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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 2016/301**

Dear Ms Cann,

I refer to your e-mail of 10 February 2016, registered on 11 February 2016, 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 21 January 2016, you requested access to:

- *all minutes of the external meetings listed on the public website<sup>3</sup> on meetings with organisations and self-employed individuals that Jonathan Faull has held on the Brexit/ UK referendum;*

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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> Meetings of Director-General Jonathan Faull with organisations and self-employed individuals: <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=4e595d6e-b89a-465b-9b63-b293c8fd8e30&d-6679426-p=1>

- *copies of any position papers sent to him by external lobby groups on the Brexit/UK referendum.*

In its initial reply of 4 February 2016, the Task Force for Strategic Issues related to the UK Referendum (hereinafter, 'UKTF') identified six meeting notes as falling under the scope of your request, i.e.:

1. *Minutes of meeting with the Royal Society for the Protection of Birds (RSPB) on 22/10/2015;*
2. *Minutes of meeting with the City of London Corporation on 14/10/2015;*
3. *Minutes of meeting with Pro-Europa, held on 21/09/2015;*
4. *Minutes of meeting with Centre for European Reform (CER) on 15/09/2015;*
5. *Minutes of meeting with the Centre for European Policy Studies (CEPS) on 08/09/2015;*
6. *Minutes of meeting with Open Europe on 04/09/2015.*

It refused to grant access to these notes based on Article 4(3), first and second subparagraphs (protection of the decision-making process), of Regulation 1049/2001.

In your confirmatory application, you request a review of this position as regards the UKTF's refusal to grant access to the six documents, arguing that *no harm would occur if the meeting notes were released*. You maintain that the initial reply does not explain how the disclosure of the *notes* would *specifically and actually undermine* the decision-making process and contest the Commission's involvement in the decision-making process in the European Council.

## **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 or service concerned at the initial stage.

Following this review, I regret to inform you that the refusal of the UKTF to grant access to the requested documents has to be confirmed, based on Article 4(3), first subparagraph (and in the alternative, second subparagraph) (protection of the decision-making process), of Regulation 1049/2001, for the reasons set out below.

### **2.1. Protection of the decision-making process**

Article 4(3) of Regulation 1049/2001 provides that *[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

*Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

The six *meeting notes*, to which you request access, were drawn up by the UKTF in the context of the decision-making process as regards the establishment of a new settlement for the United Kingdom within the EU. These *notes* reflect the opinions and perceptions of Commission staff on meetings of the UKTF with interest representatives and think tanks, and are for internal use only. They are informal documents reflecting preliminary opinions and views of Commission officials and third-party meeting participants in relation to matters possibly relating to the new settlement for the United Kingdom within the EU.

At the European Council meeting of 17 and 18 December 2015, its members agreed to work together closely to find mutually satisfactory solutions in all four areas mentioned in the British Prime Minister's letter to Mr Tusk of 10 November 2015<sup>4</sup>.

The European Council of 18 and 19 February 2016 agreed on a set of arrangements for a new settlement for the United Kingdom within the EU<sup>5</sup>. The European Council also decided that these arrangements will become effective only on the date the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain an EU Member State<sup>6</sup>. In your confirmatory application you state that *the Commission's role as a "facilitator" in this process maybe be "crucial", [...] but the Commission is not in a decision-making position in the UK government – European Council negotiations.* The decision-making process protected by Article 4(3) of Regulation 1049/2001 is not limited to the Commission but refers to the institutions in general, including the European Council and the Council. It therefore includes the decision-making process on a new settlement for the United Kingdom within the EU, which is based on an agreement reached within the European Council, and, as you admit yourself, entails the involvement of the Commission.

Furthermore, the decision-making process concerning certain arrangements agreed at the European Council of 18 and 19 February 2016, would remain open and ongoing even after confirmation by the Government of the United Kingdom of the UK's intention to remain an EU Member State, as these arrangements invite the Commission to prepare legislative and implementing proposals and/or require the (subsequent) approval of the co-legislators.

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<sup>4</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/475679/Donald\\_Tusk\\_letter.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf).

<sup>5</sup> A New Settlement for the United Kingdom within the European Union, Extract of the conclusions of the European Council of 18-19 February 2016, OJ C 69I , 23.2.2016, p. 1–16.

<sup>6</sup> Ibid.

In addition, Section E of Annex I to the Conclusions of the European Council of 18-19 February 2016 makes clear that that Decision will take effect only ‘on the same date as the Government of the United Kingdom has decided to remain a member of the European Union’. This means that, although an agreement was reached at the European Council, the effect of that agreement is conditional upon a further decision-making process, connected to the United Kingdom referendum, which is inextricably linked to the European decision-making process and still ongoing.

Consequently, in the light of both the possible future need to prepare further proposals and of the condition upon which depends the effect of the agreement, the decision-making process did not stop with the European Council of 18 and 19 February 2016.

Disclosure of the requested documents at this stage would seriously undermine the decision-making process with regard to the establishment of a new settlement for the United Kingdom within the EU, as it would put in the public domain internal, informal opinions of Commission staff, as well as preliminary views and positions of Commission officials and interest representatives, giving rise to premature, and potentially erroneous, inferences about the delicate topics under discussion. The content of these purely internal documents could be misunderstood, or misused, in the context of the (in/out) referendum in the United Kingdom, distorting or impairing a serene discussion on this highly sensitive matter. The characterisation of the decision-making process as regards a new settlement for the United Kingdom within the EU as unprecedented is further justified by the fact that the set of arrangements agreed on 18-19 February are an important factor in the forthcoming referendum on the continued membership of a Member State in the EU.

The outcome of the ongoing decision-making process as regards a new settlement for the United Kingdom within the EU is essential for the taking effect of a series of arrangements and other decision-making processes to start<sup>7</sup>. Its sound conclusion is of paramount importance for the Union as a whole, i.e. the continued membership of a Member State. Therefore, the Commission has to refrain from taking any measures which would negatively affect the described decision-making process, such as the disclosure of internal, informal opinions of Commission officials and preliminary views and positions of interest representatives.

If the decision-making process were nevertheless considered to be closed following the agreement of the European Council concerning a new settlement for the United Kingdom within the European Union – *quod non* – I consider, in the alternative, that the refused documents would nevertheless be covered by the exception provided for in Article 4(3), second subparagraph, for similar reasons to those set out above. Disclosure of internal *meeting notes* which reflect opinions and views for internal use as part of preliminary

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<sup>7</sup> Several legislative initiatives to be prepared and adopted, e.g. a proposal to amend Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems; a proposal to amend Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union; a proposal to complement Directive 2004/38 on free movement of Union citizens.

deliberations on such a sensitive subject would seriously harm the institutions' (and more broadly, the Union's) (future) decision-making process as regards the continued membership of the United Kingdom in the EU, including – but not limited to – the adoption and implementation of the set of arrangements agreed on at the European Council of 18 and 19 February 2016.

Consequently, I conclude that access to the six *meeting notes* has to be refused, based on Article 4(3), first subparagraph (and, in the alternative, second subparagraph) (protection of the decision-making process) of Regulation 1049/2001.

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

Article 4(1)(b) of Regulation 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 your confirmatory application you do not seem to question the applicability of the above-mentioned exception to the document concerned. Nevertheless, I would like to provide additional explanations of how the disclosure of certain parts of the document would undermine the interests protected by this exception.

The documents in question contain names, telephones numbers and office numbers of Commission staff (not forming part of senior management), as well as names of interest representatives and think tank members. These data constitute personal data within the meaning of Article 2(a) of Regulation 45/2001<sup>8</sup>, which defines personal data as *any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.*

In consequence, the public disclosure of this data in the requested document would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling<sup>9</sup>, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients 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>10</sup> Only fulfilment of both conditions

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<sup>8</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.

<sup>9</sup> Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*

<sup>10</sup> Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 77-78.

enables one to consider the processing (transfer) of personal data as compliant with the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that the Institution does not have to examine *ex officio* the existence of a need for transferring personal data<sup>11</sup>. In the same ruling, the Court stated that if the applicant has not established a need, the institution does not have to examine the absence of prejudice to the person's legitimate interests<sup>12</sup>.

Neither in your initial, nor in your confirmatory application, have you established the necessity of, nor any interest in, disclosing any of the above-mentioned personal data. Therefore, I have to conclude that the transfer of personal data through the disclosure of the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

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

The exceptions laid down in Article 4(3) (protection of the decision-making process) 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 argue that the [r]elease [of the documents] *would bring transparency to the role of the Commission and lobby groups in this important area where there is a significant public interest*. However, while there is certainly a public interest as regards a new settlement for the United Kingdom within the EU, please note that in its Judgment of 16 July 2015 in case C-612/13 P, *ClientEarth v Commission*<sup>13</sup>, the Court of Justice held that a general reference to *transparency* is not per se sufficient to substantiate an overriding public interest, by ruling that *considerations as general as those relied on by ClientEarth are not capable of demonstrating that the principles of transparency and democracy raised in this case issues of particularly pressing concern which could have prevailed over the reasons justifying the refusal to disclose in their entirety the contested studies [...]*.

Nor have I been able to identify any public interest capable of overriding the public interest protected by Article 4(3) of Regulation 1049/2001.

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<sup>11</sup> Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, paragraph 47.

<sup>12</sup> *Ibid.*, paragraphs 47-48.

<sup>13</sup> Judgment of the Court of Justice 16 July 2015 in case C-612/13 P, *ClientEarth v Commission*, p. 93.

To the contrary, I consider that the public interest is best served by avoiding taking any measure which would negatively affect or distort the above-described decision-making process and therefore refrain from disclosing internal, informal opinions of Commission staff and preliminary views and positions of interest representatives giving rise to premature, and potentially erroneous, conclusions about the topics under discussion, as explained above.

In consequence, I consider that, in this case, there is no overriding public interest that would outweigh the interest in safeguarding the protection of the ongoing decision-making process based on Article 4(3) of Regulation 1049/2001.

#### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above. Partial access to the requested documents would result in documents which would be either meaningless or else give rise to misinterpretations, confusion and undue speculation.

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

#### **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,



*For the Commission*  
*Alexander ITALIANER*  
*Secretary General*