



EUROPEAN COMMISSION

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Mr Mathias SCHINDLER
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Unter den Linden 50
11011 Berlin

**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2016/6031**

Dear Mr Schindler,

I refer to your e-mail of 10 December 2016, registered on 12 December 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 documents² (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR APPLICATION

In your initial request of 27 October 2016, you requested access to:

** All versions, including drafts, written remarks and notes concerning the speech of Commissioner Günther Oettinger at the "27. EuropaAbend" event on October 27, 2016 in Hamburg*

** All correspondence between the AGA (AGA Norddeutscher Unternehmensverband Großhandel, Außenhandel, Dienstleistung e. V.) and the individuals organizing the EuropaAbend and DG CNECT regarding this event.*

** Briefings provided to Mr. Oettinger relating to this event and his speech.*

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

** Recordings and transcripts of this speech as well as follow-up requests to him or the Commission after the event.*

In its initial reply dated 21 November 2016, the Directorate-General for Communications Networks, Content and Technology (hereafter 'DG CNECT') identified one document as falling under the scope of your application, namely a briefing prepared by its services, and gave you full access to this document.

In your confirmatory application, you ask confirmation that this document is the only relevant document held by the Commission falling under the scope of your request and that all parts of your request have been treated by DG CNECT.

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 service concerned at the initial stage in light of the provisions of Regulation 1049/2001.

Following your confirmatory application, the Commission carried out a renewed, thorough search for further documents falling under the scope of your request. Based on this renewed search, the Commission identified two such further documents, namely:

- (1) an e-mail exchange between a member of the European Parliament and Commissioner Oettinger (ref. Ares(2016)6499550) and
- (2) a letter the AGA addressed to Commissioner Oettinger (ref. Ares(2016)7049904).

In this context, I would like to clarify with regard to the arguments you raise in your confirmatory application that, as regards correspondence between AGA and *the individuals organizing the EuropaAbend*, the latter individuals are not part of Commission staff. As to the speech, this document was modified several times by the author but only the final version was kept. It was not modified during the approval process and is entirely included in the briefing that was transmitted to you at the initial stage. Finally, I would like to underline that Regulation 1049/2001 and thus the present Decision do not concern documents that are already publicly available, such as video recordings of midday press briefings³ or parliamentary questions⁴.

³ See <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128452>, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128529>, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128531>, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128540>, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128542>, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128621>, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128625> and <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I128630>.

⁴ See parliamentary question E-8588/16: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2016-008588%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>. The Commission's answer will be published at the same address once it has been given.

With regard to the newly identified documents, I am pleased to inform you that partial access is granted to the documents in question, where only personal data has been redacted based on the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and the integrity of the individual).

Article 4(1)(b) of Regulation 1049/2001 provides that *the 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.*

The documents in question contain names of persons or information from which their identity can be deduced.

In this respect, 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* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁵ (hereafter 'Data Protection Regulation') becomes fully applicable⁶.

Article 2(a) of the Data Protection Regulation provides that '*personal data*' shall mean *any information relating to an identified or identifiable 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.* 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"*⁷. The names⁸ of the persons concerned, as well as information from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. 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.⁹

⁵ 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, Official Journal L 8 of 12 January 2001, page 1.

⁶ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

⁷ Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁸ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

⁹ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraphs 77-78.

Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In the recent judgment in the *ClientEarth* case, the Court of Justice ruled that *whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*¹⁰. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data¹¹.

In your initial request, you do not establish the necessity of having the data in question transferred to you. Therefore, I have to conclude that the transfer of personal data through its disclosure cannot be considered as fulfilling the requirements of Regulation 45/2001.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) of Regulation 1049/2001 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, 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 in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure.

¹⁰ Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

¹¹ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

4. 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*

Annexes (2)