EUROPEAN COMMISSION

C(2016) 2469 final

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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

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2016/790

Dear Mr Panichi,

I refer to your e-mail of 11 March 2016, registered on 14 March 2016 and your additional e-mail registered on 30 March 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 ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 15 February 2016, you requested access to:

- All notes, correspondence and documentation prepared specifically for a videoconference involving Commission official Paul Nemitz and senior staff of the Fundamental Rights Agency in Vienna, which took place on Thursday, January 28, 2016.

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In its initial reply of 11 March 2016, the Directorate-General for Justice and Consumers (DG JUST) identified the following documents as falling under the scope of your request:

1. E-mail invitation of 25 January 2016 (Ares(2016)392507);
2. E-mail of 25 January entitled 'WG: director of FRA-probation report' (Ares(2016)1373730);
3. Attachment: EB decision 2011_01 appraisal of the director (Ares(2016)392507);

DG JUST informed you that both attachments were the same for both identified e-mails. It granted partial access to document 1 after redaction of personal data on the basis of Article 4(1)(b) of Regulation 1049/2001 and provided the link for document 3 which is publicly available under [http://fra.europa.eu/sites/default/files/eb_decision_2011_01_appraisal_of_director.pdf](http://fra.europa.eu/sites/default/files/eb_decision_2011_01_appraisal_of_director.pdf).

After having consulted the originators of documents 2 and 4, in accordance with Article 4(4) of Regulation 1049/2001, it refused access thereto on the basis of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual).

On 11 March 2016, you lodged a confirmatory application where you pointed out that the heading of the e-mails to which partial access was granted was preceded by the mention 'FW'. You considered that this was not the original e-mail and asked the Commission to provide you with the original e-mail.

On 16 March 2016, DG JUST replied that the document that was sent to you as a reply to your initial request for access to documents was a chain of e-mails, which explains why the latest messages in the chain were preceded by the mention 'FW'. DG JUST provided detailed explanations about the senders and addressees of the e-mail messages forming part of the chain of e-mails. Further, DG JUST confirmed that the document in question was indeed the original version.

On the same day, you lodged another confirmatory application requesting a review of the decision to offer these documents in the current form: heavily redacted, including the subject of the emails. You also asked the Commission to provide you with the original emails, not email which have "FWD" in the subject line.

This decision will address these points, that concern document 1, which was partially disclosed at initial level.
As regards document 3, this document is Decision no. 2011/01 of the Executive Board of the European Union Agency for Fundamental Rights concerning the appraisal for the director of the European Union Agency for Fundamental Rights. This is a public document, accessible already in its entirety (without any redactions) under the above-mentioned link, to which DG JUST already directed you at the initial stage. It therefore falls outside the scope of your confirmatory request.

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.

In reply to your request to obtain access to the original version of document 1, please note that the original e-mail to which you request access is already included in the chain of e-mails disclosed at initial stage. It is the e-mail sent on January 25, 2016 1:02 PM from Frauke Seidensticker to Michael O'Flaterty to which Paul Nemitz is copied.

As regards your request to obtain wider access to the original version of document 1, I am pleased to inform you that wide partial access is granted to this document (annexed), after redaction of the names and contact details of the Commission officials not forming part of the senior management and of the Appeal Officer. The reasons for these redactions are explained below.

2.1. **Protection of Privacy and Integrity**

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.*

In its judgment in the *Bavarian Lager* case⁵, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁴ (hereinafter the 'Data Protection Regulation') becomes fully applicable. In this Judgment the Court stated that Article 4(1)(b) *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 Regulation No 45/2001⁵.*

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⁵ Paragraph 59.
Article 2(a) of the Data Protection Regulation provides that 'personal data' shall mean any information relating to an identified or identifiable person [...]. As the Court of Justice confirmed in Case C-465/00 (Rechnungshof)\(^6\), there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life.

The names and contact details of Commission officials not forming part of senior management and the Appeal Officer undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation. As indicated above, they have been redacted from document 1 which is annexed to the present decision.

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.\(^7\)

In the ClientEarth case, the Court of Justice ruled that the institution does not have to examine ex officio the existence of a need for transferring personal data\(^8\). In the same ruling, the Court stated that if the applicant has not established a need to obtain the personal data requested, the institution does not have to examine the absence of prejudice to the person's legitimate interests\(^9\).

I note that in your confirmatory application, you do not put forward any arguments to establish the necessity of disclosing the requested personal data. Nor have you expressed any specific interest in obtaining these personal data. Furthermore, there are reasons to assume that the legitimate interests of the individual concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would subject them to unsolicited external contacts and forgery of their signature.

Consequently, I conclude that access cannot be granted to the personal data concerned pursuant to Article 4(1)(b) of Regulation 1049/2001.

I would also like to point out that, as regards the personal data included in the document requested, 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.

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\(^6\) Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between Rechnungshof and Österreichischer Rundfunk, paragraph 73.

\(^7\) Judgment of the Court of Justice of 29 June 2010, Bavarian Lager, quoted above, paragraphs 77-78.

\(^8\) Case C-615/13P, Judgment of the Court of Justice 16 July 2015 ClientEarth v EFSA, paragraph 47.

3. **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