



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/6207**

Dear Mr Fanta,

I refer to your email of 9 March 2019, registered on 13 March 2019, 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

On 8 November 2018, you submitted an initial application for access to documents under Regulation (EC) No 1049/2001, in which you requested access to 'documents which contain the following information:

- All correspondence and minutes pertaining to the meeting with Apple on May 15 2018 on the issue of the common charger. [...]
- The impact assessment study and all documents and correspondence pertaining to the study on common chargers. [...]

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

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

The European Commission attributed the above-mentioned application to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, for handling and reply.

The European Commission has identified 18 documents as falling under the scope of your application³.

On 8 February 2019, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs granted:

- full access to documents 2, 10⁴, 11 and 16;
- wide partial access to documents 1, 3, 4, 5, 6, 7, 8, 9, 13 and 15, with the parts containing personal data redacted, based on the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001. Additionally, the relevant parts of documents 1, 4, 5, 6, 7, 8, 13 and 15 were redacted as falling outside the scope of your initial application;
- partial access to documents 12, 14, 17 and 18, with the relevant parts redacted on the basis of the exception protecting commercial interests, provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001. Additionally, personal data was redacted from documents 14, 17 and 18, on the basis of the above-mentioned exception in Article 4(1)(b) of Regulation (EC) No 1049/2001. Documents 12, 14, 17 and 18 contain also information unrelated to your initial application, which was consequently redacted as falling outside its scope.

Through your confirmatory application, you request a review of this position.

In particular you ‘[...] ask for full disclosure of the blackened parts of the documents [...]’, however, your reasoning underlying that request is concentrated on the undisclosed parts of documents 13 and 14. You point out at a potential conflict of interest in the context of the contract, under which the European Commission procured the study ‘Impact Assessment on Common Chargers of Portable Devices’. In this context, you argue that ‘[i]t would be helpful to know who signed the Conflict of interest declaration („[document]13”) and who conducted the evaluation report on behalf of the [European] Commission [included in document]„14”.’

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

³ Detailed list of documents was enclosed to the initial reply of the Directorate-General for Internal Market, industry, Entrepreneurship and SMEs of 8 February 2019.

⁴ The European Commission made available document 10 through the Better Regulation Portal: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6427186_en#plan-2018-3079.

Following that review, I regret to inform you that I have to confirm the position of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs to refuse access to the undisclosed parts of documents 1, 3 - 9, 12 - 15, 17 and 18, withheld on the basis of the exceptions protecting privacy and the integrity of the individual, laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 (relevant parts of documents 1, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 17 and 18) and commercial interests, laid down in Article 4(2), first indent, of the above-mentioned regulation (relevant parts of documents 12, 14, 17 and 18).

I also note that due to an administrative error, the names and surnames of the staff members of the European Commission, who do not hold any senior management position, were not redacted from document 14 which was partially disclosed at the initial stage.

The correct version of document 14 is enclosed to this decision. I would like to ask you to delete the previous version of that document from your records.

The detailed reasons are set out below.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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’.

Although, as mentioned in point 1 of this decision, the reasoning included in your confirmatory application concentrates only on personal data redacted from documents 13 and 14 on the basis of the exception quoted above, I would like to explain applicability of that exception to all documents falling under the scope of your application that contain that type of information (that is documents 1, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 17 and 18).

In this context, please note that in its judgment in Case C-28/08 P (*Bavarian Lager*)⁵, the Court of Justice ruled that when an application 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 data⁶ (‘Regulation (EC) No 45/2001’) becomes fully applicable.

As from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 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

⁵ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’), C-28/08 P, EU:C:2010:378, paragraph 59.

⁶ Official Journal L 8 of 12.1.2001, p. 1.

movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁷ ('Regulation (EU) No 2018/1725').

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 2018/1725.

In the above-mentioned judgment the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 '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 [...] [the Data Protection] Regulation'.⁸

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.⁹

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'.⁹

Documents 1, 3, 4, 5, 6, 7, 8, 9, 15, 17 and 18 contain the names, surnames and contact details (telephone number, office location) of the staff members of the European Commission who do not hold any senior management position. They contain also biometric data (handwritten signatures of, for example, Commissioner Bieńkowska included in document 3, or the staff member of the European Commission included in document 9).

With regard to documents 13 and 14, on which you concentrate in your confirmatory application, please note that document 13 contains three declarations of absence of conflict of interests and of confidentiality submitted by the staff members of the European Commission who do not hold any senior management position. The redacted parts of the document contain their names, surnames and the biometric data pertaining to them (their handwritten signatures).

Document 14 contains the evaluation report prepared in the context of the call for tender organised under the above-mentioned framework contract 575/PP/2016/FC. The relevant undisclosed parts of this document cover names and surnames of the three staff members mentioned above, as well as the biometric data pertaining to them (their handwritten signatures and handwritten initials).

The names¹⁰ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 2(a) of Regulation (EU) No 2018/1725.

⁷ Official Journal L 205 of 21.11.2018, p. 39.

⁸ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

⁹ Judgment of the Court of Justice of 20 May 2003, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

Pursuant to Article 9(1)(b) of Regulation (EU) No 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he 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 proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

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

In Case C-615/13 P (*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.¹¹ This is also clear from Article 9(1)(b) of Regulation (EU) No 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) No 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighted the various competing interests.

As explained in point 1 of this decision, in the confirmatory application you point out that ‘[your] reading of the documents [disclosed at the initial stage] suggests a potential conflict of interest on behalf of the Centre for European Policy Studies, which is part of the specific contract [under which the study Impact Assessment on Common Chargers of Portable Devices’ was procured], but also counts Apple, which indirectly is subject of the study, among its corporate members’. Therefore, in your view, ‘[i]t would be helpful to know who signed the Conflict of interest declaration („[document]13”) and who conducted the evaluation report on behalf of the [European] Commission [included in document],,14”.’

Consequently, public disclosure of personal data included in documents 1, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 17 and 18 would help you (and the public in general) to verify whether there potentially was a conflict of interest regarding the subject matter of the Impact Assessment study and the economic operators involved in its preparation.

¹⁰ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

¹¹ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

As a preliminary comment, I would like to clarify that the study ‘Impact Assessment on Common Chargers of Portable Devices’ was prepared under framework contract 575/PP/2016/FC. The framework contract is an umbrella agreement, which sets out general principles applicable to specific contracts signed under that agreement in order to implement the later. The consortia composed of the lead contractor and its partners enter into the contractual relationship with the European Commission under the framework contract. The specific contracts can cover a very broad range of subjects and may be delegated by the lead contractor to any third parties (subcontractors) competent in the field of the specific contract. It is important to note that not all partners in the consortium which signed the framework contract are always involved in carrying out the tasks under every specific contract. The partners of the consortium provide a ‘pool’ of entities which can be in charge of specific contracts.

The framework contract 575/PP/2016/FC was indeed signed between the European Commission and (among others) a consortium consisting of ‘Economisti Associati’ as the lead contractor and the Centre for Social and Economic Research, the Centre for European Policy Studies, Coffey International Development Ltd and Technopolis Limited as the partners. However, the specific contract for the study ‘Impact Assessment on Common Chargers of Portable Devices’ has been carried out jointly by the lead contractor (‘Economisti Associati’) and its three subcontractors (Ipsos Market and Opinion Research International, Trinomics BV and Fraunhofer FOKUS)¹². The Centre for European Policy Studies was not involved in the implementation of this specific contract and therefore there may not be any conflict of interest regarding the subject matter of the study ‘Impact Assessment on Common Chargers of Portable Devices’ and the entities involved in its preparation.

Consequently, in the absence, as explained above, of any alleged conflict of interest, such as that referred to in your confirmatory application, I consider that the necessity for the transfer of personal data (through its public disclosure) included in documents 1, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 17 and 18 has not been established. 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, there are reasons to assume that the legitimate interests of the data subjects 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 (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access

¹² Please note that point 5 of the evaluation report included in document 14, erroneously contains the list of the members of the consortium that signed the framework contract 575/PP/2016/FC, rather than the name of the operator to which the specific contract for preparation of the study ‘Impact Assessment on Common Chargers of Portable Devices’ was awarded.

thereto for a purpose in the public interest 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.

Furthermore, as the handwritten signatures included in documents 3, 9, 13 and 14 and handwritten initials included in document 14, which are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

2.2 Protection of commercial interests of a natural or legal person

Article 4(2), first indent, of Regulation 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure’.

Although in your confirmatory application you do not seem to question the applicability of the above-mentioned exception to the relevant undisclosed parts of documents 12, 14, 17 and 18, I would like to provide additional explanations on how their public disclosure would undermine the interests protected by this exception.

As explained by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs in its initial reply, the above-mentioned parts of documents 12, 14, 17 and 18 contain information which public disclosure would undermine the competitive position of economic operators referred to in these documents.

The relevant undisclosed parts of document 12 contain the list of economic operators invited to submit their offers under framework contract 575/PP/2016/FC, but which did not provide the offers.

Document 14, as described in point 2.1 of this decision, contains the evaluation report prepared in the context of the call for tender organised under the above-mentioned framework contract 575/PP/2016/FC. The report contains the results of the qualitative evaluation of submitted offers, concluded with the score given to each offer. The version of this document disclosed at the initial stage contained the descriptive part of the evaluation, however, the names of the economic operators were redacted. In this way, it is not possible to associate the description of the offer with the given operator. For the same reason, the information concerning particular experience of a given economic operator in the field cover by the call for tender, was redacted from document 14.

The names of the economic operators were removed also from documents 17 and 18.

Public disclosure of that redacted parts of the above-mentioned documents would allow to compare the relative merits and advantages of each economic operator and the offers submitted by them. That in turn, would undermine the competitive position of the economic operators in question, as their competitors (for instance in the future tenders) would receive the insight into the information included in their offers.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators in question. I conclude, therefore, that access to the undisclosed parts of

documents 12, 14, 17 and 18 must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against overriding public interest in disclosure.

The exceptions laid down in Article 4(2) of Regulation (EC) No 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.

Except for the issue of the potential conflict of interest in the context of the framework contract 575/PP/2016/FC (which was addressed in point 2.1 of this decision), you do not refer in your confirmatory to any particular public interest that would warrant public disclosure of the relevant redacted parts of documents 12, 14, 17 and 18

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial interests of the economic operators grounded in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

4. NO FURTHER PARTIAL ACCESS

(Wide) partial access has been granted to documents 13 and 14 at the initial stage. Further (partial) access to the documents concerned is not possible for the reasons described in point 2 of this decision.

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 specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General