



EUROPEAN COMMISSION

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Ms Julia REDA
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European Parliament
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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° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2017/6751**

Dear Ms Reda,

I refer to your email registered on 22 December 2017 by 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

By your initial application, submitted on 9 October 2017 and dealt with by the Directorate-General Joint Research Centre (JRC), you requested access to all information related to the creation, assignment, preparation or conduction of the study entitled 'The economics of online news aggregation and neighbouring rights for news publishers'. You specified that this *may include emails, notes, presentations, files, letters and memos sent to and from the authors of the study as well as between JRC and other parts of the Commission regarding this study.*

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

You specified that if *a preliminary study or parts of the study have been written already*, you wanted *these parts to be included in the request*. You added that *this request also extends to information that is not considered important enough for filing or archiving*.

The JRC replied to your request on 20 December 2017. It granted wide partial access to the latest draft version of the requested study, explaining that it is a draft scientific paper which is still subject to modifications. The JRC also specified that the content of the draft study only expresses the views of its author and not the views of the European Commission. The JRC granted wide partial access also to three further e-mails. The partial refusal only concerned personal data of non-senior staff of the Commission and was based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

Through your confirmatory application, you contest the initial reply provided by JRC, claiming that all information falling within the scope of your request was not released. You do not contest the non-disclosure of personal data. Therefore, the scope of your confirmatory application is considered to cover only your claim relating to the complete identification of documents falling within the scope of your 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.

Following your confirmatory application, the Commission has carried out a renewed, thorough search for possible documents falling under the scope of your request.

Based on this renewed search, the Commission has identified the early preliminary draft of the study attached to the e-mail of 25 October 2016, Ares(2017)6256585. Please note that this is without prejudice to any documents that may be identified in the framework of the other access-to-documents requests you have lodged with Directorates-General other than JRC and which are currently under examination.

Wide partial access was granted by the JRC to the e-mail of 25 October 2016, subject only to the redaction of personal data, in accordance with Article 4(1)(b) of Regulation 1049/2001.

I am pleased to inform you that partial access is granted to the early preliminary draft attached to the e-mail of 25 October 2016. The limited redactions are justified on the basis of the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), first and second subparagraphs (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 limited redactions in the draft study, which was attached to the e-mail of 25 October 2016, concern the personal opinions of the scientist who prepared this early preliminary draft. The draft, which was destined for further preliminary consultations within the Commission, was meant exclusively for internal use, and contained the following disclaimer on the first page *please do not quote or circulate*. This early preliminary draft had to undergo modifications, following Commission internal discussions, to comply with the expected quality standards for robustness of a scientific study, as the JRC implements a quality control system including an internal review. Although partial access is granted to this document, disclosure of the withheld parts thereof, which are opinions for internal use as part of deliberations and preliminary consultations within the Commission, would seriously undermine the Commission's ongoing decision-making process regarding this study.

In order to accomplish their tasks properly for this ongoing process, the Commission services should be allowed to finalise their work on the draft study in serenity, without risking that the public would confuse the preliminary opinions expressed by a particular scientist in an early preliminary version of the study with the final Commission decision concerning the study. Public disclosure, at this stage, would also create confusion as to the possible position of other Commission services or experts and create false expectations as to the final position of the Commission decision regarding this study, thus seriously undermining the Commission's final decision, which is still to be taken. Ensuring the serenity of internal discussions and exchanges on drafts is essential for the JRC's ability to freely develop studies and for ensuring good quality work. Public disclosure of the withheld opinions, at least at this stage, would seriously damage the Commission's decision-making process relating to the finalisation of the study, its quality and the effectiveness of its conclusion.

Against this background, I consider that public disclosure of the withheld opinions in the early preliminary draft of the study, which was attached to the e-mail of 25 October 2016, would seriously undermine the Commission's decision-making process in the meaning of Article 4(3) of Regulation 1049/2001 pertaining to this file.

2.2. 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 the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

In its judgment in the *Bavarian Lager* case², the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001³ (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 45/2001*⁴.

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*)⁵, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life.*

The requested document contains the name, job title or other details of the author of the study allowing his identification. This information clearly constitutes personal data in the sense of Article 2(a) of Data Protection Regulation 45/2001.

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.⁶

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.

² Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, Case C-28/08P, EU:C:2010:378, paragraph 59.

³ 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 12.1.2001.

⁴ Paragraph 59.

⁵ 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*, EU:C:2003:294, paragraph 73.

⁶ Judgment of the Court of Justice of 29 June 2010, *Bavarian Lager*, quoted above, paragraphs 77-78.

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 data⁷. 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 interests⁸.

In your confirmatory application, you do not put forward any arguments to establish the necessity of, or any particular interest in obtaining access to the requested 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 document, as there is a real and non-hypothetical risk that such public disclosure would harm its privacy and subject it to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data included in the requested document, as the need to obtain access thereto has not been substantiated, and there is no reason to think that the legitimate interests of the author would not be prejudiced by disclosure of the personal data concerned.

I would also like to point out that Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) 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 claim an overriding public interest in disclosure of the requested documents in your case.

I take the view that the public interest in protecting the Commission's internal reflections during its decision-making process is not outweighed by any possible public interest in transparency in this case.

Please note also that 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.

⁷ Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, EU:C:2015:489, paragraph 47.

⁸ *Ibid*, paragraph 47-48.

4. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

Enclosure: (1)