Brussels, 17.7.2018
C(2018) 4829 final

Mr Mathias SCHINDLER
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Germany

DECISION OF THE EUROPEAN 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 2018/1846

Dear Mr Schindler,

I refer to your email of 15 May 2018, registered on the next day, 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 (‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 22 March 2018, registered under reference number GESTDEM 2018/1846 and dealt with by the Legal Service of the European Commission, you requested access to ‘all documents from, to and in possession of the Legal Service concerning access to documents requests regarding copyright and the ancillary copyright “press publishers right” in particular’.

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2 Official Journal L 145 of 31.05.2001, p. 43.
You pointed out that you had been informed ‘that the Legal Service had been in contact with DG CNECT and several other DGs on the interpretation and compliance with Regulation 1049/2001’ on this topic and stressed that ‘this communication includes the interpretation of Regulation 1049/2001, the definition of document under said Regulation and the application of these rules’.

By email of 18 April 2018, the Legal Service asked you to clarify the scope of your request and whether you could narrow it down in accordance with Article 6(3) of Regulation 1049/2001, as your request ‘concern[ed] a large number of documents which need[ed] to be assessed individually’ and where other services of the European Commission needed to be consulted. The Legal Service concluded that ‘the analysis of these documents and the referred consultations cannot be carried out within the normal time limits set out in Article 7 of Regulation 1049/2001’.

In your reply of the same day you clarified that your request GestDem 2018/1846 also covered documents related to three previous requests for access to documents lodged by yourself but not the replies published on AsktheEU. Moreover, you refused to narrow down the scope of your request.

Through its email of 30 April 2018, the Legal Service informed you that it had unilaterally restricted the scope of your request and that it would deal with the documents related to these three requests for access to documents that had been made by you.

On 9 May 2018, you informed the Legal Service that you did ‘not consent [to its] attempts to narrow down the scope of this request’. In the absence of an initial reply within the prescribed time limit, you submitted a confirmatory application under Article 7(4) of Regulation 1049/2001 on 15 May 2018.

By letter of 7 June 2018, the Secretariat-General, as part of its confirmatory review, informed you that your application concerned 15 requests for access to documents and that there were at least 109 documents falling under its scope.

Consequently, in accordance with Article 6(3) of Regulation 1049/2001, the Secretariat-General asked you to specify the objective of your request and your specific interest in the documents requested and whether you could significantly narrow down the scope of your request, so as to reduce it to a more manageable amount of documents. In this context, the Secretariat-General provided a detailed calculation regarding the estimated workload required for the various steps of the process. It explained to you in detail the administrative burden that the handling of your confirmatory application would entail, also taking into account that you had

simultaneously lodged another wide-scoped confirmatory request, which it had to examine in the same period.

With a view to reaching a fair solution concerning the handling of your confirmatory application, taking into account the amount of work already engendered by assessing the workload associated with the handling of your request, and to respect the time-limits set by Regulation 1049/2001, the Secretariat-General proposed to deal with an overall number of 20 documents concerning at least three different requests for access to documents, ‘giving priority to some documents where […] [the Secretariat’s-General] preliminary assessment suggests the possibility of granting (at least wide) access’.

Through your reply of 11 June 2018, you did not contest the administrative burden that the examination of your confirmatory request would entail and you signalled your agreement by highlighting that you were ‘willing to give this procedure another try in order not to create [an] unnecessary burden to the administration’. However, you asked the Secretariat-General to provide you with a list of documents identified by the European Commission as falling under the scope of your confirmatory application, on the basis of which you would select the documents that should be the subject of the related confirmatory decision. You pointed out that their ‘number might be close to the 20 documents in the […] suggestion’ of the Secretariat-General and that you would identify these documents in the week of 18 June 2018.

On 15 June 2018, the Secretariat-General sent you the requested list of 111 documents identified as falling within the scope of your request and asked for your selection of documents by 19 June. As you had not replied by that date, the Secretariat-General asked you again on 21 June to provide it with your selection of documents by 22 June at the latest and indicated that it would otherwise proceed based on the information available to it. The Secretariat-General did, however, not receive a reply from you by that date.

The Secretariat-General concluded from your request to proceed yourself to a selection of the documents that it had not been established that you would potentially be interested in the documents that the Secretariat-General would have chosen in this regard.

For these reasons, it re-contacted you by email on 25 June 2018. It highlighted that, since time had passed since it consulted you, on 7 June, on a fair solution offering the handling of 20 documents, and taking into account the need to conduct internal consultations on the documents concerned, it would only be able to handle five documents in the remaining four working days before the expiry of the extended deadline on 2 July 2018, without taking into account the time necessary for obtaining formal approval of the reply to your confirmatory application.

Registered under reference number GESTDEM 2018/811.
In order to process your request further and to safeguard the interests of good administration, the Secretariat-General asked you to provide it as soon as possible with a list of documents which should, in your view, fall under the restricted scope of your confirmatory application. It concluded that in the absence of an answer by 26 June 2018, it would take a decision on your confirmatory application on the basis of the information available to it, taking into account the need to safeguard the interest of good administration in accordance with the applicable case law.

On 25 June 2018, you replied to this email of the Secretariat-General and indicated your choice of 35 documents (i.e. email exchanges and their attachments) that you had chosen from the list of 111 documents provided to you on 15 June 2018.

On the basis of the above-mentioned exchanges with you and for the reasons set out hereafter, the Secretariat-General has selected the following eight documents (five email exchanges and three attachments) from these 35 documents as falling under the restricted scope of your confirmatory application:

- **Request GESTDEM 2016/5572:**
  - Exchange of emails between the Legal Service and the Directorate-General for Communications Networks, Content and Technology of 30 September and 3 October 2016 (document 1);
  - Attachment to this exchange of emails: Draft initial reply of the Directorate-General for Communications Networks, Content and Technology (document 1.1);
  - Exchange of emails between the Legal Service and the Directorate-General for Communications Networks, Content and Technology of 4 and 5 October 2016 (document 2);
  - Email of the Directorate-General for Communications Networks, Content and Technology to the Legal Service of 6 October 2016 (document 3);
  - Attachment to this email: Modified draft initial reply of the Directorate-General for Communications Networks, Content and Technology (document 3.1);

- **Request GESTDEM 2015/3828:**
  - Exchange of emails between the Secretariat-General and the Legal Service and the latter’s final reply of 15 December 2015 (document 4);

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6 However, you sent this reply not to the email address from which the Secretariat-General had sent its message on 25 June 2018, but to the functional mailbox of the Legal Service that had dealt with your request at initial stage.
Attachment to this exchange of emails: Draft confirmatory decision of the Secretariat-General with the Legal Service’s comments in track changes (document 4.1);

and

- Requests GESTDEM 2017/7583, 2017/7585 and 2017/7593:

This selection of documents has been carried out in order to respond as much as possible to your preferences as reflected in your confirmatory application.

Documents 1 to 3.1. relate to a request for access to documents that was dealt with by the Legal Service at initial stage (GESTDEM 2016/5572). They reflect the handling of such a request by the Legal Service, the Secretariat-General and the Directorate-General for Communications Networks, Content and Technology and thus the application of Regulation 1049/2001 – these aspects have been highlighted in your request.

In order to better illustrate these aspects, documents 1.1. and 3.1, that contain two different versions of the draft initial reply of the Directorate-General for Communications Networks, Content and Technology, have also been selected. Priority was given to these two versions of the draft reply concerning access to documents and thus reflecting the application of Regulation 1049/2001, instead of documents that refer to the content-related aspects of copyright for which your preference had not been established to the same extent and that had, moreover, not been disclosed in the context of the initial reply.

The documents related to requests GESTDEM 2015/3828 as well as GESTDEM 2017/7583, 2017/7585 and 2017/7593 reflect the involvement of the Legal Service at confirmatory stage.

Moreover, the documents selected form part of the handling of three requests for access to documents originating from three different applicants, including yourself, submitted in three different years, i.e. in 2015, 2016 and 2017.

Finally, these documents have been selected given that wide partial access can be granted to them, subject to the sole redaction of personal data as set out under point 2 hereafter.

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7 Such as the replies of several Directorates-General to the Inter Service Consultation.
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 the confirmatory review, I would like to inform you that wide partial access is granted to the documents, subject to the sole redaction of personal data pursuant to Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

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 Case C-28/08 P (Bavarian Lager)\(^8\), the Court of Justice ruled that when a request is made for access to documents containing personal data, 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\(^9\) (‘Regulation 45/2001’) 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.’\(^10\)

Article 2(a) of Regulation 45/2001 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), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’\(^11\).

The documents contain the email addresses and the names of European Commission staff members not forming part of senior management as well as the names and contact details of applicants in the context of the requests for access to documents.

This information clearly constitutes personal data in the sense of Article 2(a) of Regulation 45/2001.

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\(^10\) Op cit, paragraph 59.

\(^11\) Judgment of the Court of Justice 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.
Pursuant to Article 8(b) of Regulation 45/2001, the European 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.\(^\text{12}\)

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 transfer of personal data occur.

In Case C-615/13 P (\textit{ClientEarth}), the Court of Justice ruled that the institution does not have to examine of its own motion the existence of a need for transferring personal data.\(^\text{13}\) 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.\(^\text{14}\)

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 above-mentioned personal data.

Furthermore, there are reasons to assume that the legitimate interests of the individuals 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 harm their privacy and subject them 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 that have been redacted from the documents concerned, as the need to obtain access thereto has not been substantiated, and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

\section*{3. \textsc{Partial Access}}

In accordance with Article 4(6) of Regulation 1049/2001, partial access is herewith granted to documents 1 to 5 as set out above.

\section*{4. \textsc{No Overriding Public Interest in Disclosure}}

Please note also that Article 4(1)(b) of Regulation 1049/2001 has an absolute character and does not include the possibility to demonstrate the existence of an overriding public interest.

\(^{12}\) Judgment of the Court of Justice of 29 June 2010, \textit{Bavarian Lager}, quoted above, paragraphs 77-78.


5. **Means of Redress**

I would like to draw your attention to the means of redress that are available against this decision concerning public access to the requested documents, 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,

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*For the European Commission*

*Martin SELMAYR*

*Secretary-General*

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**Enclosures:** 8