EUROPEAN COMMISSION

Brussels, 18.1.2019
C(2019) 594 final

Ms Margarida da Silva
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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION NO 1049/2001[1]

Subject: Your confirmatory application for access to documents under Regulation No 1049/2001 - GESTDEM 2018/5149

Dear Ms da Silva,

I refer to your email of 12 October 2018, in which you submitted 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[2] (hereafter 'Regulation No 1049/2001').

I apologise for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 2 October 2018, addressed to the Secretariat-General of the European Commission, you requested access to 'document SI(2018)410 referring to a proposal on the reform of the Transparency Register […] mentioned in the minutes of the 2263rd meeting of the European Commission […] on […] 18 July 2018 […].'

The European Commission has identified the document in question.

In its initial reply of 11 October 2018, the Secretariat-General refused access to this document on the basis of the exception of Article 4(3), first subparagraph of Regulation No 1049/2001, which relates to the protection of the decision-making process.

[1] Official Journal L 345 of 29.12.2001, page 94.
[2] Official Journal L 145 of 31.5.2001, page 43.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I address in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation No 1049/2001, the Secretariat-General conducts a review of the reply given at the initial stage.

Following this review, I would like to inform you that partial access is granted to the requested document. The redacted parts of the document fall under the applicability of the exceptions protecting the decision-making process (Article 4(3), first subparagraph, of Regulation No 1049/2001) as well as privacy and the integrity of the individual (Article 4(1)(b) of Regulation No 1049/2001).

The reasons for these redactions are set out below.

2.1. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation No 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.'

According to settled case law, Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly, so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions.[3] Moreover, the risk of a protected interest being undermined 'must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical'.[4] Furthermore, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view.[5]

In this instance, the requested document relates to the negotiations on the European Commission's proposal for an interinstitutional agreement on a mandatory Transparency Register.

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3 See, inter alia, judgment of 18 December 2007, C-64/05 P, *Sweden v Commission*, EU:C:2007:802, paragraph 66.

4 Judgment of 1 July 2008, C-39/05 P and C-52/05 P, *Sweden and Turco v Council and Commission*, EU:C:2008:374, paragraph 43.

5 Judgment of 6 December 2001, C-353/99 P, *Council* v *Hautala*, EU:C:2001:661, paragraph 28.

The said proposal, which was adopted on 28 September 2016[6], and the subsequent negotiations are based upon Article 295 of the Treaty on the Functioning of the European Union, which provides that 'the European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements, which may be of a binding nature.'

The requested document was prepared for the meeting of the Commission's Interinstitutional Relations Group ('Groupe de Relations Interinstitutionnelles') of 12 July 2018, following a meeting at political level that took place on 12 June 2018 in Strasbourg. Its purpose was to inform the College of Commissioners of the state of play in the negotiations on the European Commission's proposal and to propose accordingly for consideration a negotiating position to be endorsed by the latter ahead of the subsequent trilateral political meetings.

Against this background, some of parts of the requested document reflect the positions of the European Parliament, the Council of the European Union and the European Commission, as well as the state of play of the negotiations.

On the basis of the exception provided under Article 4(3), first subparagraph of Regulation No 1049/2001, I must refuse access to some parts of the document, which would reveal the European Commission's internal assessment of the respective negotiating positions of the European Parliament and the Council of the European Union in the framework of the ongoing interinstitutional negotiations on a mandatory Transparency Register.

Indeed, the internal critical analysis contained in the redacted parts of the document remains sensitive.

More specifically, the public disclosure of the European Commission's critical and strategic analysis of the positions of the other two institutions, which was drafted for internal use only, would disrupt the atmosphere of mutual trust between the three institutions at this stage of the process when negotiations are still ongoing.

Moreover, such disclosure would weaken the negotiating position of the European Commission and its negotiating margin towards the other two institutions at a critical point, where fallback options and negotiated solutions may be required in a politically sensitive field. In this context, the European Commission also notes that the European Parliament is still supposed to vote on possible amendments to its Rules of Procedure to increase the transparency of the legislative process. Depending on the outcome, such amendments may then become part of the political negotiation process on the mandatory Transparency Register.

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[6] Proposal for an Interinstitutional Agreement on a mandatory Transparency Register, COM(2016) 627 final, 28.9.2016, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016PC0627

Consequently, the next stages of the ongoing decision-making process of the European Commission would be seriously undermined in a reasonably foreseeable and not purely hypothetical way within the meaning of the exception provided under Article 4(3), first subparagraph of Regulation No 1049/2001, as construed by the above-mentioned case law.

2.2. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation No 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'.

The applicable legislation in this field is Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.[7]

Article 3(1) of Regulation No 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person […]'. The Court of Justice ruled that any information, which due to its content, purpose or effect, is linked to a particular person, qualifies as personal data.[8]

In the *Rechnungshof* case law, the Court of Justice further confirmed that 'there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life'.[9]

Accordingly, the names, signatures, functions, telephones numbers and/or initials pertaining to members of staff of an institution constitute personal data.[10]

In this instance, the document to which you request access contains personal data, in particular, the names, positions and direct telephone numbers of the European Commission officials who drafted it and who are not part of the senior management.

Pursuant to Article 9(1)(b) of Regulation No 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if […] the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is

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7 Official Journal L 205 of 21.11.2018, page 39, hereafter 'Regulation 2018/1725'.

8 Judgment of 20 December 2017, C-434/16, Peter Novak v Data Protection Commissioner, EU:T:2018:560, paragraphs 33-35

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

10 Judgment of 19 September 2018, T-39/17, *Port de Brest v Commission*, EU:T:2018:560, paragraphs 43-44.

proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.'

Only if both of these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation No 2018/1725, can the transmission of personal data occur.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the 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 contacts.

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

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Whereas the exception provided under Article 4(1)(b) of Regulation No 1049/2001, does not include the possibility to be set aside by an overriding public interest; the exception laid down in Article 4(3), first subparagraph of the said Regulation 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 '[t]here is a widespread interest in the issue of lobby transparency across the EU as it speaks directly to the accountability and scrutiny of policy-makers' interactions with vested interests'.

Moreover, you allege that '[the requested document] seems to be the current [European] Commission position in the negotiations for an Interinstitutional Agreement which is a fairly non-transparent process itself.'

Furthermore, you note that, as 'similar documents containing assessments on the negotiations have been released by the European Parliament […] [it would make it unacceptable for the [European] Commission to not match that standard of transparency.'

You conclude that '[t]here is a pressing and obvious need to be transparent about discussions on lobby transparency'.

I would like to reassure you, that the European Commission is well aware of the public interest regarding the issue of interest representation in the context of the activities of the

EU institutions. At the same time, the institution acknowledges that engaging with stakeholders enhances the quality of decision-making by providing channels for the input of external views and expertise. Accordingly, the European Commission is strongly committed to ensuring transparency regarding interest representation and maintaining citizens' trust in EU law making.

A reformed, mandatory Transparency Register covering the European Parliament, the Council of the European Union and the European Commission is a key commitment of President Juncker's political guidelines under the priority entitled 'A Union of Democratic Change'.

Therefore, the European Commission submitted a proposal aiming from the very start of the negotiations to achieve a strong, mandatory tripartite Transparency Register.

Moreover, the European Commission committed, together with the two other institutions, to ensure that the process regarding the interinstitutional negotiations on a mandatory Transparency Register is highly transparent by adopting a set of guiding principles on communication during the negotiations.[11]

Furthermore, the European Commission publishes a press release after every political meeting.[12]

Against this background, I consider that the European Commission already ensures a high degree of transparency regarding the ongoing negotiations for a mandatory Transparency Register, which is matching the standard of the two other institutions.

Finally, I would like to draw your attention to the fact that documents that do not fall under the scope of an acknowledged general presumption must be assessed specifically and individually, pursuant to Regulation No 1049/2001, as construed by the case law of the European Court of Justice. Therefore, the circumstance that similar documents have already been disclosed does not prejudge on the public release of others, which must be assessed *in concreto*, in light of their specific contents and the current particular legal and temporal circumstances.

In light of the above, I conclude that you have not established the existence of any overriding public interest that would warrant the public disclosure of the withheld parts of the document requested, reflecting the European Commission's internal critical assessment of the respective negotiating positions of the European Parliament and the Council of the European Union.

Nor have I been able to identify any public interest capable of overriding the interest protected by Article 4(3), first subparagraph of Regulation No 1049/2001.

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[11] Available at: http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=REFORM_NEGO

[12] *Ibid.*

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation No 1049/2001, partial access is hereby granted to the document requested, subject to the redactions required under Article 4(3), first subparagraph and Article 4(1)(b) of the said Regulation, as detailed above.

5. MEANS OF REDRESS

Finally, I 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 provided respectively in Article 263 and Article 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General

Enclosure: (1)