



EUROPEAN COMMISSION

Brussels, 29.3.2019
C(2019) 2640 final

Ms Josefina Martí
Calle de Juan Bravo 62
28006 Madrid
Spain

**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 2019/0758**

Dear Ms Martí,

I refer to your e-mail of 28 February 2019, registered on 1 March 2019, 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 (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 2 February 2019, addressed to the Directorate-General for Justice and Consumers, you requested access to the following documents:

- ‘1) all the agendas/ minutes/ notes/ documents/ presentations/ videos (and any other information) produced and exchanged in the meeting between Daniel Braun, Cabinet member of Věra Jourová, and the European Jewish Congress in Brussels on 24 June 2015.
- 2) a list of all the people present at the meeting and their roles’.

At initial stage, the Directorate-General for Justice and Consumers replied that, as for point 1) of your request, the European Commission does not hold any documents that would correspond to the description given in your application.

As for point 2), the Directorate-General for Justice and Consumers identified the following document as falling within the scope of your request:

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

- e- Pass document granting access to the Berlyamont building of 18 June 2015, reference Ares(2019) 1459954.

This document was prepared to grant access to the Berlaymont building and lists the external visitors participating in the meeting, referred to in your request. The Directorate-General for Justice and Consumers refused access to the personal data contained in this document based on the exception protecting the privacy and the integrity of the individual provided for in Article 4(1)(b) of Regulation (EC) No 1041/2001.

In your confirmatory application, you request a review of this position, as regards point 2). Consequently, this review will focus on the refusal of the Directorate-General for Justice and Consumers to disclose the personal data present in the document granting access to the Berlyamont building, namely the names of external visitors taking part in the meeting you refer to in your request.

You provide different arguments to support your request, which have been taken into account in our assessment, the results of which are described below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

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

Following this review, I regret to inform you that I have to confirm the position of the Directorate-General for Justice and Consumers and refuse access to the requested document based on the protection of the privacy and integrity of the individual provided for in Article 4(1)(b) of Regulation (EC) No 1041/2001.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and 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*),² 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 data³ (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

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

³ Official Journal L 8 of 12.1.2001, p. 1.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 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.⁴

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

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

Please note that the requested document includes the names and surnames of the meeting participants. This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) No 2018/1725 and in the sense of the *Bavarian Lager* judgment⁵.

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.

Furthermore, in Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data.⁶ This is also clear from Article 9(1)(b) of Regulation (EU) 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) 2018/1725, the European Commission has to examine the further conditions for the 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 weighed the various competing interests.

⁴ Official Journal L 205 of 21.11.2018, p. 39.

⁵ *Bavarian Lager*, cited above, paragraph 70.

⁶ 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.

In your 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.

You argue that '[...] lobbyists have an obligation to be registered in the transparency register (each lobby organization has accredited people). For this reason, and without asking for personal data, I ask again for the names of the participants in the meeting'.

In this context, I would like to point out that the right to the protection of the privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of the processes within the Institutions of the EU. The legislator has not given any of these two rights primacy over each other, as confirmed by the *Bavarian Lager* case-law referred to above⁷.

The European Commission has undertaken initiatives aimed at making its decision-making processes more transparent, also from the point of view of accountability of its staff members. Such initiatives include the pro-active publication of the names, surnames and positions of staff members holding senior management positions within the European Commission.

Nevertheless, I consider that with regard to third parties, in particular lobbyists, an important distinction has to be made. Indeed, 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. Whereas, the name of the organisation would in principle be disclosed, the identities of members of this organisation deserve, in the view of the European Commission, protection as their public disclosure would undermine the equilibrium between the fundamental right to privacy and the obligation to ensure the transparency and openness in order to enable the citizens to participate more closely in the decision-making process.

Based on the information at my disposal, I note that there is a risk that the disclosure of the names of the individuals appearing in the requested document would prejudice the legitimate interests of the third-parties concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9(1)(b) of Regulation (EU) 2018/1725, access cannot be granted to the personal data, as the need to obtain access 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.

⁷ *Bavarian Lager*, cited above, paragraph 56.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

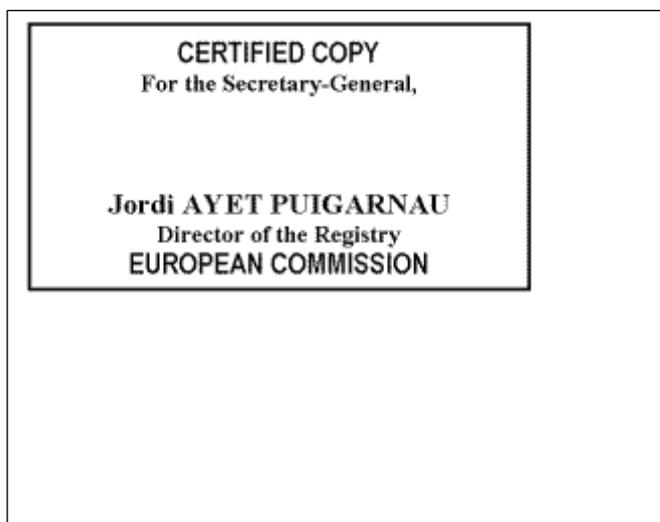
4. PARTIAL ACCESS

Please note that granting partial access to the document would be meaningless in this case, since the document consists of the names and surnames of the third parties concerned, to which the access is refused based on article 4(1)(b) of Regulation (EC) No 1049/2001.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to 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