EUROPEAN COMMISSION

Brussels, 10.12.2018
C(2018) 8747 final

Mr Leonid Schneider
Taunusstraße 11
63526 Erlensee
Germany

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/5387**

Dear Mr Schneider,

I refer to your letter of 14 November 2018, registered on the same 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 documents[2] (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 12 October 2018, addressed to the Directorate-General for Research and Innovation, you requested access to '[r]ecords of any possible meetings or communications between EU special envoy Robert-Jan Smits and the scholarly publisher Frontiers Media SA, in the years 2017 and 2018'.

You asked the European Commission 'to check for any meetings, phone/video calls or emails between Mr Smits and these senior Frontiers executives:

- Kamila Markram;
- Frederick (or Fred) Fenter;
- Henry Markram;

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.

- as well as any other Frontiers representatives.'

You stated that '[you] understand the contents of Mr Smits' work emails, phone calls and meetings might be protected. Hence [you] request[ed] a summary of when such meetings took place, and which Frontiers representatives were met. Same for emails and phone calls: Just dates and names of correspondents.'

In its initial reply of 12 November 2018, the Directorate-General for Research and Innovation replied to your request for information. It informed you that Mr Smits met three times with Frontiers representatives in the course of 2018 and provided detailed information on these meetings. It also provided you with a list of Mr Smits' e-mail exchanges with Frontiers representatives during that year. This document was registered under registration number Ares(2018)577302 (hereafter 'document 1'). It only contained the headings of several e-mails, which included details on the requested exchanges[3].

Concerning your request for access to documents, the Directorate-General for Research and Innovation informed you that no documents fell within the scope of your request for the year 2017. As to the year 2018, it identified the following document as falling within the scope of your request:

> 'Report of meeting with Frontiers on Open Access to scientific publications EC offices, 25 April 2018', including two attachments, Ares(2018)5777302 (hereafter 'document 2').

The Directorate-General for Research and Innovation granted wide partial access to document 1 and to the main text of the meeting report included in document 2, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

In your confirmatory application, you request a review of this position. You ask the European Commission to release 'all the e-mails in full, including the names of all involved'. You specify that '[t]he e-mail lists also indicate a number of e-mails [which are] missing, please check again. [For instance], there are replies but the original e-mails, which are replied to, are not listed.' You do not contest the partial refusal of access to document 2.

Consequently, the partial refusal of access to document 2 does not fall within the scope of this confirmatory review.

[3] The disclosed details included the name of the sender, the name of the main representative of Frontiers, the generic e-mail address of Frontier, the domain of the e-mail addresses of non-senior Frontier representatives, the name and the domain e-mail addresses of European Commission staff members holding a senior management position, the domain of e-mail addresses of Commission officials not holding any senior management position, the date and the time these exchanges took place, and the subject of the exchange.

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.

The purpose of a confirmatory application is to review the initial reply of the institution to the initial request of the applicant. This means in practice that the scope of the review at confirmatory stage cannot go beyond of what was requested by the applicant in the initial application.

In your initial application, you indicated expressly that you requested 'a summary of when […] meetings [with Mr Smits] took place and which Frontiers representatives were met. Same for e-mails and phone calls: Just dates and names of correspondents'. Consequently, you limited the scope of your initial request to the above-mentioned summary and did not request the contents of Mr Smits' work e-mails, acknowledging that that these might need protection.

In your confirmatory application, you now request 'all the e-mails in full, including the names of all involved' and allege that some e-mails might be missing. However, you did not request these e-mails in full in your initial request.

Consequently, your confirmatory application goes beyond what you requested initially. The respective part of your confirmatory application is therefore inadmissible, as the Directorate-General for Research and Innovation did not have the opportunity to deal with it at initial stage. Therefore the Commission is not in a position to perform a review. Indeed, according to Article 7(2) of Regulation 1049/2001, such a review is to be performed only '[i]n the event of a total or partial refusal'.

Of course, you are entitled to introduce a new request for access to documents regarding the additional e-mails in which you are interested.

The Directorate-General for Research and Innovation granted wide partial access to document 1 and to the report of the meeting included in document 2, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. In your confirmatory application, you contest the redaction of the personal data in document 1 and ask the European Commission to review its position.

Following this review, I confirm the initial position of the Directorate-General for Research and Innovation to refuse access, based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

Article 4(1)(b) of Regulation 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 undisclosed parts of the requested documents contain the names, surnames and contact details (such as e-mail addresses) of Commission staff members who do not hold any senior management position. They also contain names, surnames and contact details of third party staff members, who are not the main representatives of the third party concerned.

Article 2(a) of Regulation 45/2001 defines personal data as 'any information relating to an identified or identifiable natural 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'. The names of individuals, regardless of their affiliation with the above-mentioned organisations and companies, falls without doubt under that concept.

The names of staff members of the European Commission and third parties have to be considered as 'any information relating to an identified or identifiable natural person'. Also the contact details, such as their e-mail addresses, fall under the above-mentioned definition, as on the basis of such information, an individual, natural person can be identified.

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

In accordance with the *Bavarian Lager* ruling[4], when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. 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[5].

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

In that context, 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[6].

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4 Judgment of the Court of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.*, EU:C:2010:378, paragraph 63.

5 Ibid, paragraphs 77-78.

6 Ibid.

This has been confirmed by the Court of Justice in the judgment in the *ClientEarth* case[7]. 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 data[8].

In your confirmatory application, you do not give any reasons to justify that there is a need to disclose the withheld personal data. You state that 'Frontiers business interests and their lobbyists enjoy no privacy protection here'. However, this statement, which is particularly abstract and general in nature, cannot justify the need for the transfer of the personal data of the natural persons contained in the requested documents, let alone its proportionality[9].

I would like to refer in this respect to the *Dennekamp* judgement, according to which, if the condition of necessity laid down by Article 8(b) of Regulation No 45/2001, which is to be interpreted strictly, is to be fulfilled, it must be established that the transfer of personal data is the most appropriate means for attaining the applicant's objective and that it is proportionate to that objective[10].

The right to the protection of privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of EU decision-making processes, subject to the limits and conditions defined in Regulation 1049/2001. The legislator has not given either of these two rights primacy over the other, as confirmed by the *Bavarian Lager* case-law referred to above.

The European Commission has undertaken various initiatives aimed at making its decision-making processes more transparent, also from the point of view of the accountability of its staff members. Consequently, the names, surnames and positions of staff members holding senior management positions within the European Commission are not redacted from documents disclosed under Regulation 1049/2001.

With regard to third-party representatives, in particular interest representatives, a distinction must be made. It is one thing to shed light on the interest represented and another thing to disclose the personal data of the person representing the interest.

Whilst the name of the company represented and the name, surname and function of their main representative are disclosed, the identities of interlocutors at technical level, who do not hold any senior management position, deserve protection, in the view of the European Commission. Indeed, the public disclosure of such identities would undermine the equilibrium between the fundamental right to privacy and the obligation to ensure the transparency of the decision-making process.

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7 Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, EU:C:2015:219, paragraph 47.

8 Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 106.

9 Judgment of the General Court of 25 September 2018 in Joined Cases T-639/15 to T-666/15 and T-94/16, *Psara et al. v European Parliament*, EU:T:2018:602, paragraph 84.

10 Judgement of the General Court of 15 July 2015 in Case T-115/13, *Dennekamp v European Parliament*, EU:T:2015:497, paragraph 77.

The European Commission has also applied the above-mentioned practice in the case at hand. Therefore, the personal data (names, surnames and functions) of Commission staff members holding senior management positions were, where applicable, not redacted from the disclosed documents.

Indeed, I consider that the transfer of the personal data of European Commission staff members who do not hold any senior management position, and the personal data of third party representatives included in the withheld parts of the documents, would go beyond what is necessary for attaining the objective of ensuring the transparency of the decision-making process, and would therefore be disproportionate to that purpose.

I conclude that the transfer of personal data in question through the full disclosure of the above-mentioned documents cannot be considered as fulfilling the requirements of Regulation 45/2001. Consequently, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to disclose publicly the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

Please note that the exception laid down in Article 4(1)(b) of Regulation 1049/2001 does not need to be balanced against any possible overriding public interest in disclosure.

3. 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 specified respectively in Articles 263 and 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 European Commission
Martin SELMAYR
Secretary-General