailed activities offered and performed by the company and their respective prices, as well as information about the management of the contract and the contractor's methodology. Through this contractual and financial information, one could gain access to significant confidential information about the commercial activities of the company in question and its commercial strategy. Its public release would potentially damage the company's commercial interests, as it would put in the public domain confidential financial data, which could be adversely used by the company's competitors. In particular, public access to information relating to the prices offered by the company would harm its position on the market and have a negative impact on its ability to exercise commercial and business activities in the future.

Having regard to the above, I consider that the use of the exception under Article 4(2), first indent, of Regulation (EC) No 1049/2001 on the grounds of protecting commercial interests is justified with respect to document 2 and the relevant parts redacted from documents 3 and 4.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

As mentioned above, Article 4(1)(b) of Regulation 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

The exception laid down in Article 4(2) first indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you do not mention any overriding public interest that would outweigh the protection of the commercial interests of the company in question. I cannot see any public interest in the full disclosure of the documents either.

Therefore, I consider that in this case there is no overriding public interest that would outweigh the protection of the commercial interests of the company involved, as provided for in Article 4(2), first indent, of Regulation 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,<sup>9</sup> provides further support to this conclusion.

### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting (further) partial access to document 3 and partial access to documents 2 and 4. I am pleased to inform you that partial access is granted to document 4, as explained above. However, no meaningful partial access is possible to document 2 and no further partial access is possible to document 3 without undermining the interests described above.

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<sup>9</sup> Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *Commission v Bavarian Lager*, paragraphs 56-57 and 63.

## **5. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

A handwritten signature in black ink, consisting of a series of overlapping loops and a long horizontal stroke extending to the right.

Alexander Italianer

Enclosures: Document 4 (partial access)